No. 10-5400

In the Supreme Court of the United States

ALEJANDRA TAPIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3582(a), directs courts, "in determining whether to impose a term of imprisonment" and "in determining the length of the term," to "consider the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." The government reads that provision to bar sentencing courts from imposing or lengthening a defendant's term of imprisonment as a "means of promoting correction and rehabilitation." This Court appointed amicus curiae to file a brief "in support of the position that [Section] 3582(a) allows district courts to consider rehabilitative need in setting the length and term of imprisonment." 1/10/2011 Order.

As his primary argument, the court-appointed amicus advances a novel interpretation of Section 3582(a)

that was not the basis of the decision below and has not been adopted by any court of appeals. Amicus agrees with petitioner and the government that Congress enacted the SRA to "repudiate" the prior "[r]ehabilitation [m]odel" of sentencing. Br. 1. Amicus contends, however, that the repudiated "rehabilitative ideal" was limited to the notion that "isolation and prison routine" would induce rehabilitation and did not encompass rehabilitation through treatment programs targeted to offenders' specific needs. Br. 16; see Br. 1-13. From that premise, amicus argues (Br. 21-43) that Section 3582(a) "forbids" only reliance on "'imprisonment' by itself" to promote rehabilitation and does not preclude imprisoning a defendant "to allow participation in a targeted treatment program." Br. 22-23. Amicus's premise is incorrect, however, and his interpretation of Section 3582(a) cannot be squared with its text, the statutory context, or the purposes and drafting history of the SRA.

Amicus also proffers two alternative theories: first, that Section 3582(a) does not impose a categorical ban on using a term of imprisonment to promote rehabilitation but only cautions against reliance on rehabilitation as the sole justification for an imprisonment term (Br. 46-51); and, second, that Section 3582(a) does not prohibit reliance on rehabilitation to justify lengthening an imprisonment term that a court has already decided to impose for other reasons (Br. 52-56). Those back-up arguments are also incorrect. The SRA's text, purposes, and history make clear that Section 3582(a) categorically prohibits a court from imposing or lengthening a term of imprisonment to promote a defendant's rehabilitation.

I. SECTION 3582(a) PRECLUDES USING A TERM OF IMPRISONMENT TO PROMOTE REHABILITATION THROUGH A PRISON TREATMENT PROGRAM

A. The Rehabilitation Model Rejected By The SRA Included Targeted Prison Treatment Programs

Amicus's principal theory depends on the erroneous premise that the rehabilitation model rejected by the SRA did not include prison treatment programs targeted to offenders' specific needs. Although the earliest forms of the rehabilitative ideal focused on rehabilitation through "isolation and regimented prison routines" (Amicus Br. 1), amicus's own sources make clear that "[b]y the opening decades of the twentieth century, a frankly therapeutic model was in effect." Edgardo Rotman, *The Failure of Reform: United States 1865-1965*, in *The Oxford History of the Prison* 169 (Norval Morris & David J. Rothman eds. 1995) (*Oxford History*). Indeed, by the time of the sentencing reform debate that culminated in the SRA, rehabilitation efforts in prison centered on treatment programs. *Ibid.*; Norval Morris, *The Contemporary Prison: 1965-Present*, in *Oxford History* 242-243, 246-247; Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 11-12, 14 (1976). For example, federal prisons in the 1970s offered numerous rehabilitative programs, including educational programs, vocational training, counseling, and medical and psychiatric services. United States Department of Justice, Federal Bureau of Prisons (BOP), *Federal Prison System Facilities 1976*, at 11-77 (*BOP Facilities*).

