No. 09-6822

In The
Supreme Court of the United States

JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTIONS PRESENTED

1. Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. §3553(a) after *Gall* v. *United States*?

2. Whether as a sentencing consideration under 18 U.S.C. §3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation?

3. When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

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INTEREST OF *AMICUS CURIAE*

This brief is submitted by Adam G. Ciongoli, *Amicus Curiae* in support of the judgment below, under the Court's order of July 22, 2010.[1] *Amicus* addresses the first two Questions Presented, on which the Government concedes error. *Amicus* adopts the Government's arguments in support of the judgment below on the third Question Presented.

SUMMARY OF THE ARGUMENT

The Eighth Circuit's holding that a district court may not consider evidence of post-sentencing rehabilitation in resentencing is not only permissible—it is compelled by Congress' unambiguous language in 18 U.S.C. §3742(g)(2). As conceded by the Government, see Gov't Br. 47, the plain language of 18 U.S.C. §3742(g)(2), which governs sentencing upon remand, clearly prohibits district courts from granting a variance based on grounds that were not "specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal." 18 U.S.C. §3742(g)(2)(A). By definition, post-sentencing rehabilitation could not have been

[1] Under Supreme Court Rule 37.6, *Amicus* affirms that no counsel for a party authored any part of this brief, and no person other than *Amicus* and his co-counsel made a monetary contribution to fund its preparation or submission.

considered at the original sentencing and, therefore, cannot serve as the basis for a variance during resentencing. See *id.* This statute reflects a variety of important and permissible policy judgments by Congress, not least of which is to promote an orderly and effective appellate process by limiting district courts' ability to circumvent appellate mandates using new information.

Nonetheless, Petitioner and the Government urge the Court to reverse the Eighth Circuit's holding and, in so doing, they ask the Court—for the first time since its decision in *United States v. Booker,* 543 U.S. 220 (2005)—to use *Booker* to invalidate a duly enacted federal statute. Pet'r Br. 32 n.13; Gov't Br. 48. The customary reluctance to conclude that a duly enacted statute violates the Constitution does not appear to have figured into the Government's confession of error; the brief confessing error does not even acknowledge the statute. See generally Br. Opp'n.

The Court should decline this invitation, as §3742(g) survives *Booker*. Indeed, the Court fully reviewed §3742 in *Booker* and did not excise §3742(g). Nor does the statute in any way implicate the Sixth Amendment concerns raised in *Booker*, or make the Guidelines otherwise impermissibly mandatory. To the contrary, §3742(g) permits district courts to vary from the Guidelines based on any and all grounds that were considered in the original sentencing and that were not held to be impermissible by the court of appeals. See 18 U.S.C. §3742(g)(2)(A), (B).

In addition to preserving a meaningful role for appellate courts in sentencing cases—a role reaffirmed by *Booker*, 543 U.S., at 260-262, and its progeny—§3742(g)(2) ensures the mechanism of an effective appeal by both the Government and defendants, which is particularly important given the broad sentencing latitude left to district courts post-*Booker*. It also serves Congress' "basic goal in passing the Sentencing Act" of reducing sentencing disparities between defendants convicted of similar offenses. *Id.*, at 253. Unlike policy statements made by the Sentencing Commission in the Guidelines, these are congressional policy choices embodied in statutes that district courts are not free to disregard. *E.g.*, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 493 (2001) (emphasizing courts' inability to "override a legislative determination manifest in the statute").

Even if §3742(g) were read to make the Guidelines impermissibly mandatory, the Court can and should construe it, or, alternatively, excise other portions of §3742, to avoid any constitutional problems.

Regardless, consideration of post-sentencing rehabilitation by the sentencing court is improper because it defeats the objectives Congress requires courts to consider in 18 U.S.C. §3553(a). In particular, allowing variances based on post-sentencing rehabilitation would create unwarranted disparities in sentences for defendants convicted of similar conduct—only a handful of whom fortuitously would obtain

resentencings in which to present such evidence—*id.*, at §3553(a)(6), and it would thwart the Sentencing Commission's core function of promoting orderly and just sentencing through policy determinations that Congress requires district courts to consider. *Id.*, at §3553(a)(5). Sections 3553(a)(1) and (a)(2), on which the Government and Petitioner heavily rely, do not authorize district courts to disregard the objectives Congress articulated in §§3553(a)(5) and (a)(6). Nor, on their own, do these §3553(a) factors render post-sentencing rehabilitation a proper consideration.

Post-sentencing rehabilitation may play a valid role in determining how a defendant ultimately serves his sentence, but Congress—recognizing the procedural problems of allowing courts to consider this factor during resentencing—instead designed mechanisms under 18 U.S.C. §§3583 and 3624 to effectuate adjustments based on post-sentencing rehabilitation through good time credits and revisions to periods of supervised release. Allowing courts to consider post-sentencing rehabilitation during resentencing would defeat the scheme Congress envisioned and implemented through the interplay of §3742(g) and §§3583 and 3624, frustrating the Sentencing Reform Act's goal of moving away from indeterminate sentencing and unwarranted sentencing disparities.

Because the Eighth Circuit's holding complies with Congress' statutory directives and the reasoned

policy determination of the Sentencing Commission, the Court should affirm the judgment below.

ARGUMENT

I. 18 U.S.C. §3742(g) PROHIBITS DISTRICT COURTS FROM CONSIDERING POST-SENTENCING REHABILITATION DURING RESENTENCING PROCEEDINGS.

The language of 18 U.S.C. §3742(g) is clear: "A district court to which a case is remanded[2] . . . shall not impose a sentence outside the applicable guidelines range except upon a ground that was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal." 18 U.S.C. §3742(g)(2)(A). The district court, bound by statute to consider only the grounds "in connection with the previous sentencing of the defendant," *id.*, is therefore necessarily foreclosed from considering post-sentencing rehabilitation during resentencing proceedings.

The Government and *amicus curiae* the National Association of Criminal Defense Lawyers (NACDL)

[2] Section 3742(g) governs remands following a determination by a court of appeals that the sentencing court imposed a sentence in violation of law, incorrectly applied the Guidelines, or unreasonably imposed a sentence outside the applicable Guidelines range. 18 U.S.C. §§3742(f)(1)-(2), (g).

both concede that §3742(g) forecloses consideration of post-sentencing rehabilitation "on its face." See Gov't Br. 47; NACDL Br. 4.[3] Indeed, throughout the resentencing proceedings below, the Government consistently argued, post-*Booker*, that "18 U.S.C. §3742(g) requires that only issues raised before at the original sentencing . . . shall be considered at sentencing upon remand." J.A. 82 (March 13, 2006 Resistance to Defendant's Sentencing Memorandum); see also J.A. 178-179 ("As to any other grounds for variance, if they were not raised at the previous sentencing or in the opinion from the Court of Appeals, they may not be considered.") (July 12, 2007 Sentencing Memorandum).[4]

Petitioner, the Government, and NACDL now seek to avoid the plain language of §3742(g), contending that the statute must be invalidated as unconstitutional because it renders the Guidelines impermissibly mandatory in violation of *Booker*. See Pet'r Br. 33; Gov't Br. 48; NACDL Br. 12-20. No such constitutional infirmity exists, as the Court's analysis in *Booker* confirms. See 543 U.S., at 259-264 (examining

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[3] Petitioner claims that "[t]here is no statutory authority for [the Eighth Circuit's] rule," Pet'r Br. 18, but, as the Government and NACDL acknowledge, the plain language of §3742(g) not only supports but compels the Eighth Circuit's ruling. Gov't Br. 47; NACDL Br. 4.

