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

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

I. SECTION 3742(g)(2) CANNOT SUPPORT THE EIGHTH CIRCUIT'S BAN ON POST-SENTENCING REHABILITATION AS A GROUND FOR VARIANCE BECAUSE IT IS INVALID.

Amicus in Support of the Judgment Below ("Amicus") first urges this Court to uphold the Eighth Circuit's ban on consideration of post-sentencing rehabilitation on the basis of 18 U.S.C. §3742(g)(2), claiming (1) that this provision does not mandate Guidelines sentences in violation of *United States v. Booker*, 543 U.S. 220 (2005), Amicus Br. 2, 6-7, 10-11, 13, 18; (2) that it merely prevents the "same illegal departure on a different theory" on remand, *id*. at 11, 13-14; and (3) that several features of the "robust" standard of review for "departures" instituted by the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003), should now apply to "any sentence outside the guideline range" before such a sentence may be imposed on remand. *Id*. at 17-22. Amicus is entirely wrong.

A. Section 3742(g)(2) Is Invalid.

Booker itself invalidates §3742(g)(2) by providing that "statutory cross-references to the two sections" that it expressly invalidated, §3553(b) and §3742(e), were themselves "consequently invalidated." *Booker*, 543 U.S. at 259. Section 3742(g)(2)(B), together with

§3742(j)(1), constitutes such a cross-reference, providing that no sentence outside the guideline range may be imposed on remand except upon a ground "held by the court of appeals, in remanding the case," to be a "permissible ground of departure," defined in language that mirrors the excised standard of review for departures, including that the "departure" must be "authorized under section 3553(b)." *Compare* §3742(e)(3)(B) *with* §3742(j)(1). These cross-references were "consequently invalidated" by the holding in *Booker*.

Booker also invalidates §3742(g)(2) because subparagraph (A) of that provision prohibits any sentence outside the guideline range on remand except upon a ground previously stated by the district court. In many cases, this limitation would vitiate the remedy *Booker* provided – a remand for a sentencing in which the Guidelines are advisory only. *See Booker*, 543 U.S. at 267-68. Application of subparagraph (A) would have prevented obedience to this Court's mandate in *Booker* itself by making the Guidelines mandatory on remand. And in any succeeding case in which the district court erred by treating the Guidelines as mandatory, *see, e.g.*, *United States v. Conner*, 583 F.3d 1011, 1027 (7th Cir. 2009); *United States v. Santillanes*, 274 Fed. Appx. 718 (10th Cir. 2008), or presumptively applicable, *see, e.g.*, *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam); *United States v. Mendoza-Mendoza*, 597 F.3d 212 (4th Cir. 2010), the same perverse result would obtain. In such cases, §3742(g)(2)(A) would mandate a Guidelines

sentence on remand, in direct contradiction of the relief granted on appeal, since the district court, having previously given no reason for a sentence outside the guideline range, would be precluded from exercising the discretion the appellate court's mandate requires. Indeed, the language of §3742(g)(2) demands this mandate-defeating result; its introductory clause expressly provides that on remand a sentencing court shall proceed "in accordance with . . . such instructions as may have been given by the court of appeals, *except that*. . . ." (emphasis added). The obligation to sentence within the Guidelines on remand is thus made explicitly superior to the district court's duty to obey the mandate. Avoidance of the question thus raised under Article III and the separation of powers is another powerful reason to recognize that §3742(g)(2) was invalidated by *Booker*.

In many other types of cases, the *Booker* remedy would be entirely unavailable if §3742(g)(2) were valid. Defendants whose cases were remanded on procedural grounds, such as the judge's failure to consider grounds asserted for variance, would be deprived of the opportunity, at any stage, to have arguments for a non-guideline sentence heard and acted on. In cases like *United States v. Sevilla*, 541 F.3d 226 (3d Cir. 2008), where the court of appeals reversed a Guideline sentence because the district court failed to consider the defendant's arguments for downward variance, §3742(g)(2)(A) would make the Guidelines mandatory on remand and deprive the defendant of any opportunity to have his argument

for a variance heard, as the very remand of the court of appeals and the holding of *Booker* required. *See also, e.g.*, *United States v. Dury*, 336 Fed. Appx. 371, 373 (4th Cir. 2009); *United States v. Tisdale*, 264 Fed. Appx. 403, 409-10 (5th Cir. 2008). When sentences are reversed for procedural error of this kind, the district courts, on further consideration, often impose a non-guideline sentence on remand,[1] but this proper result of the correction of a procedural error would not be possible under §3742(g)(2)(A). Another absurd result of §3742(g)(2)(A) would be that, in cases where the district court imposed a non-guideline sentence, but neglected to specifically state the reasons for it, *see, e.g.*, *United States v. Pena-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008), a sentence *within* the range would be required on remand.