In a footnote, amicus himself essentially concedes that the rehabilitation model encompassed treatment programs, but he attempts to distinguish those pro-

grams as "generic activities for all inmates" not targeted to prisoners' specific needs. Br. 4 n.3. The rehabilitation model was, however, not only treatment-based but also focused on "individualizing punishment." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). Amicus's own sources describe the post-World War II "therapeutic model of rehabilitation" or "rehabilitative ideal" as based on "individualized treatment." *Oxford History* 189-190; accord, *e.g.*, Marvin E. Frankel, *Criminal Sentences: Law Without Order* 87 (1973); American Friends Serv. Comm., *Struggle for Justice* 39 (1971). Thus, federal prisons offered various targeted treatment programs, including individualized psychiatric counseling and long-term, residential drug treatment. *BOP Facilities* 11, 21, 23, 41, 69; BOP, *State of the Bureau 1991, The Evolving Structure of Drug Treatment* 7.

In repudiating the "rehabilitation model," the SRA specifically rejected using a term of imprisonment to promote participation in treatment programs. S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983) (Senate Report). The Senate Report accompanying the SRA describes the repudiated "model of 'coercive' rehabilitation" as based on a "theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons." *Id.* at 40. And the Report repeatedly equates "rehabilitation" with providing "programs within the prison setting," including "educational opportunity, vocational training, or other correctional treatment." *Id.* at 76, 91, 171-172 n.410.

In revising sentencing practices, the SRA rejected using an imprisonment term not only to achieve generalized rehabilitation but also to provide treatment programs targeted to individual needs. The Senate Report

states that various provisions of the SRA, including Section 3582(a), were intended to "discourage the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner." Senate Report 119; see *id.* at 171 (defendants should not be "relegate[d] to prisons" because they are "in need of education and vocational training"); *id.* at 172 n.410 ("a defendant should not be sent to prison only because the prison has a program that 'might be good for him'"). Instead, Congress intended that courts use other sentencing options, such as probation, to provide targeted rehabilitative treatment. See, *e.g.*, *id.* at 76 (participation in "treatment programs such as those for persons with emotional problems or drug or alcohol problems, might be made conditions of probation for rehabilitative purposes"); *id.* at 91 ("when the purpose of sentencing is to provide the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is generally considered to be preferable to imprisonment").

B. Section 3582(a)'s Text Precludes Using A Term Of Imprisonment To Promote Rehabilitation, Including Through Targeted Treatment Programs

Based on his flawed understanding of the repudiated rehabilitation model, amicus advances (Br. 21-23) an equally flawed reading of Section 3582(a). Amicus asserts that the directive that sentencing courts "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. 3582(a), "does not address targeted treatment programs that are available in prison" but only "'imprisonment' per se." Br. 22. Amicus argues that the "recognizing"

clause therefore does not "forbid[] a judge to lengthen a prison sentence to facilitate a defendant's entry into a treatment program," but only "forbids" imprisoning defendants based on the theory that "'imprisonment' by itself" will promote their rehabilitation. Br. 22-23.

Amicus errs in asserting that the "recognizing" clause "does not address" the provision of targeted treatment programs. Br. 22. The phrase "promoting correction and rehabilitation" refers to the rehabilitative purpose of sentencing described in 18 U.S.C. 3553(a)(2)(D)—"provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment." That purpose plainly includes providing a targeted treatment program. Indeed, amicus himself (Br. 25) describes Section 3553(a)(2)(D) as encompassing targeted treatment programs. Thus, Section 3582(a) instructs courts, when imposing or determining the length of an imprisonment term, to "recogniz[e] that imprisonment is not an appropriate means of" providing targeted treatment programs, as well as other rehabilitative and correctional treatment.

Amicus also incorrectly argues that "[w]hen a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program," not imprisonment, "that is the means of promoting rehabilitation." Br. 22. That argument is based on an artificial distinction between using imprisonment to promote rehabilitation and using imprisonment to promote rehabilitation by facilitating access to prison programs. The subsidiary or intermediate purpose of facilitating access to prison programs does not alter the broader or ultimate purpose of promoting rehabilitation. Nor does it alter the reality that the court is using "imprisonment" as a "means" of achieving that purpose. A "means" is

"something by the use or help of which a desired end is attained or made more likely." *Webster's Third New International Dictionary* 1398 (1993) (*Webster's Third*); see *Black's Law Dictionary* 1070 (9th ed. 2009) (defining "means" as "[s]omething that helps to attain an end; an instrument"). In order to facilitate a defendant's access to a prison program for the purpose of promoting her rehabilitation, the court must place and keep the defendant in prison. In doing so, the court uses imprisonment as an "instrument" to "help[] to attain" her rehabilitation, in contravention of Section 3582(a)'s command that the court recognize that imprisonment is not an appropriate means of achieving that goal.