[4] Although the Government and NACDL note that the Eighth Circuit did not expressly rely on 18 U.S.C. §3742(g) in prohibiting consideration of post-sentencing rehabilitation on remand for resentencing, see Gov't Br. 48; NACDL Br. 4, the effect of §3742(g) on Petitioner's resentencing proceedings was litigated and is reflected in the record below. J.A. 82, 178-179.

§3742 in particular and excising §3742(e) while leaving §3742(g) intact).

However, even if *Booker* had not already resolved the fate of §3742(g), the statute withstands constitutional scrutiny because it does not impermissibly compel a district court on remand to impose a Guidelines sentence. The statute simply reflects Congress' view that a district court, on resentencing, may consider only information available to the court of appeals—a limitation that promotes compliance with the appellate court's mandate and ensures sentencing based on the conduct of conviction. See 18 U.S.C. §3742(g)(2)(A)-(B). Section 3742(g)(2) provides no opportunity for increasing punishment based on facts not found by a jury and therefore implicates no Sixth Amendment concerns.

The Court should not lightly embark down a path that would lead it, for the first time since *Booker*, to invalidate a congressional sentencing statute, the policy objective and plain terms of which do not violate the Sixth Amendment. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) ("In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people."); *El Paso & N.E. Ry. Co.* v. *Gutierrez*, 215 U.S. 87, 97 (1909) (noting "the reluctance with which this court interferes with the action of a co-ordinate branch of government, and its duty, no less than its disposition, to sustain the enactments of the national legislature, except in clear cases of invalidity").

Should the Court nonetheless re-examine §3742 and determine that subsection (g) yields unconstitutional results, the Court, as in *Booker*, should sever only the portion of §3742 necessary to prevent mandatory imposition of a Guidelines sentence on remand for resentencing. If the Court pursues this approach, *Amicus* urges the Court to preserve §3742(g) in its entirety and to excise, at most, the definitional provision in §3742(j)(1)(B) that informs the circumstances under which a non-Guidelines sentence may be imposed during resentencing under §3742(g)(2)(B). This remedy would minimize injury to Congress' objective to promote fairness and uniformity in all phases of criminal sentencing proceedings, including remands from courts of appeals.

A. The Plain Language of §3742(g)(2) Expressly Forecloses Consideration of Post-Sentencing Rehabilitation.

Because the meaning of §3742(g)(2) is clear, the Court need not engage in statutory interpretation. See, *e.g.*, *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."). The plain text of §3742(g) expressly prohibits a district court from considering, on plenary resentencing, any ground for a sentence outside the Guidelines range unless it "was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal." 18 U.S.C.

§3742(g)(2)(A). As the Government concedes, the statute's clear terms render any conduct or circumstances arising post-sentencing—including post-sentencing rehabilitation—impermissible grounds for a downward variance. Gov't Br. 47; see also *United States* v. *Mills*, 491 F.3d 738, 742 (CA8 2007) (reversing district court for violation of §3742(g) for considering criminal history overrepresentation that did not appear as an original ground for departure); *United States* v. *Andrews*, 390 F.3d 840, 852 (CA5 2004) ("[T]he plain language of §3742(g) appears to handcuff any court on remand.").

The Court must presume that Congress "'says in a statute what it means and means in a statute what it says there.'" *Dodd* v. *United States*, 545 U.S. 353, 357 (2005) (refusing to rewrite statute despite potential for harsh results arising from interplay of two paragraphs within 28 U.S.C. §2255) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992)); see also *Tyler* v. *Cain*, 533 U.S. 656, 663, n.5 (2001) ("[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds."); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks omitted).

Section 3742(g)(2)(A)'s prohibition against considering new information unavailable at the original sentencing will deny defendants like Petitioner an

opportunity to demonstrate rehabilitation success to a district court following imposition of their original sentences. But this result does not rise to a constitutional defect or render the Guidelines mandatory. It simply limits a district court on remand to a variance based on grounds that were available and considered in connection with the original sentence. In other words, it puts the defendant in the same position as the vast majority of other defendants convicted of similar conduct whose sentences were not vacated and remanded for resentencing and who must use the administrative process established by Congress, see 18 U.S.C. §3624(b), to receive credit for such conduct. See also *infra* Part II.A (discussing the congressional directive to avoid unwarranted sentencing disparities).

Section 3742(g) includes another important feature that affects the grounds a district court may consider on remand for resentencing. In addition to limiting the sentencing court to grounds raised "in connection with the previous sentencing of the defendant prior to the appeal," 18 U.S.C. §3742(g)(2)(A), the statute also precludes imposition of a non-Guidelines sentence based on a ground that was disapproved by the court of appeals in remanding the case for resentencing. *Id.* §3742(g)(2)(B) ("The court shall not impose a sentence outside the applicable guidelines range except upon a ground that . . . was held by the court of appeals, in remanding the case, to be a permissible ground of departure."). Although the Government and NACDL cast this provision as an

impermissible attempt to require a Guidelines sentence in substance, §3742(g)(2)(B) is merely a procedural safeguard imposed by Congress to prevent circumvention of the appellate mandate. Indeed, as the Government acknowledges, see Gov't Br. 47, §§3742(g)(2)(A) and (B) work together to further Congress' intent "to prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess., 59 (2003).