Such a problem would also arise where the district court, after considering arguments for a non-guideline sentence and treating the Guidelines as advisory, imposes a Guideline sentence, *see Rita v. United States*, 551 U.S. 338, 351, 355 (2007), but that sentence is reversed because the guideline calculation was incorrect. In such cases, the district court may find it necessary on remand to vary from the corrected guideline range to reach the sentence that it finds, in its discretion, to comply with §3553(a). *See, e.g.*,

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[1] *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* 12-18 (2010), available at http://www.fd.org/pdf_lib/Procedure_Substance.pdf.

United States v. McClellan, 320 Fed. Appx. 162 (4th Cir. 2009) (reversing guideline sentence of 36 months because range was calculated incorrectly and should have been 121-151 months); Amended Judgment, *United States v. McClellan*, No. 1:04-cr-00074 (W.D.N.C. July 28, 2009) (correcting calculation and sentencing to 72 months under §3553(a)). Under §3742(g)(2)(A), the parties would be unable to argue for, or the court to impose, a non-guideline sentence, though the court never considered whether a sentence within the corrected guideline range was appropriate under §3553(a).

Not only would application of §3742(g)(2)(A) in these situations violate the *Booker* remedy, but it would often result in a Sixth Amendment violation by mandating on remand a sentence based on judge-found facts above the "statutory maximum" authorized by the facts found by the jury beyond a reasonable doubt or admitted by the defendant, *see Booker*, 543 U.S. at 244; *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), as it would have in Booker's and Fanfan's cases, *Booker*, 543 U.S. at 226-29, and in many subsequent cases.[2]

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[2] For example, the Sixth Amendment would have been violated in several of the cases cited *supra* at 2-5, because the guideline range, made mandatory by §3742(g)(2)(A) on remand, was based on judge-found facts. *See Tisdale*, 264 Fed. Appx. at 410-12; *Dury*, 336 Fed. Appx. at 372; *Pena-Hermosillo*, 522 F.3d at 1110; *McClellan*, 320 Fed. Appx. at 163; Def.'s Sent'g Mem.,

(Continued on following page)

Given the obvious invalidity and absurd results dictated by §3742(g)(2), it is not surprising that the lower courts after *Booker* have either ignored it,[3] or found it to be inapplicable.[4] Amicus cites two cases to suggest otherwise, Amicus Br. 9, 12, but both cases demonstrate that on remand, the Guidelines must be advisory to comply with *Booker*. In *United States v. Williams*, 411 F.3d 675 (6th Cir. 2005), where the

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United States v. Conner, 3:07-cr-00031 (W.D. Wis. Jan. 4, 2010); Def.'s Sent'g Mem. on Remand, *United States v. Santillanes*, No. CR 07-619 (D.N.M. June 16, 2008).

[3] *See, e.g.*, *United States v. McMannus*, 262 Fed. Appx. 732, 733 (8th Cir. 2008) (affirming downward variance on ground not included in initial statement of reasons, *United States v. McMannus*, 436 F.3d 871, 875 (8th Cir. 2006)); *United States v. Hernandez*, 604 F.3d 48 (2d Cir. 2010) (court may consider post-sentencing rehabilitation); *United States v. Bell*, 280 Fed. Appx. 548 (7th Cir. 2008) (affirming consideration of post-sentencing malingering to undermine competency determination); *United States v. Jones*, 489 F.3d 243 (6th Cir. 2007) (court may consider post-sentencing rehabilitation); *United States v. Reinhart*, 442 F.3d 857 (5th Cir. 2006) (affirming consideration of post-sentencing misconduct while incarcerated).

[4] *See United States v. Harrison*, 362 Fed. Appx. 958, 965 (11th Cir. 2010) (§3742(g)(2) did not preclude upward variance because "*Booker* made the guidelines range advisory and authorized 'variances' outside the range based on the §3553(a) factors"); *United States v. Angle*, 598 F.3d 352, 360 (7th Cir. 2010) (while §3742(g)(1) "precluded the district court from *applying*" the current, higher version of the Guidelines, "the statute did not bar the court from *consulting*" those Guidelines in the "exercise of *Booker* discretion" to impose upward variance on remand); *United States v. Bruce*, 256 Fed. Appx. 520 (3d Cir. 2007) (applying §3742(g)(2) would amount to "holding that the guidelines are mandatory on remand"; *dicta*).