That the court is using imprisonment as the means of promoting rehabilitation is clear because the imposition and length of imprisonment are the only aspects of the prison sentence over which the court has authority. Sentencing courts have no power to place defendants in prison treatment programs; that authority lies with the BOP. U.S. Br. 29-30. Thus, although the district court increased petitioner's imprisonment term in part to facilitate her participation in the BOP's residential drug abuse program (RDAP), J.A. 27, whether petitioner participated depended on her meeting BOP's eligibility criteria, 28 C.F.R. 550.53, as well as her volunteering for the program, BOP, *Program Statement: Psychology Treatment Programs P5330.11*, at § 2.5.1 (2009) (*Program Statement*), and the availability of open slots, see 18 U.S.C. 3621(e)(1) (participation "subject to the availability of appropriations"). Because the court could not order petitioner's participation in RDAP, it makes little sense to describe the court as using RDAP, rather than

the increased imprisonment term, as the means of promoting petitioner's rehabilitation.[1]

Amicus's construction of Section 3582(a) has yet another logical flaw. It would allow courts to imprison defendants based on not only the "targeted" treatment programs that amicus highlights (Br. 22), but also the "generic" activities that amicus admits were part of the repudiated rehabilitation model (Br. 4 n.3). Like "targeted" programs, programs offered to all inmates are not "'imprisonment' itself." Therefore, under amicus's interpretation, they are not covered by Section 3582(a)'s "recognizing" clause. Consequently, courts could imprison defendants to facilitate access to *any* prison program or service—a result inconsistent with even amicus's constricted view of Congress's intent in enacting the SRA. Indeed, amicus's interpretation would deprive Section 3582(a) of almost any effect, because courts could imprison defendants for rehabilitative purposes so long as the courts identified anything other than confinement itself as the specific rehabilitative mechanism. It is thus unsurprising that no court of appeals has adopted amicus's interpretation.

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[1] Petitioner notes (Br. 43) that she has not participated in RDAP. According to BOP records, petitioner was encouraged to enroll during her psychology intake screening at FMC Carswell, where she is currently incarcerated, but that she stated that she was not interested, and she has not volunteered for the program. Because she has not volunteered, the BOP has not conducted a clinical interview to determine her eligibility. See *Program Statement* § 2.5.9. Petitioner also notes (Br. 43) that she was not placed in FCI Dublin, the facility recommended by the district court. BOP did not place petitioner there because it determined that she had to be separated from an inmate who was already housed at that facility. See 28 C.F.R. 524.72(f).

C. Section 3582(a)'s Statutory Context Makes Clear That The Prohibition Encompasses Prison Treatment Programs

Other provisions of the SRA confirm that Congress did not intend to exclude prison treatment programs from Section 3582(a)'s prohibition on using a term of imprisonment to promote rehabilitation.

1. As the government's opening brief describes (at 20-21), the SRA contains a directive to the United States Sentencing Commission that parallels Section 3582(a)'s directive to sentencing courts. The directive states that "[t]he Commission shall insure that the [Sentencing Guidelines] reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. 994(k). Section 994(k) makes absolutely clear that Congress intended to prohibit using a term of imprisonment to promote rehabilitation and correction through targeted treatment programs. Section 994(k) expressly directs that an imprisonment term not be used to "provid[e] the defendant with needed educational or vocational training, medical care, or other correctional treatment," 28 U.S.C. 994(k), which plainly encompasses treatment programs targeted to a defendant's specific needs. Indeed, the language in Section 994(k) is nearly identical to Section 3553(a)(2)(D), which amicus agrees (Br. 25) describes targeted treatment programs. Section 994(k) informs the meaning of Section 3582(a) because Congress intended the two provisions to work together to implement its determination that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Senate Report 76; see U.S. Br. 21.