B. Section 3742(g)(2) Is Valid Post-*Booker*.

Just last term, the Court reaffirmed that §3742(g) "establish[es] the terms of 'sentencing upon remand.'" *Dillon* v. *United States*, 130 S.Ct. 2683, 2691 (2010) (considering applicability of *Booker* to modification proceedings). This recognition of the continuing validity of §3742(g) is unsurprising following *Booker*, in which the Court carefully "examined the [Sentencing Reform Act (SRA)] in depth to determine Congress' likely intent in light of [*Booker*'s] holding," 543 U.S., at 265, and, in a remedial response, excised only two statutory provisions: 18 U.S.C. §§3553(b)(1) and 3742(e). 543 U.S., at 259. The Court emphasized that most of the SRA was "perfectly valid" and that, with these two provisions removed, "the remainder of

the Act satisfies the Court's constitutional requirements." *Id.*, at 258, 259.[5]

The Government, Petitioner, and NACDL cannot credibly argue that the Court in *Booker* somehow overlooked §3742(g), particularly when the Court excised §3742(e) but left §3742(g) in place. See *United States* v. *Williams*, 411 F.3d 675, 677-678 (CA6 2005) ("Although *Booker* excised 18 U.S.C. 3742(e) in its remedy opinion, it left 18 U.S.C. §§3742(f) and (g) intact . . . the remedial majority did not excise [them] and both remain valid law."); cf. *United States* v. *Tanner*, 544 F.3d 793, 797 (CA7 2008) (holding post-*Booker* that §3742(g)(1) requires a sentencing judge to apply the sentencing guidelines in effect at the time of the first sentencing); *United States* v. *Andrews*, 447 F.3d 806, 812, n.2 (CA10 2006) (same). Arguments that §3742(g) is invalid in light of *Booker* are unavailing, and the Court should not revisit the constitutionality of the statute.

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[5] The Government cites Justice Stevens' dissent in *Dillon* in arguing that §3742(g) should have been excised in *Booker* along with §3742(e) and §3553(b)(1). Gov't Br. 48-49 (citing *Dillon*, 130 S.Ct., at 2698 n.5) (Stevens, J., dissenting). The fact remains, however, that the Court carefully scrutinized §3742 in *Booker* and excised only subsection (e). 543 U.S., at 259. Justice Stevens' view regarding §3742(g) failed to elicit comment, much less agreement, from other members of the Court.

1. Section 3742(g)(2) Advances Congressional Sentencing Policy and Preserves the Role of Appellate Courts Without Implicating Sixth Amendment Concerns.

Even if the Court re-examines §3742(g) in light of *Booker*, it is clear that the Sixth Amendment concerns that led the Court to excise §3553(b)(1) and §3742(e) are not triggered by §3742(g)(2). *Booker* held that it was a violation of the Sixth Amendment for a court to increase a defendant's sentence beyond the maximum punishment authorized by the facts established by a guilty plea or a jury verdict. 543 U.S., at 244 (building on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004)). As a remedial measure, the Court excised those statutory provisions that would require a district court to impose a Guidelines sentence rather than merely consider the Guidelines as an advisory factor along with all other sentencing objectives defined by Congress in 18 U.S.C. §§3553(a)(1)-(7). *Booker*, 543 U.S., at 265.

Unlike §3553(b)(1) and §3742(e), which the Court eliminated in *Booker*, §3742(g)(2) does not mandate that a district court impose a Guidelines sentence. It merely prohibits a district court from identifying new grounds to grant a variance at resentencing that were not previously considered in the pre-appeal sentencing proceeding. See 18 U.S.C. §3742(g)(2)(A), (B). Section 3742(g)(2), therefore, promotes orderly administration of resentencing proceedings and

reflects Congress' intent that appellate courts retain a meaningful role in criminal sentencing, see 18 U.S.C. §§3742(f), (g), ensuring that district courts on remand cannot circumvent the appellate court's mandate by citing new grounds to reimpose a previously reversed sentence.

Although, in *Booker*, this Court excised §3742(e), the statute that prescribed the scope of appellate review, 18 U.S.C. §3742(e), the Court made clear that it intended to preserve "Congress' intent to provide appellate review." 543 U.S., at 262. To eliminate appellate review altogether, the Court observed, would "cut the statute loose from its moorings in congressional purpose." *Ibid*. By retaining the remaining provisions of §3742 and the mechanism of appellate review, albeit under the Court-defined "reasonableness" standard, *id.*, at 226, the carefully-fashioned *Booker* remedy properly served the overarching objective of Congress to "iron out sentencing differences" and "avoid excessive sentencing disparities." *Id.*, at 263-264.

The Government argues that §3742(g)(2) is "invalid after *Booker*" because it "*restrict[s]* the authority of district courts to vary from the applicable Guidelines range at resentencing." Gov't Br. 48 (emphasis added). But this criticism overstates the Court's holding in *Booker* and fails to acknowledge the Court's repeated, subsequent affirmations of meaningful appellate review. Although an appellate court cannot require a district court to impose a Guidelines sentence, appellate courts routinely—consistent with

Booker—make a variety of determinations regarding the procedural or substantive reasonableness of a sentence that necessarily "restrict" district courts' ability to vary from the applicable Guidelines range at resentencing. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 51 (2007) (authorizing appellate courts to review sentences for substantive reasonableness after "tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range").

As the Court has observed, "[i]n sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." *Rita* v. *United States*, 551 U.S. 338, 354 (2007). Restrictions on resentencing will occur in every remand in which the appellate court determines the district court imposed a non-Guidelines sentence that was procedurally or substantively unreasonable. See, *e.g.*, *United States* v. *Irey*, 612 F.3d 1160, 1225 (CA11 2010) (en banc) (reversing sentence because district court unreasonably varied downward from the advisory guidelines sentence); *United States* v. *Henry*, 545 F.3d 367 (CA6 2008) (remanding because district court failed to explain why sentence was substantially below Guidelines range despite amount of drugs and role in crime); *United States* v. *Goff*, 501 F.3d 250, 262 (CA3 2007) (remanding because district court failed to properly consider the Guidelines or §3553(a) factors and imposed a "drastic," lenient sentence); *United States* v. *Pugh*, 515 F.3d 1179, 1192 (CA11

2008) (remanding despite appreciation of "the thoughtfulness and care" of the district court, because non-custodial sentence was unreasonably lenient in child pornography case). This unsurprising and routine consequence of appellate review is by no means "invalid after *Booker*." See Gov't Br. 48.

To the contrary, §3742(g)(2) is critical to effectuating Congress' intent to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess., 59 (2003). The instant case is illustrative. The district court originally sentenced Petitioner to 24 months to enable Petitioner to qualify for a drug rehabilitation program. J.A. 43. After the Eighth Circuit determined that this consideration was not a valid ground for quantifying a Guidelines departure for substantial assistance to the Government, J.A. 66-68, the district court on remand imposed the same 24-month sentence based on a new ground not raised in the original sentencing proceeding: post-sentencing rehabilitation. J.A. 69-70, 145. The judge even acknowledged that his decision may have been against prevailing Eighth Circuit law, J.A. 146-147, and, following a second reversal, the court of appeals reassigned the case consistent with the original sentencing judge's reluctance to participate in a third resentencing. J.A. 149, 173.