judge had given no reason for a sentence outside the guideline range, the court of appeals held that the "most appropriate post-*Booker* understanding" of §3742(g) was to treat "the Guideline range . . . on resentencing as an advisory range." *Id*. at 678. In *United States v. Mills*, 491 F.3d 738 (8th Cir. 2007), §3742(g)(2) was applied to preclude a "departure" not included in the initial statement of reasons, but not to preclude a potential variance. On the government's appeal, the Eighth Circuit reversed based on §3742(g)(2), which it said "limits permissible departures on remand," and the ground for departure "does not appear in the district court's statement of reasons." *Id*. at 742-43. The court of appeals, however, remanded "for re-sentencing with consideration of the §3553(a) factors." *Id*. Accordingly, on remand, the district court imposed a downward variance under §3553(a),[5] and the government did not appeal.

B. Amicus's Proposed Revision Of §3742(g)(2)(B) And (j) Does Not Address §3742(g)(2)'s Invalidity And Is Itself Invalid.

Conceding that §3742(g)(2)(B) and (j)(1)(B) would forbid any sentence outside the guideline range on remand except a "departure" "authorized under section 3553(b)," thus rendering the Guidelines

[5] *See* Amended Judgment, *United States v. Mills*, 5:02-cr-04089-MWB (N.D. Iowa Mar. 31, 2008).

mandatory, Amicus proposes to "construe" the word "departure" in §3742(g)(2)(B) to mean "any sentence outside the applicable Guidelines range" and to delete the cross-reference to §3553(b) from §3742(j)(1). Amicus Br. 19-22 & n.7. Under this revision, §3742(g)(2)(B) and (j) would prohibit "any sentence outside the applicable Guidelines range" unless "held by the court of appeals, in remanding the case," to "advance[ ] the objectives set forth in section 3553(a)(2)" and to be "justified by the facts of the case."

Even if the judicial power included the authority to rewrite an unconstitutional section of a statute (which it plainly does not, *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922); *United States v. Reese*, 92 U.S. 214, 221 (1876)), rather than merely sever and excise it, as this Court severed and excised §3742(e) in *Booker*, Amicus's revision itself is invalid. *First*, it fails to address the fact that subparagraph (A) of §3742(g)(2) alone would deprive defendants in many cases of any sentencing in which the Guidelines are advisory. As the cases cited in Part I.A, *supra*, demonstrate, the very error that occasions a remand often consists of, or has as a practical result, the failure to consider or state any basis for a sentence outside the guideline range, a failure that would mandate a Guidelines sentence under §3742(g)(2)(A).

Second, as Amicus puts it, under his revision, §3742(j)(1)(C) would "demand[ ] a non-Guidelines sentence be 'justified by the facts of the case.'" Amicus

Br. 22 n.7. But this Court has made clear that to ensure that the Guidelines are not "effectively mandatory," *Kimbrough v. United States*, 552 U.S. 85, 92 (2007), district courts must be able to sentence outside the guideline range when they find that the guideline range *itself* is unsound in light of the goals of §3553(a), *apart* from case-specific facts. *See Rita*, 551 U.S. at 351, 353, 357; *Kimbrough*, 552 U.S. at 101; *Spears v. United States*, 129 S. Ct. 840, 842 (2009); *cf. Cunningham v. California*, 549 U.S. 270, 278-81 (2007).

Third, Amicus's revision, like the plain text, would prohibit re-imposition of a variance or departure on remand that was imposed and included in the statement of reasons but was not the subject of an appellate holding in remanding the case. *See* 18 U.S.C. §3742(g)(2)(B) (ground must be "held by the court of appeals, in remanding the case, to be a permissible ground . . ."). In many cases, the judge imposes a sentence outside the guideline range but the sentence is appealed solely on some other basis, usually the calculation of the guideline range, in which case the court of appeals does not "hold" anything with respect to the variance or departure.

Fourth, when a sentence outside the guideline range *is* the subject of an appeal, Amicus's revision would compel, or invite, the courts of appeals to "hold" that the "ground" does or does not "advance[ ] the objectives set forth in section 3553(a)(2)," and is or is not "justified by the facts of the case." In other words, instead of reviewing all sentences "limited to

[deferentially] determining whether they are 'reasonable,'" *Gall v. United States*, 552 U.S. 38, 46 (2007), the courts of appeals would review sentences within the range deferentially for reasonableness (and in several circuits with a presumption of reasonableness), but would review "any sentence outside the guideline range" under a portion of the *de novo* standard of review excised in *Booker*, *compare* §3742(j)(1)(A), (C) *with* §3742(e)(3)(B)(i), (iii) – the very same standard rejected by this Court in *Gall* as *de facto de novo* review. *See* 552 U.S. at 56-60.