Interpreting Section 3582(a) to prohibit using an imprisonment term to promote rehabilitation through prison treatment programs is also supported by the SRA's provisions governing who has authority to assign offenders to those programs. Before the SRA's enactment, sentencing courts had authority to mandate that certain offenders, such as drug addicts or youths, be confined "for treatment," 18 U.S.C. 4253(a), 5010(b) (1982), and the BOP was required to provide that treatment, 18 U.S.C. 4254, 5011 (1982). The SRA repealed that authority, see Pub. L. No. 98-473, § 218(a)(6) and (8), 98 Stat. 2027, and instead gave the BOP sole power to make treatment and program placement decisions for all offenders, see 18 U.S.C. 3621 (2006 & Supp. III 2009); p. 7, *supra*. Although courts cannot place offenders in prison treatment programs or require their participation, courts can require them to participate in treatment programs, including residential drug treatment, as a condition of probation or supervised release. 18 U.S.C. 3563(b)(9), 3583(d). That allocation of authority is inconsistent with amicus's interpretation of Section 3582(a). Instead, it supports the government's view that Section 3582(a) precludes courts from using an imprisonment term to promote a defendant's rehabilitation through treatment programs, because Congress intended courts to use other sentencing options for that purpose.[2]

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[2] Amicus observes (Br. 43) that, under 18 U.S.C. 3583(e), a court can consider rehabilitative needs in deciding whether to incarcerate a defendant for violating a condition of supervised release even though courts cannot require incarcerated defendants to participate in prison treatment programs. Allowing courts to consider rehabilitative needs in deciding whether to incarcerate defendants for violating conditions of supervised release still makes sense, however, because courts can use

2. Contrary to amicus's contention (Br. 25-30), his interpretation of Section 3582(a) is not necessary to reconcile that provision with Section 3553(a)(2)(D). As the government's opening brief explains (at 23-27), Section 3553(a)(2)(D) instructs courts to consider a defendant's rehabilitative needs, including any need for treatment programs, in fashioning the *overall* sentence, which need not include imprisonment or imprisonment alone, but can include other components, such as probation and supervised release. Although Section 3582(a) instructs that the need for rehabilitation is not an appropriate reason to impose or increase a term of imprisonment, the SRA's provisions governing non-incarcerative sentencing options permit consideration of rehabilitation. *E.g.*, 18 U.S.C. 3562(a), 3572(a), 3583(c). Thus, Section 3582(a) "harmonize[s] comfortably" with Section 3553(a)(2)(D) "in a rational scheme that retains the sentencing goal of rehabilitation," including through targeted treatment programs, "but pursues this goal through means other than incarcerating a defendant or keeping him in prison longer." *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009).

Amicus mistakenly contends that interpreting Section 3582(a) to preclude using an imprisonment term to promote rehabilitation through treatment programs "creates an exception" to Section 3553(a)(2)(D) that would "swallow the rule" that courts must consider defendants' rehabilitative needs at sentencing. Br. 28.

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incarceration to encourage compliance with rehabilitative conditions of supervised release. For example, if a defendant has violated a condition of supervised release requiring participation in a drug treatment program, a court might conclude that the defendant's rehabilitative needs require incarceration to impress upon the defendant the importance of complying with that condition.

Contrary to amicus's contention, even though "[t]he vast majority of federal felons are sentenced to imprisonment," *ibid.*, defendants' rehabilitative needs will still be considered at every sentencing. For example, whenever a court sentences a defendant to a term of imprisonment, the court must also determine whether to impose supervised release, and the court must consider how best to provide for the defendant's rehabilitative needs in making that determination. 18 U.S.C. 3583(a) and (c).