Section 3742(g) was designed to keep this phenomenon in check and to promote orderly administration of remand proceedings. Despite the post-*Booker* advisory nature of the Guidelines and the enhanced discretion of sentencing judges, judicial discretion

"hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). Section 3742(g) preserves the role of appellate courts in the criminal sentencing system, promotes fairness and uniformity in sentencing, and remains valid after *Booker* by restricting, but not eliminating, the grounds on which a district court can impose a non-Guidelines sentence on remand for resentencing.

Indeed, appellate review is particularly important now that district courts have broad sentencing discretion. Pre-*Booker*, appeals courts reviewed sentences largely to ascertain that district courts correctly applied mandatory Guidelines. See *Booker*, 543 U.S., at 261. Under the post-*Booker* discretionary sentencing regime, a robust role for appeals courts furthers Congress' goal to reduce unwarranted disparities and implement a more uniform and just sentencing scheme. See *id*., at 263-264 (noting that Congress would favor meaningful appellate review, which "tend[s] to iron out sentencing differences"); S. Rep. No. 98-225, p. 52 (1983); 28 U.S.C. §991(b)(1)(B). Section 3742(g)(2) reflects a policy determination regarding the role of appellate review that was made by Congress, not the Sentencing Commission. Courts are not free to disregard congressional policy or to substitute their judgment for a clear, statutory directive. Compare, *e.g.*, *Oakland Cannabis*, 532 U.S., at 493 (emphasizing that a court may not "override a legislative determination manifest in the

statute"), with *Kimbrough* v. *United States*, 552 U.S. 85, at 109-110 (2007) (permitting disagreement with Sentencing Commission's policy determination regarding crack/powder cocaine ratio).

2. Section 3742(g) Requires No Remedial Excision in Whole or in Part.

The Government, Petitioner, and NACDL cite various portions of §3742, arguing that they impermissibly require district courts to impose a Guidelines sentence on remand. The plain language of the statute, however, clearly permits district courts on remand to resentence outside the applicable Guidelines range and to rely on any and all factors, provided the factors were identified at the original sentencing (as required by §3553(c)) and were not held to be unlawful by the court of appeals. To the extent certain words or cross-references in §3742(g) might be found to reflect vestiges of the mandatory Guidelines regime, the Court should not invalidate any part of §3742(g)(2), instead using the doctrine of constitutional avoidance to read isolated portions of the statute in a manner consistent with *Booker*.

For example, the introductory paragraph of §3742(g) requires district courts to "resentence a defendant in accordance with section 3553." 18 U.S.C. §3742(g). Although the broad reference to §3553 could be read to impermissibly encompass §3553(b)(1), which this Court excised in *Booker*, that reading is not inescapably compelled by the text. Rather, the

Court can and should construe the reference to §3553 to exclude §3553(b)(1), thereby avoiding any constitutional concern. See, *e.g.*, *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) ("[I]f the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.").

Similarly, NACDL emphasizes that §3742(g)(2)(B) requires a non-Guidelines sentence to be based on a ground "'held by the court of appeals . . . to be a permissible ground of *departure*.'" NACDL Br. 11-12 (quoting 18 U.S.C. §3742(g)(2)). The term "departure," NACDL contends, is a term of art that specifically refers to Guidelines-authorized grounds to sentence outside the applicable range and thus excludes "variances" based instead on the factors in 18 U.S.C. §3553(a). NACDL Br. 11 (citing *Irizarry* v. *United States*, 553 U.S. 708 (2008) (defining "departure" as a Guidelines-specific term of art in context of Rule 32(h) notice requirement).[6] Under NACDL's reasoning, therefore, no §3553(a) "variance" sentence ever could

[6] The Court's interpretation of Federal Rule of Criminal Procedure 32(h) does not compel a similarly confined reading of "departure" in §3742(g)(2)(B). As the Court observed, the Rule 32(h) notice requirement was linked to a pre-*Booker* expectation of a Guidelines sentence. *Irizarry*, 553 U.S., at 713-714. By contrast, the Court has emphasized, post-*Booker*, that there is an enduring—if not enhanced—need for meaningful appellate review, and a reading of §3742(g)(2)(B) to include both variances and Guidelines-authorized departures furthers that objective.

be imposed on remand. The Court should reject this hypertechnical construction of §3742(g)(2)(B) for several reasons.

First, §3742(g) was enacted in 2003 as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), which predates the Court's 2005 decision in *Booker*. Pub. L. No. 108-21, §401(e), 117 Stat. 671 (2003). Congress therefore did not include, and could not have included, the term "variance" in drafting §3742(g)(2)(B), even though its intent to effectuate meaningful appellate review of sentences is clearly applicable to both departures and variances. See *supra* Part I.B.1. The use of the term "departure," therefore, should be read as any sentence outside the applicable guidelines range, whether through a Guidelines-defined departure or a §3553(a) variance.

Indeed, this Court's own use of the terms "departure" and "variance" following *Booker* underscores why NACDL's hypertechnical reading should be rejected. Until crystallizing the distinction in *Irizarry* while discussing Rule 32(h), 553 U.S., at 714, the Court treated the term "variance" as virtually indistinct from "departure," with both terms merely signifying a sentence outside the applicable Guidelines range for the underlying conviction. See, *e.g.*, *Gall*, 552 U.S., at 46-47 (interchangeably using "departure" and "variance" to describe an "outside-Guidelines sentence"); *Rita*, 551 U.S., at 350 ("[S]entencing courts . . . may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).").

To the extent the Court determines that the meaning of "departure" leaves room for debate, it should apply the doctrine of constitutional avoidance and construe the term as signifying any sentence outside the applicable Guidelines range. Reading §3742(g)(2)(B) in this manner would avoid constitutional concerns, see, *e.g.*, *Delaware & Hudson Co.*, 213 U.S., at 407; *United States* v. *Congress of Indus. Orgs.*, 335 U.S. 106, 120-121 (1948), and fulfill Congress' overall goal of preserving a meaningful role for appellate courts, even in the post-*Booker* sentencing regime.

3. Section 3742(j)(1)(B)'s Definition of "Permissible Ground of Departure" Does Not Require Invalidation of §3742(g)(2).

Looking beyond the text of §3742(g) itself, Petitioner, the Government, and NACDL contend that §3742(j)(1), which defines a "'permissible' ground of departure," works in conjunction with §3742(g)(2)(B) to require a Guidelines sentence, rendering §3742(g)(2)(B) invalid after *Booker*. Gov't Br. 49; Pet'r Br. 33, n.13; NACDL Br. 10. They cite, in particular, §3742(j)(1)(B), which defines a permissible ground of departure, in part, as one "authorized under section 3553(b)" —which includes §3553(b)(1), one of the two provisions the Court excised in *Booker*. 543 U.S., at 259. If the Court agrees that the cross-reference in §3742(j)(1)(B) to §3553(b) raises constitutional concerns, it should nonetheless reject the invitation to excise §3742(g)(2), because a less drastic remedy exists. At most, the Court should excise §3742(j)(1)(B), leaving intact the remaining components of the definition

of "'permissible' ground of departure," see 18 U.S.C. §§3742(j)(1)(A), (C),[7] as well as the totality of §3742(g), which includes that defined phrase. See 18 U.S.C. §3742(g)(2)(B).