Nonetheless, Amicus argues that "any sentence outside the applicable Guidelines range" *should* be subject to this *de novo* standard of review because (1) the difference between departures and variances is merely "hypertechnical," Amicus Br. 19-20; (2) Congress's "intent [in the PROTECT Act] to effectuate meaningful appellate review of sentences is clearly applicable to both departures and variances," *id*. at 20; and (3) "now that district courts have broad sentencing discretion," there is an "enduring – if not enhanced – need" for "robust" review of all sentences outside the guideline range, *id*. at 17, 19 n.6. Thus, according to Amicus, any sentence outside the guideline range should be subject to the standard of review instituted by the PROTECT Act for "departures," minus only the reference to §3553(b). *Id*. at 21-22.

Amicus is quite wrong. The distinction between "departures" and variances is at the very heart of the difference between mandatory and advisory Guidelines, *see Gall*, 552 U.S. at 49-50; *Rita*, 551 U.S. at

351, 357; *Booker*, 543 U.S. at 261; if that were not the case, the excision of §3553(b) would have been pointless. *See Booker*, 543 U.S. at 234 ("availability of departures in specified circumstances does not avoid the constitutional issue"); *see also Irizarry v. United States*, 553 U.S. 708, 714-15 (2008) (declining to read term "departure" in Rule 32(h) to mean "variances . . . under the sentencing factors set forth in 18 U.S.C. §3553(a)").[6] And *all* sentences must be reviewed deferentially for unreasonableness, *see Gall*, 552 U.S. at 46; *Rita*, 551 U.S. at 351; *Booker*, 543 U.S. at 260-62; if that were not the case, the excision of §3742(e) would have been pointless. *See Booker*, 543 U.S. at 261 ("*de novo* standard of review for departures and . . . cross-reference to §3553(b)(1) . . . ma[de] Guidelines sentencing even more mandatory than it had been").

Congressional preferences expressed in the PROTECT Act cannot prevail. The reasons for §3742(g)(2), no less than §3742(e), "have ceased to be relevant."[7] *Booker*, 543 U.S. at 261.

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[6] Judges rarely impose "departures," U.S. Sent'g Comm'n, *Preliminary Quarterly Data Report, Third Quarter 2010,* tbl. 1 ("departures" imposed in 1.76% of non-government sponsored sentences below guideline range), because the "departure" provisions of the Guidelines Manual are inadequate and restrictive. U.S. Sent'g Comm'n, *Results of Survey of United States District Judges: January 2010 through March 2010*, tbl. 14 (2010).

[7] Unlike §3742(g)(2), §3742(f)(2) is not necessarily incapable of functioning independently of excised §3742(e). *Cf. Booker*,

(Continued on following page)

C. Section 3742(g)(2) Does Not Serve, And Cannot Be Made To Serve, Its Claimed Purpose.

Amicus claims that §3742(g)(2) is needed to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." Amicus Br. 11, 16 (internal citation and quotation marks omitted). Amicus, however, has not shown what his argument suggests – that on remand, district courts engage in the subterfuge of adopting a "different theory," also invalid under §3553(a), to persist in imposing a legally erroneous sentence. While Amicus misleadingly describes this case in an effort to illustrate the point, Amicus Br. 16, what this case demonstrates is that, if applied, §3742(g)(2) would prevent district courts from resentencing based on *new* facts (*i.e.*, post-sentencing rehabilitation) and old facts (*i.e.*, lack of violent criminal history and

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543 U.S. at 307 n.6 (Scalia, J., dissenting). Unlike subsection (g)(2), subsection (f)(2) does not confine district courts to "departures" or require *de novo* review of sentences outside the guideline range. Subsection (f)(2) refers to "impermissible factors" only in relation to "departures." While the Commission deems various factors to be "impermissible" for purposes of "departure," *see* USSG §§5K2.0(d), 5K2.12, 5K2.19, 5H1.4, 5H1.7, 5H1.12, p.s., under the "departure" framework of the Guidelines Manual, these prohibitions do not extend to variances. *Irizarry*, 553 U.S. at 714-15. Thus, subsection (f)(2) does not make the guidelines or policy statements mandatory. So long as the Court does not equate "departures" with §3553(a) as a whole, as Amicus mistakenly urges, Amicus Br. 19-20, subsection (f)(2) need not be invalidated.

disparity among co-defendants), both made *legally relevant* by *Booker*, an intervening change in law. Pet'r Br. 3-11.