Amicus also erroneously argues (Br. 18, 25, 29) that Congress would not have imposed a significant limitation on Section 3553(a)(2)(D) in "a different statutory provision many sections later." Br. 18. Section 3553(a) sets out general criteria that guide courts in fashioning a defendant's overall sentence, while subsequent provisions of the SRA provide more specific guidance on how those criteria apply in the context of each of the various sentencing options. U.S. Br. 3. Congress therefore placed the limitation on using a term of imprisonment to promote rehabilitation exactly where it belongs—in the statutory provision that addresses the "[f]actors to be considered in imposing a term of imprisonment." 18 U.S.C. 3582(a).

Amicus further argues (Br. 32-34) that if Congress had intended to preclude using imprisonment to further the rehabilitative purpose of sentencing, Congress would have structured Section 3582(a) like Section 3583(c), which governs the imposition of supervised release. Section 3583(c) explicitly lists each Section 3553(a) factor that courts must consider and omits the factors whose consideration Congress intended to preclude. See 18 U.S.C. 3583(c). Contrary to amicus's argument, Congress had good reasons for not using that formulation in Section 3582(a). First, Section 3583(c)

removes multiple Section 3553(a) factors from consideration (Section 3553(a)(2)(A) and Section 3553(a)(3)), while Section 3582(a) merely limits the consideration of a single factor (Section 3553(a)(2)(D)). More fundamentally, Congress did not intend to preclude courts from considering rehabilitative purposes entirely when making imprisonment decisions. Although Congress wanted to prohibit courts from imposing or lengthening a term of imprisonment to promote rehabilitation, Congress did not intend to prohibit courts from rejecting imprisonment or shortening an imprisonment term for that purpose. U.S. Br. 25, 40. Nor did Congress intend to prevent courts from recommending that defendants be placed in certain prison programs or facilities that might serve their rehabilitative needs. *Id.* at 26.

D. The SRA's Purposes And Drafting History Confirm That Section 3582(a) Precludes Using A Term Of Imprisonment To Promote Rehabilitation Through Treatment Programs

1. Amicus's interpretation of Section 3582(a) also conflicts with the SRA's purposes and drafting history. Amicus contends (Br. 30-33) that his interpretation is consistent with several of the SRA's goals, including individualizing sentences where appropriate, promoting certainty and fairness, and avoiding unwarranted sentencing disparities. That contention is beside the point, however, because amicus's interpretation is inconsistent with another central goal of the SRA—"reject[ing] imprisonment as a means of promoting rehabilitation." *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989). In conflict with that goal, amicus's interpretation would allow courts to impose or increase imprisonment terms for rehabilitative purposes whenever the courts invoke

anything besides confinement itself as the specific means of rehabilitation.

The SRA's drafting history also contradicts amicus's attempt to carve out an exception in Section 3582(a) for targeted treatment programs. A predecessor bill to the SRA, S. 1437, 95th Cong., 1st Sess. (as reported Nov. 15, 1977), contained just such an exception (although limited to the "exceptional case"), but that exception was eliminated in later predecessor bills, including S. 1722, 96th Cong., 1st Sess. (as reported Jan. 17. 1980), and in the SRA itself. U.S. Br. 31-35. That shift in language during the evolution of the SRA supports interpreting Section 3582(a) as a categorical ban on using a term of imprisonment to promote rehabilitation, including through targeted treatment programs.

Amicus notes (Br. 36-37) that the targeted treatment exception was accompanied by provisions allowing for an indeterminate sentence and parole and that, when Congress eliminated the exception, Congress also eliminated those additional provisions. Amicus argues that Congress's "target" in eliminating the exception therefore must have been indeterminate sentencing and parole rather than the use of imprisonment to facilitate targeted treatment. Br. 37. That argument ignores the fact that the language allowing the use of imprisonment to provide targeted treatment was contained in separate statutory provisions (proposed 18 U.S.C. 101(b)(4) and 28 U.S.C. 994(j)) from the provisions allowing an indeterminate sentence and parole (proposed 18 U.S.C. 2301(c), 2302(a), 3831-3835, 3841-3846 and 28 U.S.C. 994(b)(2)). See S. 1437, §§ 101, 124. If Congress had intended only to abolish parole and indeterminate sentences, but to retain use of an imprisonment term to facilitate targeted treatment, Congress could easily have

eliminated only the provisions allowing indeterminate sentences and parole. Instead, Congress eliminated all of the provisions, including the language creating the targeted treatment exception.