As in *Booker*, the Court should seek to determine "what Congress would have intended in light of the Court's constitutional holding," 543 U.S., at 246, and "refrain from invalidating more of the statute than is necessary." *Id.*, at 258 (quoting *Regan*, 468 U.S., at 652). Because the remaining portions of §3742(j), as well as the totality of §3742(g), are constitutionally valid and capable of functioning independently and in a manner consistent with Congress' basic objectives in enacting the statute, the Court should not unnecessarily thwart congressional intent by striking these provisions. See *Booker*, 543 U.S., at 223-224, 246 ("We answer the remedial question by looking to legislative intent."). Adopting this limited remedy would permit appellate reasonableness review to remain meaningful and binding, *id.*, at 261-262, while also ensuring that the mandatory Guidelines scheme dismantled in *Booker* remains inoperative.

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[7] Section 3742(j)(1)(A) requires a permissible ground of departure to "advanc[e] the objectives set forth in section 3553(a)(2)," and §3742(j)(1)(C) demands that a non-Guidelines sentence be "justified by the facts of the case." 18 U.S.C. §§3742(j)(1)(A), (C).

II. PERMITTING DISTRICT COURTS TO CONSIDER POST-SENTENCING REHABILITATION WOULD DEFEAT CONGRESS' OBJECTIVES UNDER §3553(a).

Even if the Court were to find that §3742(g)(2) yields an unconstitutional result under *Booker* requiring its complete invalidation, the Court nonetheless should give weight to Congress' underlying intent in enacting that provision to preserve a meaningful role for appellate review in the sentencing scheme, thereby promoting the Sentencing Reform Act's overall goal of increased fairness and uniformity in sentencing. See, *e.g.*, *Booker*, 543 U.S., at 263-264 (retaining appellate review despite excision of §3742(e), because it "tend[s] to iron out sentencing differences" and furthers Congress' goal of reducing unwarranted disparities). This can be achieved by requiring district courts, on remand, to evaluate the §3553(a) factors in light of the information available at the time of the original sentencing proceeding. This approach is warranted based not only on congressional intent reflected in §3742(g)(2), but also on the plain text of §3553(a) itself. Specifically, permitting consideration of post-sentencing rehabilitation on resentencing would defeat Congress' directive that courts consider the Sentencing Commission's policy statements, 18 U.S.C. §3553(a)(5)(A), and it would create unwarranted sentencing disparities, directly contravening §3553(a)(6). See *United States* v. *Lorenzo*, 471 F.3d 1219, 1221 (CA11 2006) (per curiam).

Although the Government and Petitioner advocate that two other subsections of §3553(a)—§3553(a)(1) and §3553(a)(2)—should be read to authorize consideration of post-sentencing rehabilitation, that

construction is belied by Congress' subsequent enactment of §3742(g), which confirms that Congress never intended §3553(a)(1) and §3553(a)(2) to expand the temporal scope of information to be considered on resentencing. See 18 U.S.C. §3742(g)(2)(A); *Lorenzo*, 471 F.3d, at 1221 ("[W]e are not persuaded that §3553(a)(1) contemplates post-sentencing history and characteristics."); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.") (internal quotation marks omitted); *infra* Part II.C.

While a trial court enjoys broad discretion during sentencing proceedings, it nonetheless is required by statute to take all §3553(a) factors into account, see, *e.g.*, *Rita*, 551 U.S., at 347-348, and it must be reversed if it ignored or slighted a factor that Congress has deemed pertinent. Cf. *United States* v. *Taylor*, 487 U.S. 326, 337 (1988) (emphasizing district court's obligation to exercise discretion under Speedy Trial Act in light of particular factors required by Congress); see also *Oakland Cannabis*, 532 U.S., at 493 (prohibiting disregard for statutorily expressed congressional judgment); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942) (finding an abuse of discretion when the National Labor Relations Board sought to fulfill one congressional objective but "wholly ignore[d] other and equally important Congressional

objectives").[8] Because consideration of post-sentencing rehabilitation would unduly slight §3553(a)(5) and (6), the Court should reject the Government's and Petitioner's §3553(a) analysis.

A. Considering Post-Sentencing Rehabilitation During Resentencing Would Create Unwarranted Disparities That Frustrate the Purpose of 18 U.S.C. §3553(a)(6).

In many ways, §3553(a)(6) most clearly embodies the overarching goals of the Sentencing Reform Act. See, *e.g.*, *Rita*, 551 U.S., at 354 ("Congress sought to diminish unwarranted sentencing disparity."); *Booker*, 543 U.S., at 253 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."). Prior to the enactment of the SRA, indeterminate sentencing was roundly criticized for its "arbitrary and capricious" nature and for creating the "shameful disparity in criminal sentences" that was the criminal justice system's "major flaw." S. Rep. No. 98-225, p. 38; see also *Mistretta* v. *United States*, 488 U.S. 361, 365 (1989) ("Serious disparities in sentences . . . were common."). Congress was concerned not only that disparate sentencing was unfair to both defendants and to the public, but that "sentences that are

[8] While district courts must consider all §3553(a) factors, *e.g.*, *Rita*, 551 U.S., at 347, the proper construction and relevance to Petitioner's sentence of factors (a)(3) (the kind of sentences available), (a)(4) (consideration of the applicable Guidelines range), and (a)(7) (restitution) are not disputed before the Court.

disproportionate to the seriousness of the offense create a disrespect for the law." S. Rep. No. 98-225, p. 45-46. Eliminating unwarranted sentencing disparity, therefore, was a "primary goal" of Congress in undertaking sentencing reform and in the ensuing Guidelines system. S. Rep. No. 98-225, p. 52; 28 U.S.C. §991(b)(1)(B) (specifying Commission's objective to "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."); see also *Mistretta*, 488 U.S., at 366-367.

The language of §3553(a)(6) plainly reflects this goal, requiring sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). Because permitting courts to consider post-sentencing rehabilitation would create precisely the type of unwarranted disparities that the SRA was designed to eradicate, prohibiting courts from considering this factor not only would fulfill Congress' directive in §3553(a)(6), but also realize the larger goal of increased certainty and consistency in the federal system so as to "retain the confidence of American society and . . . be an effective deterrent against crime." S. Rep. No. 98-225, p. 49-50.