Amicus fails to show that application of §3742(g)(2) in this situation, or any other, would be orderly or fair. Instead, §3742(g)(2) would create absurd results and prevent district courts from imposing sentences on remand for reasons they must be permitted to consider under §3553(a).

II. AMICUS'S INCORRECT INTERPRETATION OF §3553(a) AND §3661 WOULD REINSTATE A MANDATORY GUIDELINES REGIME.

In the alternative, Amicus urges the Court to uphold the Eighth Circuit's categorical ban on consideration of post-sentencing rehabilitation under §3553(a) because such consideration is "preclude[d]" by an alleged imperative to treat identically defendants convicted of the same offense with the same criminal history without regard to differences among them, and would "contravene" the Commission's ban on such consideration as a ground for "departure," §5K2.19, p.s. Amicus Br. 23-33. According to Amicus, this would not contradict §3553(a)(1)'s command to consider the "history and characteristics of the defendant," §3553(a)(2)'s command to consider the purposes of sentencing, or §3661's command that "no limitation shall be placed" on the information a court may consider, because the enactment of §3742(g)(2) in

2003 shows that Congress "never intended" for §3553(a) or §3661 to "expand the temporal scope" of information to be considered at sentencing, and this alleged "policy" should be given effect even if §3742(g)(2) is completely invalid. *Id*. 23-24, 33-38 & n.10. These arguments fail.

A. Section 3553(a)(6) Does Not And Cannot Mandate Uniform Treatment Of Defendants Regardless Of Relevant Differences.

Amicus first claims that §3553(a)(6) "precludes" consideration of post-sentencing rehabilitation, Amicus Br. 27, 30, because it evinces Congress's intent in enacting the Sentencing Reform Act of 1984 (SRA) to require uniform treatment of defendants convicted of the same offense with the same criminal record, and thus, consideration of factors that are not part of the defendant's offense or criminal record by definition create "unwarranted disparity." *Id*. at 25-27.

This is wrong. In enacting the SRA, Congress expected that both unwarranted disparity and unwarranted uniformity would be avoided through a combination of guidelines and judicial departures taking into account *all* relevant factors. *See* S. Rep. No. 98-225, at 161 (1983) ("The key word in discussing unwarranted disparities is 'unwarranted,'" and does "not mean . . . that sentencing policies and practices should eliminate justifiable differences

between the sentences of persons convicted of similar offenses who have similar records."); *id*. at 52 ("sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case"). Thus, Congress directed the Commission to "maintain[ ] sufficient flexibility to permit individualized sentences when warranted by aggravating or mitigating factors not taken into account in the" Guidelines, 28 U.S.C. §991(b)(1)(B), to reflect "advancement in knowledge of human behavior," *id*. §991(b)(1)(C), and to include all relevant offender characteristics in the Guidelines, both aggravating and mitigating, *id*. §994(d).[8]

Under Congress's view, treating Pepper as harshly as a defendant convicted of the same crime with the same criminal history who, like Pepper, was released between sentencings, but who, unlike Pepper, did *not* abstain from drugs, complete college courses, excel in his job, strengthen his family ties, and take on new family responsibilities would constitute unwarranted uniformity. And, under Congress's

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[8] *See also* 28 U.S.C. §994(e) (noting "general inappropriateness" of considering education, vocational skills, employment, family and community ties "in recommending a term of imprisonment or length of a term of imprisonment"); S. Rep. No. 98-225, at 175 (1983) ("The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties."); *id*. at 172-75 (suggesting ways in which these offender characteristics may mitigate sentences).

view, rejecting Pepper's self-rehabilitation simply because it occurred after an initial sentencing, while taking into account similar or less impressive accomplishments of other defendants simply because they occurred before an initial sentencing, would constitute unwarranted disparity. *See* Pet'r Br. 47-48; Gov't Br. 42-43. This disparity is particularly unwarranted given that substantial opportunities for rehabilitation are available to defendants fortunate enough to be released on bail before sentencing, while such opportunities are not available to defendants who, like Pepper, are detained. *See* Brief of Federal Public and Community Defenders et al. as *Amici Curiae* in Support of Petitioner (FPD Br.) 24-27.

Amicus further contends that consideration of post-sentencing rehabilitation would inequitably benefit "lucky defendants" whose sentences are reversed on appeal, Amicus Br. 27-30, but this contention has been fully refuted by Pepper, his amici, and the government. *See* Pet'r Br. 45-48; Gov't Br. 41-46; FPD Br. 28-30; Brief of Families Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner (FAMM Br.) 21-27.