2. Amicus's reliance (Br. 38-39) on a sentencing reform bill introduced by Senator Kennedy in 1981 is also misplaced. That bill combined what are now Sections 3553(a) and 3582(a) in one provision that required courts, "in determining the particular sentence to be imposed," to consider, among other factors, "the need for the sentence imposed * * * with respect to a sentence other than a sentence to a term of imprisonment, to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." S. 1555, 97th Cong., 1st Sess. § 102(a) (proposed 18 U.S.C. 3579). Amicus argues that Congress would have enacted that language, rather than the language in Section 3582(a), if Congress had intended to preclude using a term of imprisonment to facilitate access to targeted treatment programs.

Congress's failure to utilize the language in S. 1555 is, however, entirely understandable. That language could have been interpreted to preclude courts from relying on a defendant's rehabilitative needs to reject a sentence of imprisonment, shorten the length of an imprisonment term, or recommend placement in particular prison facilities or programs—restrictions that Congress did not intend. See p. 13, *supra*. In addition, Congress chose an entirely different structure from S. 1555 in the SRA, placing general sentencing criteria in one provision and limitations on the consideration of those criteria in subsequent provisions dealing with the specific sentencing options. See p. 12, *supra*. In any event, S. 1555 was not a significant precursor to the SRA. Un-

like S. 1437 and S. 1722, which the Senate Report accompanying the SRA acknowledged as predecessor bills and which were reported out of Committee, see Senate Report 37, S. 1555 was merely one sentencing reform bill among many that were introduced, referred to a subcommittee, and died without further action.

3. Contrary to amicus's contention (Br. 39-41), Congress's support of prison drug treatment programs, including RDAP, does not justify his interpretation of Section 3582(a). Based on experience with the rehabilitation model, Congress "doubt[ed] that rehabilitation [could] be induced *reliably* in a prison setting," Senate Report 38 (emphasis added), and concluded that efforts to "coerc[e]" participation in prison rehabilitative programs had "failed." *Id.* at 40. Congress therefore provided in the SRA that it is "not * * * appropriate" to impose or lengthen a term of imprisonment for the purpose of rehabilitation. 18 U.S.C. 3582(a). At the same time, Congress did not intend "that efforts to rehabilitate prisoners should be abandoned." Senate Report 76. On the contrary, Congress concluded that treatment "[p]rograms within the prison setting should be available and encouraged to enhance the *possibility* of rehabilitation," *ibid.* (emphasis added), particularly if the programs are "made available to prisoners on a voluntary basis," *id.* at 173.

II. SECTION 3582(a) IMPOSES A CATEGORICAL BAN ON IMPOSING OR LENGTHENING AN IMPRISONMENT TERM TO PROMOTE REHABILITATION AND CORRECTION

Amicus also argues (Br. 23-25, 43-51) that, even if Section 3582(a) limits using imprisonment to promote rehabilitation through treatment programs, it only

"discourage[s]," but does not "forbid," reliance on treatment needs, particularly "as one factor among others." Br. 43. That alternative argument is also incorrect.

A. Section 3582(a) imposes an absolute prohibition, not a mere caution. Its text instructs courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). A common meaning of the word "recognize" is "to acknowledge or treat as valid." U.S. Br. 18 (citing *Random House Dictionary of the English Language* 1611 (2d ed. 1987) (*Random House*)); *Webster's Third* 1896 ("to acknowledge in some definite way"); 13 *Oxford English Dictionary* 343 (2d ed. 1989) ("to treat as valid"). Whenever a court imprisons a defendant in order to rehabilitate her, the court fails "to acknowledge or treat as valid" that imprisonment is not an appropriate means of promoting rehabilitation. U.S. Br. 18-19.[3]

Although amicus observes (Br. 24 & n.5) that "recognize" has other definitions, including "to recall knowledge of," "realize," and "perceive clearly," those definitions do not suggest that Section 3582(a) is anything less than a categorical ban. A court that "knows," "realizes," or "perceives clearly" that "imprisonment is not an appropriate means of correction and rehabilitation" has no basis for using imprisonment to promote those goals.