The plain language of §3553(a)(6) and legislative history of the SRA both demonstrate that Congress redesigned the sentencing system to address the problem of unwarranted sentencing disparity by refocusing the bases of a proportionate sentence to (1) the prior records of offenders and (2) the criminal conduct for which they are to be sentenced. S. Rep.

No. 98-225, p. 65 (criticizing the "unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances"); 18 U.S.C. §3553(a)(6) (focusing on "defendants with similar records" who are found "guilty of similar conduct"); *Booker*, 543 U.S., at 250 (linking Congress' goal of diminishing sentencing disparity to "judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction"). Post-sentencing rehabilitation, which by definition occurs after an offender commits the criminal conduct for which he or she is to be sentenced, does not factor into either of these criteria.

Allowing courts to consider post-sentencing rehabilitation would further contravene §3553(a)(6) because it would inequitably benefit only those who fortuitously gain the opportunity to be resentenced due to procedural happenstance unrelated to the offense itself; that is, only when the sentencing court metes out a legally erroneous or otherwise unreasonable sentence in the first instance. See *United States* v. *Lloyd*, 469 F.3d 319, 325 (CA3 2006) ("[A]n approach permitting a defendant's post-sentencing rehabilitation efforts to impact on a resentence would unfairly disadvantage defendants who were ineligible for re-sentencing and therefore had no opportunity to bring their rehabilitative efforts before the sentencing court.") (internal quotation marks omitted). The resulting disparity would be "grossly unfair." *United States* v. *McMannus*, 496 F.3d 846, 852, n.4 (CA8 2007) (noting that the "vast majority" of defendants receive no sentencing-court review of post-sentencing rehabilitation); *United States* v. *Rhodes*, 145 F.3d 1375, 1384 (CADC 1998) (Silberman, J.,

dissenting) ("Only those prisoners who are lucky enough to have a sentencing judge who commits legal error can benefit from their postconviction conduct."). While every defendant has the opportunity to exhibit rehabilitative efforts post-sentencing, only those who benefit from plenary resentencing following reversal of their original sentence will have the opportunity to present post-sentencing rehabilitative efforts as a basis for downward variance. See *McMannus*, 496 F.3d, at 852, n.4; *Lloyd*, 469 F.3d, at 325; *United States* v. *Sims*, 174 F.3d 911, 912-913 (CA8 1999); *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting).

This procedural phenomenon necessarily creates unwarranted disparities between similarly situated defendants, because other defendants convicted of similar conduct who have post-sentencing rehabilitation success but are not "lucky" enough to be resentenced will not have the opportunity to have that success influence the sentence imposed. See *McMannus*, 496 F.3d, at 852, n.4; *Lloyd*, 469 F.3d, at 325; *Sims*, 174 F.3d, at 912; *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting); 18 U.S.C. §3742. Even a defendant with superlative rehabilitative efforts cannot earn a downward variance on that basis if his original sentence was legally "reasonable." 18 U.S.C. §3742(f)(3) (requiring affirmance of lawful sentences). Such disparity in sentencing and, more fundamentally, in procedural opportunity, exemplifies the very unwarranted disparities that Congress sought to eradicate in the SRA. S. Rep. No. 98-225, p. 53-54; 28 U.S.C. §991(b)(1)(B). Indeed, when the Commission considered this very issue, it determined that "such a

departure would . . . inequitably benefit only those who gain the opportunity to be resentenced *de novo*." U.S.S.G. §5K2.19 cmt. background (2000); see *infra* Part II.B.

Procedural happenstance is an unjustifiable basis to authorize district courts to contravene §3553(a)(6). Even circuits that have permitted consideration of post-sentencing rehabilitation have acknowledged the problematic disparities that arise. See *Lloyd*, 469 F.3d, at 325 (doubting that a district court would ever be able permissibly to consider post-sentencing rehabilitation during resentencing); *Quesada Mosquera* v. *United States*, 243 F.3d 685, 686-687 (CA2 2001) (per curiam) (noting the inequity eliminated by §5K2.19).

The Government erroneously contends that *Rhodes*, 145 F.3d, at 1381, illustrates why any resulting disparity from resentencing is warranted. See Gov't Br. 42. *Rhodes* is inapposite, however, because the defendant was resentenced after reversal of his *conviction*, changing the nature of the criminal conduct for which he was to be resentenced. 145 F.3d, at 1381. By contrast, nothing about Petitioner's criminal conduct changed from one sentencing proceeding to the next. Compare S.J.A. 1 (Petitioner's Plea Agreement), with S.J.A. 7-13 (March 18, 2004 Presentencing Investigation Report). Petitioner had the opportunity to benefit from additional sentencing proceedings solely because the Eighth Circuit repeatedly had to correct the erroneous sentences Petitioner received for the same underlying conduct. The distinct nature of a remand for sentencing error

was highlighted in *Rhodes*, in which the D.C. Circuit contrasted that defendant's resentencing following reversal of his conviction with what would have been a "random" event if he were merely "lucky enough" to be resentenced based on the same criminal conduct. 145 F.3d, at 1381.

Distinctions also exist between post-offense, pre-sentencing rehabilitation and post-sentencing rehabilitation, undermining the arguments of the Government and Petitioner that universal acceptance of the former compels adoption of the latter. See Gov't Br. 42-43; Pet'r Br. 47. This attempted analogy ignores crucial procedural differences between the two factors. Every defendant has the right to a sentencing proceeding, in which pre-sentencing rehabilitation, if any exists, can be assessed. But not every defendant obtains plenary resentencing. See *McMannus*, 496 F.3d, at 852, n.4 (noting that the "vast majority" of defendants receive no sentencing-court review of post-sentencing rehabilitation); *Quesada Mosquera*, 243 F.3d, at 686-687; *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting). Unlike pre-sentencing rehabilitation, therefore, whether a downward variance or departure is granted to a defendant on the basis of post-sentencing rehabilitation depends entirely on whether his original sentence was lawfully determined. See 18 U.S.C. §3742(f). Because the resulting disparities are unwarranted, the plain text of §3553(a)(6) precludes consideration of post-sentencing rehabilitation.

B. Considering Post-Sentencing Rehabilitation Contravenes 18 U.S.C. §3553(a)(5).

Congress required sentencing courts to "consider . . . any pertinent policy statement issued by the Sentencing Commission . . . that . . . is in effect on the date the defendant is sentenced." 18 U.S.C. §3553(a)(5). In *Booker*, the Court underscored the importance of the Sentencing Commission's determinations, emphasizing that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." 543 U.S., at 264 (citing 18 U.S.C. §§3553(a)(4), (5)); see, *e.g.*, *United States* v. *Martin*, 371 Fed. Appx. 602, 604-605 (CA6 2010) (unpublished) (remanding because district court failed to reference Guideline §5G1.3 or its application notes). Neither the Government nor Petitioner disputes the enduring importance of the Guidelines or the need for district courts to consider the Commission's policy determinations, as required by §3553(a)(5).