A blanket prohibition on post-sentencing rehabilitation is inconsistent with both the SRA as enacted and the individualized sentencing that is now required. *See Gall*, 552 U.S. at 49-50; *Booker*, 543 U.S. at 264-65. Any potential disparity is to be addressed by the sentencing judge in light of all of the §3553(a) factors in the individual case. *See Kimbrough*, 552 U.S. at 108.

B. The Commission's Policy Statement Cannot Forbid Consideration Of Post-Sentencing Rehabilitation Under §3553(a).

Amicus next claims that the Commission's "unequivocal" ban on post-sentencing rehabilitation as a ground for "departure," USSG §5K2.19, p.s., "should be given effect" as a binding rule applicable to variances because the Commission "articulated reasons," Congress delegated to the Commission authority to establish sentencing policies and practices, and the policy statement thus "arises from its core mission." *Id*. at 31-33. This argument patently conflicts with *Booker*'s excision of §3553(b) and this Court's decisions in *Rita* and *Gall*.

The policy statement is not entitled to "special weight," much less binding weight. Amicus Br. 32. As a categorical ban, it prohibits flexibility to consider factors not included in the Guidelines, contrary to 28 U.S.C. §991(b)(1)(B). Congress directed sentencing judges to "consider" policy statements, if "pertinent," §3553(a)(5). Consistent with the language and structure of §3553(a), policy statements cannot be elevated above other considerations – least of all a policy statement that directs judges to disregard matters made relevant by §3553(a)(1) and (a)(2). In cases like this, where the defendant's rehabilitative achievements were highly relevant to the purposes of sentencing, *see* Pet'r Br. 37-40, FPD Br. 16-19, 22-23, FAMM Br. 13-21, Gov't Br. 34-35, §5K2.19 does not even roughly approximate §3553(a)'s objectives, *Rita*,

551 U.S. at 350, much less §3553(a)'s overarching parsimony command, *Kimbrough*, 552 U.S. at 101.

Amicus declares that §5K2.19 "exemplif[ies] the Commission's exercise of its characteristic institutional role," Amicus Br. 33, but the contrary is true. First, the "reasons articulated" by the Commission, *i.e.*, that consideration of post-sentencing rehabilitation by a judge would be inequitable and would interfere with the award of good time credit, had already been thoroughly rebutted by seven courts of appeals at the time, FPD Br. 14-15, and have been again refuted by Pepper, his amici, and the government. *See* Pet'r Br. 36, 45-49; Gov't Br. 41-44, 49-51; FPD Br. 28-30; FAMM Br. 25-27. Second, the policy statement is contrary to substantial empirical research, was not based on research or national experience at the time, and has not been revisited in light of the Commission's own subsequent research and comments that have since come to its attention. FPD Br. 14-15, 16-21.

In any event, a judge may reject a policy statement that does not treat the defendant's characteristics in the proper way, *Rita*, 551 U.S. at 357, and when he does, the court of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Id*. at 347.

C. Section 3742(g)(2) Does Not Limit The "Temporal Scope" Of §3553(a) Or §3661.

Amicus wrongly claims that a categorical ban on post-sentencing rehabilitation does not unduly slight the "history and characteristics of the defendant," §3553(a)(1), or the purposes of sentencing, §3553(a)(2), nor does it violate §3661's command that "no limitation shall be placed" on the information a court may consider, because §3742(g)(2), even if completely invalid, contains a "policy" limiting the "temporal scope" of such information. Amicus Br. 23, 33-36, 38 n.10.

This argument is deeply flawed. First, Amicus's main premise is that the Court should "interpret statutory provisions consistently," Amicus Br. at 34, but there is no authority for the proposition (and Amicus has cited none) that a constitutionally invalid statute may be used to carve out exceptions to a valid statute.

Second, Amicus's contention that §3742(g)(2) contains some sort of inchoate, but binding, "policy," independent of the text or even its validity, which sets the "temporal scope" of §3553(a) and §3661, Amicus Br. 35, is incorrect. One flaw of this argument is that this "policy" is not found in the text of the statute, *Kimbrough*, 552 U.S. at 102-03, and the actual policies the text contains produce unconstitutional,

invalid, and frequently absurd results.[9] *See* Part I, *supra*. Indeed, as written, §3742(g)(2) places absolutely no limit, temporal or otherwise, on facts a court may consider at resentencing in determining where to sentence *within* the guideline range. Thus, Congress's aim in §3742(g)(2) was not, as Amicus would have it, to generally ban consideration of facts on a *temporal* basis. On the contrary, the aim of §3742(g)(2) was to restrict the imposition of sentences outside the guideline range. *See* H.R. Conf. Rep. No. 108-66, at 59 (2003). Amicus makes no showing at all that Congress desired, independent of that aim, to place a "temporal" limit on evidence a judge may consider in imposing sentence on remand.