The Commission's policy statement on post-sentencing rehabilitation is clear and unequivocal: "Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." U.S.S.G. §5K2.19. The Commission articulated several reasons for this prohibition, including the inequitable benefit to "only those who gain the opportunity to be

resentenced *de novo*," as well as "inconsisten[cy] with the policies established by Congress under 18 U.S.C. §3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person," U.S.S.G. §5K2.19 cmt. background—a factor that further militates against consideration of post-sentencing rehabilitation, as discussed *infra* Part III.

The procedural concerns identified by the Commission should be given special weight, as they lie at the heart of the Commission's core function. Congress expressly created the Sentencing Commission to fashion procedural mechanisms to promote certainty and fairness in the sentencing system. 28 U.S.C. §991(b) (emphasizing the Commission's purpose is to "establish sentencing policies and practices of the Federal Criminal justice system"). While Congress retained the legislative prerogative of articulating the substantive objectives for sentencing, see 18 U.S.C. §3553(a)(2), it delegated to the Commission the authority to craft and develop a system to meet those objectives, regularly reevaluating federal sentencing procedures to prevent unwarranted nationwide sentencing disparities. 28 U.S.C. §991(b)(1); 18 U.S.C. §3553(a)(2); see also *Rita*, 551 U.S., at 348 ("Congressional statutes then tell the *Commission* to write the Guidelines that will carry out these same §3553(a) objectives."); *Mistretta*, 488 U.S., at 374-375.

Because the Commission's policy statement, commentary, and considerations regarding §5K2.19 arise from its core mission as defined by Congress, §5K2.19 should be given effect. Cf. *Kimbrough*, 552

U.S., at 108-109 (holding that court permissibly could vary from the Guidelines based on a policy disagreement with the crack/powder sentencing ratio, which did not "exemplify the Commission's exercise of its characteristic institutional role": "to formulate and constantly refine national sentencing standards"); accord *Spears* v. *United States*, 129 S.Ct. 840, 842-843 (2009).

C. Prohibiting Consideration of Post-Sentencing Rehabilitation Is Not Inconsistent with §3553(a)(1) or (a)(2).

Preventing courts from considering post-sentencing rehabilitation does not impermissibly slight the other §3553(a) factors on which the Government and Petitioner rely. Despite attempts to shoehorn post-sentencing rehabilitation into §3553(a)(1), congressional action subsequent to the SRA and legislative history confirm that post-sentencing rehabilitation is not part of the "history and characteristics of the defendant" described in §3553(a)(1). 18 U.S.C. §3553(a)(1); see *Lorenzo*, 471 F.3d, at 1221 (expressing doubt that post-sentencing behavior falls within §3553(a)(1)).

As previously noted, the subsequent passage of the PROTECT Act and §3742(g) demonstrates that Congress did not contemplate expanding the temporal scope of §3553(a)(1) on resentencing to permit consideration of post-sentencing rehabilitation, a factor that, by its nature, could not have been

raised in the original sentencing proceeding. Pub. L. No. 108-21, §401(e), 117 Stat. 671, 18 U.S.C. §3742(g)(2); *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 308 (1911) ("[S]ubsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."). It is a basic canon of statutory construction that courts should interpret statutory provisions consistently when possible. *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 130 S.Ct. 2433, 2447 (2010); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (internal quotation marks omitted). Section 3742(g) expressly instructs district courts to contemplate the §3553(a) factors when sentencing upon remand, 18 U.S.C. §3742(g), yet it also confines grounds for a variance to those that (1) were included in the previous sentencing proceeding and (2) were not rejected by the court of appeals. *Id.* §§3742(g)(2)(A), (B).

If the "history and characteristics" of §3553(a)(1) were read to include post-sentencing rehabilitation—a factor that did not exist when the defendant was first sentenced—that impermissibly would render meaningless the procedural mechanism established in §3742(g). Cf. *Bilski* v. *Kappos*, 130 S.Ct. 3218, 3228-3229 (2010) (interpreting two separate statutory provisions to avoid rendering one superfluous, even though enacted at different times); see also *Brown &*

Williamson Tobacco, 529 U.S., at 133 ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal quotations marks omitted). This analysis should not change even if the Court were to invalidate §3742(g) under *Booker*. Congress made a permissible policy determination regarding the temporal scope of information to be considered on remand for resentencing, and that policy determination should inform the Court's analysis of §3553(a)(1), even if Congress' chosen vehicle in §3742(g)(2) is held to be infirm. Cf. *Booker*, 543 U.S., at 263-264 (effectuating congressional preference for appellate review despite excision of §3742(e)); *Oakland Cannabis*, 532 U.S., at 497-498 (prohibiting courts from ignoring Congress' statutorily expressed judgment).

The Government's and Petitioner's invocation of 18 U.S.C. §3661 does not provide the necessary support to include post-sentencing rehabilitation in the "history and characteristics" of the defendant. 18 U.S.C. §3553(a)(1); Gov't Br. 32-37; Pet'r Br. 26-30. Although §3661 states that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a court may consider during sentencing, 18 U.S.C. §3661, courts regularly uphold such limitations in a variety of ways. See, *e.g.*, *United States* v. *Dean*, 604 F.3d 169, 174-175 (CA4 2010) (noting impropriety of collateral attacks during sentencing on validity of prior convictions); *United States* v. *Luna*, 332 Fed. Appx. 778, 783 (CA3 2009) (unpublished)

(holding that, despite *Booker*, cultural heritage is not a proper ground for downward variance); *United States* v. *Guzman*, 236 F.3d 830, 832 (CA7 2001) (reversing departure based on cultural heritage).

Moreover, U.S.S.G. §1B1.4, which is derived from §3661, specifies that §3661 must give way to contravening law. U.S.S.G. §1B1.4 ("[T]he court may consider, without limitation, any information concerning the background, character and conduct of the defendant, *unless otherwise prohibited by law.*") (citing 18 U.S.C. §3661) (emphasis added). Because §3742(g) plainly prohibits consideration of post-sentencing rehabilitation, see *supra* Part II.A, §3661 cannot be used to backdoor such evidence in a remand for resentencing.

Additionally, the legislative history of the predecessor to §3661, 18 U.S.C. §3577,[9] demonstrates that the "no limitation" language was intended to enhance judges' authority to consider a broader scope of evidence relating to the past conduct of defendants, driven by concerns over the spread of organized crime and a perceived need for greater flexibility to impose higher sentences. See Pub. L. No. 91-452, 84 Stat. 922 (1970).

[9] 18 U.S.C. §3577 was renumbered as 18 U.S.C. §3661, without comment, as part of the SRA. Pub. L. No. 98-473, §212(a)(1), 98 Stat. 1987 (1984).