Third, Amicus's claim that §3742(g)(2) somehow "confirms that Congress never intended" §3553(a) or §3661 "to expand the temporal scope of information" to be considered by the sentencing judge, Amicus Br. 24, 33, 36, is wrong. When Congress enacted the SRA in 1984 and ever since, it has been clear beyond doubt that courts are entitled to rely on facts that arose after the initial sentencing. *See Wasman v. United*

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[9] It is hardly even clear that the text of §3742(g)(2) precludes consideration of post-sentencing facts in imposing a "departure" on remand. When §3742(g)(2) was still thought to be valid before *Booker*, courts held that it did not apply to information, *United States v. Martin*, 363 F.3d 25, 40 (1st Cir. 2004), or legal grounds, *United States v. Lynch*, 378 F.3d 445, 449 n.4 (5th Cir. 2004), *United States v. Lauersen*, 348 F.3d 329, 344 n.16 (2d Cir. 2003), that could only have arisen after the previous sentencing.

States, 468 U.S. 559, 571-72 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969); Pet'r Br. 42-44 & nn.20-23. Congress specifically re-enacted §3661 and enacted the new §3553(a), thus strongly reiterating the traditional policy that, on resentencing, a court may rely on any facts, with "no limitation." Congress is presumed to legislate in light of prevailing law, *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), and, by "specifically insert[ing]" §3661 "into the Act," Congress "expected this system to continue," *Booker*, 543 U.S. at 251. In enacting §3742(g)(2) nearly twenty years later, Congress evinced not the slightest desire to place a "temporal" limitation on facts. Instead, it enacted a provision designed to make the Guidelines more mandatory. Because the "policy" Amicus seeks to make binding was a mere side-effect of an unconstitutional regime, and because there is no indication Congress intended it to apply outside that context, the alleged "policy" cannot act as a positive restriction on courts' discretion when the Guidelines are not mandatory.

Amicus further claims that courts "regularly uphold" limitations contrary to the plain text of §3661, Amicus. Br. 35-36, but cites no case in which a court actually did that.[10] To be sure, the Eighth Circuit

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[10] *See United States v. Guzman*, 236 F.3d 830, 833 (7th Cir. 2001) (declining to rule that cultural heritage could never be considered, even though the Guidelines were mandatory at the time and a policy statement could be read to preclude it); *United States v. Luna*, 332 Fed. Appx. 778, 783 (3d Cir. 2009) (declining to find procedural error in district court's refusal to consider

(Continued on following page)

issued a blanket prohibition on the history and characteristics of the defendant in this case under its improper standard of review, but this prohibition violates §3553(a), §3661, and this Court's decisions in *Booker*, *Rita*, *Gall* and *Kimbrough*. *See* Pet'r Br. 22-35.

III. OTHER "PROCEDURAL MECHANISMS" DO NOT ADDRESS, AND ARE NO SUBSTITUTE FOR, JUDICIAL CONSIDERATION OF POST-SENTENCING REHABILITATION IN IMPOSING A SENTENCE THAT COMPLIES WITH §3553(a).

Amicus presses the argument that the award of good time credit and a judge's consideration of post-sentencing rehabilitation somehow double count the same conduct, Amicus Br. 39-40, but this is incorrect, as Pepper and the government have explained. *See* Pet'r Br. 48-49; Gov't Br. 49-51; *see also United States v. Bradstreet*, 207 F.3d 76, 83 (1st Cir. 2000). Acknowledging that this spurious theory could not apply in this case in any event because Pepper's self-rehabilitation occurred after he was released, Amicus

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defendant's argument based on cultural heritage which was without factual support); *United States v. Dean*, 604 F.3d 169, 174 (4th Cir. 2010) (declining to apply limitation on permissible documents under *Shepard v. United States*, 544 U.S. 13 (2005), to determine date of an arrest under the guidelines because, "under *Rita* and *Gall*, sentencing courts are licensed to find a host of facts and to assign weight and relevance to those findings as they reasonably see fit.").

must fall back on an argument that supervised release might be terminated early or the government might move for departure under Rule 35(b) for substantial assistance. Amicus Br. 40-41. This evades the central point that, like good time credit, early termination of supervised release and departure for cooperation with the government do not address, and are no substitute for, a judge's imposition of a sentence that is not longer than necessary, in light of the defendant's rehabilitation, to satisfy the purposes of sentencing under §3553(a). Supervised release follows a term of imprisonment, and serves a different purpose than a sentence imposed under §3553(a). *See United States v. Granderson*, 511 U.S. 39, 50 (1994); *United States v. Johnson*, 529 U.S. 53, 59 (2000); USSG, Ch. 7, Pt. A(2)(b). Rule 35(b) departures address *only* cooperation with the government. *United States v. Poole*, 550 F.3d 676, 680-81 (7th Cir. 2008). Notably, Rule 35(b) departures result in disparity based on the happenstance of whether a particular defendant has any information to give, and whether the prosecutor in his sole discretion decides to recognize it, but this disparity is not deemed "unwarranted." *See* Pet'r Br. 45.

IV. THE GOVERNMENT FAILS TO ADDRESS PEPPER'S ARGUMENT THAT JUDGE BENNETT'S RULING, RATHER THAN ANY COURT OF APPEALS RULING, ESTABLISHED THE LAW OF THE CASE.

The government argues that the decisions of the *court of appeals* did not compel Judge Reade to adopt Judge Bennett's finding that a 58-month sentence was appropriate in light of Pepper's substantial assistance to the government.[11] Gov't Br. 16-19, 22, 25-26. Pepper's primary argument, however, is and has always been that "even if the [Eighth Circuit's] *remand order* did not obligate Chief Judge Reade to leave Judge Bennett's ruling in place, the *law of the case doctrine* did." Pet'r Br. 58; *see also* Pet'r C.A. Br. 23-26, 29-31; Pet. i, 19-20, 23, 25.

The government further argues that since the decision in *Pepper II* was vacated and remanded by this Court, this also included the "holding on the substantial assistance departure," and thus, *Pepper II* did not bind the new judge at resentencing. Gov't Br. 19. Although the court of appeals' judgment in *Pepper II* was vacated and the case remanded for further consideration in light of *Gall,* this vacatur did not touch and was not related to Judge Bennett's substantial assistance departure. J.A. 210. Judge Bennett's ruling was never "set aside" by the court of

[11] Amicus adopts the government's arguments regarding the law-of-the-case issue. Amicus Br. 1.

appeals or this Court. In fact, the ruling was affirmed in *Pepper II*, and never revisited thereafter. This was understood by the court of appeals in *Pepper III*, when it failed to revisit the §5K1.1 departure. J.A. 213. Because Judge Bennett's ruling was never "set aside" by any higher court, it remained the law of the case and should have been respected as such.

The government cites three cases to support its argument that when this Court vacated *Pepper II*, its holding no longer bound Judge Reade at resentencing. Gov't Br. 19. The first two cases state that when this Court vacates the decision of a court of appeals, that decision loses precedential value. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979); *O'Connor v. Donaldson,* 422 U.S. 563, 577-78 n.12 (1975). These cases are irrelevant because Pepper's law-of-the-case argument does not rely on the precedential value of any court of appeals decision.

In the third case, *United States v. Atkinson*, 15 F.3d 715 (7th Cir. 1994), the defendant did not raise the law-of-the-case argument that Pepper raises here. The phrase "law of the case" is nowhere mentioned in the opinion. As this Court has long observed, "'[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Atkinson did not involve a judge discarding a fellow judge's ruling despite the fact that the earlier ruling was never vacated and no new pertinent evidence had been presented. Instead, it involved a single judge modifying her *own* prior ruling following a resentencing at which new evidence was presented, a lower sentencing range was made applicable, and new consideration was necessary to impose a "sentence sufficient, but not greater than necessary" to comply with §3553(a)(2). *Atkinson*, 15 F.3d at 716-19. *Atkinson* thus has no bearing on the strength of Pepper's law-of-the-case argument.

In short, the government fails to identify any flaw in Pepper's argument that Judge Reade's decision to jettison Judge Bennett's ruling regarding Pepper's substantial assistance flew directly in the face of the law of the case doctrine.

CONCLUSION

For the above-stated reasons and those given in Pepper's opening brief, and for the reasons in his amici's briefs, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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18 U.S.C. § 3742(g)

(g) Sentencing upon remand. A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that –

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

(A) 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; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

18 U.S.C. § 3742(j)

(j) Definitions. For purposes of this section –

(1) a factor is a "permissible" ground of departure if it –

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).