The Government and Petitioner also rely on §3553(a)(2), which articulates overall sentencing objectives, but that provision similarly fails to authorize consideration of post-sentencing rehabilitation. See 18 U.S.C. §§3553(a)(2)(A)-(D). A critical factor under §3553(a)(2) is "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. §3553(a)(2)(A). The plain language of this provision associates the need to impose an appropriate sentence with the criminal conduct of conviction, rendering irrelevant post-sentencing rehabilitative efforts. *Id.*; see also *Irey*, 612 F.3d, at 1225 (reversing sentence that failed to reflect seriousness of offense or to provide just punishment).

Post-sentencing rehabilitation is likewise an inappropriate fit under §3553(a)(2)'s directives to consider deterrence and the need to protect the public from further crimes of the defendant. 18 U.S.C. §§3553(a)(2)(B), (C). The Court discussed these factors in *Gall*, distinguishing the defendant's self-motivated rehabilitation—which occurred not only pre-sentencing, but also significantly pre-arrest—from rehabilitation that would have been "at the direction of, or under supervision by, any court." *Gall*, 552 U.S., at 59. The Court concluded that the district court's reliance on the defendant's pre-sentencing rehabilitation as a §§3553(a)(2)(B) and (C) factor was justified because it was undertaken "on [Gall's] own initiative." *Ibid.* Post-sentencing rehabilitation, by

contrast, as demonstrated by Petitioner's case, comes at the direction or under the supervision of the Court, even if thoroughly embraced by the defendant at that juncture, as occurred in Petitioner's case. For that reason, it is not a valid consideration under §3553(a)(2) and should be considered, when relevant, under other procedural mechanisms Congress designed for this purpose. See *infra* Part III.[10]

III. OTHER PROCEDURAL MECHANISMS EXIST TO ACCOUNT FOR POST-SENTENCING REHABILITATION.

Post-sentencing rehabilitation can be a relevant factor in determining how a defendant serves his or her sentence, but the grave procedural inequities in allowing courts to consider such evidence at resentencing compel consideration of this factor at different stages. See U.S.S.G. §5K2.19 cmt. background.

[10] Nor does subsection (D) of §3553(a)(2), which discusses "needed educational or vocational training, medical care, or other correctional treatment," 18 U.S.C. §3553(a)(2)(D), support consideration of post-sentencing rehabilitation. These "treatment" factors, by their plain terms, would not authorize a reduced sentence on remand to reward a defendant who has already completed a rehabilitation program and for whom further substance-abuse education and care is not a "needed" sentencing consideration. *Id*. Regardless, as previously discussed with other §3553(a) factors, the subsequent passage of §3742(g)(2) confirms that Congress did not intend to expand the temporal scope of resentencing proceedings to include factors like post-sentencing rehabilitative success that were unavailable at the original sentencing.

Indeed, Congress saw fit to enact several procedural mechanisms that allow every defendant—not only those who get the benefit of resentencing proceedings—the opportunity to benefit from exemplary post-sentencing rehabilitative efforts. See *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting) (describing how Congress' passage of the SRA "chose to take account of a defendant's rehabilitative efforts in a different and more limited way than it had under the parole system").

First, a defendant can earn "good time" credit as evaluated by the Bureau of Prisons (BOP). Pursuant to 18 U.S.C. §3624, the BOP may reduce the term of imprisonment of a defendant who has shown "exemplary compliance with institutional disciplinary regulations," including progress toward earning a degree. 18 U.S.C. §3624(b). The BOP, being closer to the actual conduct and behavior of the defendants in its custody, is in a better position than the courts to incentivize prisoners to comply with institutional regulations and earn good time credit for rehabilitative efforts. See *Barber* v. *Thomas*, 130 S.Ct. 2499 (2010) (holding that the intent of §3624(b) was to allow BOP to enforce the connection between good behavior and the award of good time); *Sims*, 174 F.3d, at 913 (determining that consideration of post-sentencing rehabilitation would encroach on the authority of the BOP). The Government itself acknowledges that allowing courts to consider post-sentencing rehabilitation as a basis for downward

variance could duplicate the BOP's evaluation and render §3624(b) redundant. See Gov't Br. 50; see also *United States* v. *Hasan*, 245 F.3d 682 (CA8 2001) (finding that permitting a downward departure at resentencing based on post-sentencing rehabilitation would lead to "double counting" of the same efforts).

Petitioner correctly observes that the BOP cannot consider post-release conduct, see Pet'r Br. 48-49, however, Congress also designed a mechanism that allows sentencing courts to consider post-release, post-sentencing rehabilitation. That occurs in §3583(e)(1), which instructs courts to consider the §3553(a) factors when considering early termination of a term of supervised release. 18 U.S.C. §3583(e)(1); see also *United States* v. *Lussier*, 104 F.3d 32, 34-35 (CA2 1997) (holding that court may terminate, extend, or alter the conditions of the term of supervised release prior to its expiration pursuant to §3583(e)); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 400-401 (1991) (same). Because every defendant is eligible to benefit from a court's consideration of post-sentencing rehabilitative efforts in terms of supervised release, §3583(e) does not present the same procedural inequities that militate against permitting courts to consider post-sentencing rehabilitation at resentencing.

Finally, pursuant to the Federal Rules of Criminal Procedure, courts are authorized to reduce a defendant's sentence by considering post-sentencing

substantial assistance through a motion by the Government. FED. R. CRIM. P. 35(b). The Eighth Circuit has held that such Rule 35 motions are consistent with 18 U.S.C. §3742(g); moreover, the court may reduce a sentence beyond the statutory minimum under 18 U.S.C. §3553(e) and Rule 35(b)(4). See *Mills*, 491 F.3d, at 742 (considering plain language of §3742(g) and holding that the government retained authority to make recommendations under §3553(e)); see also *United States* v. *Poole*, 550 F.3d 676, 680-681 (CA7 2008) (consideration of a Rule 35(b) motion should take the statutory sentencing factors into account). Indeed Petitioner's sentence was reduced after his second resentencing proceeding through the district court's consideration of the Government's post-sentencing Rule 35 motion. S.J.A. 60-61.

Far from overlooking the role post-sentencing rehabilitation has to play in a rational and individualized sentencing system, Congress carefully designed mechanisms that expressly allow consideration of this factor by multiple branches of the penal system. The Court should decline the invitation to judicially interject an additional stage at which to consider post-sentencing rehabilitation that would render Congress' objectives in §§3624(b) and 3583(e)(1) redundant or superfluous at best, and, at worst, magnify unwarranted sentencing disparities and inequitable sentencing procedures in the criminal justice system.

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CONCLUSION

The Court should affirm the Eighth Circuit's judgment.

Respectfully submitted,

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October 8, 2010