Amicus also argues that using the term "recognizing" is a "peculiar" way to impose a categorical ban. Br. 23. The language choice makes sense, however, given the statute's drafting history. The "recognizing" clause or-

[3] The government's opening brief also cites a definition of "recognize" that is listed as obsolete. U.S. Br. 18 (quoting *Webster's Third* 1896 as defining "recognize" to mean "to admit the fact, truth, or validity of"). That definition is, however, substantially similar to the definition discussed above, which is still in common usage.

iginated in a provision of S. 1437 stating that one purpose of sentencing was to "promote the correction and rehabilitation of persons who engage in [criminal] conduct, recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation." S. 1437, § 101 (proposed 18 U.S.C. 101(b)(4)). As originally formulated, with the inclusion of the modifier "generally," that provision was indeed a caution rather than an absolute prohibition. Later bills and the SRA as enacted, however, eliminated the qualifier "generally" in order to convert the caution into a categorical ban. U.S. Br. 31-36.

Particularly given that drafting history, amicus errs (Br. 43-45) in drawing a negative inference from Section 3582(a)'s failure to use alternative language that has the same import, such as the phrase "shall insure," which appears in various directives to the Sentencing Commission. Indeed, Section 994(k), the directive to the Commission that parallels Section 3582(a), does use the language amicus suggests, directing that the Commission "shall insure" that the Guidelines reflect the inappropriateness of imposing a term of imprisonment to promote rehabilitation and correction.

B. The text of Section 3582(a) also refutes amicus's contention that courts may base a term of imprisonment on rehabilitative purposes provided that consideration is only one factor among others. A court fails to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation" whenever the court imposes a term of imprisonment, or lengthens the term, for the purposes of promoting rehabilitation. 18 U.S.C. 3582(a). That remains true even if the court also invokes other factors in justifying the chosen term. The court's reliance on rehabilitative purposes may be

harmless, but it is still improper. See *Williams* v. *United States*, 503 U.S. 193, 203 (1992).

Contrary to amicus's contention (Br. 46-47), Section 994(k) reinforces, rather than undermines, that construction of Section 3582(a). Amicus mistakenly reads Section 994(k) as if it barred using a term of imprisonment "for the *sole* purpose" of providing rehabilitation. Section 994(k) does not include that qualification. And Congress knew how to impose that qualification when it wanted. Congress did so in 28 U.S.C. 994(t), which directs the Commission, in promulgating policy statements concerning extraordinary and compelling reasons for sentence reduction under 18 U.S.C. 3582(c)(1)(A), that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" that justifies reducing a previously imposed imprisonment term.

C. The legislative history also does not support amicus's position. Amicus relies on the Senate Report's description of Section 3582(a) as a "caution" designed to "discourage" the use of imprisonment to promote rehabilitation. Br. 48 (quoting Senate Report 119). That language, however, cannot overcome the statute's plain text, its drafting history, and other statements in the legislative history, all of which make clear that Section 3582(a) imposes a categorical prohibition. See pp. 17-18, *supra*; U.S. Br. 31-36. Amicus also selectively quotes passages from the Senate Report disapproving imprisonment "on the sole ground" or "only because" a prison has a treatment program that might benefit the defendant. Br. 49 (quoting Senate Report 119, 172 n.410). Read in context, those statements mean that courts may not impose or lengthen a term of imprisonment unless imprisonment is independently justified by a sentencing

goal other than rehabilitation. In any event, the statements cannot justify disregarding Section 3582(a)'s plain text, which precludes courts from imposing or lengthening a term of imprisonment in order to promote rehabilitation.[4]

Interpreting Section 3582(a) as precatory language that merely discourages courts from relying on rehabilitation alone to justify imprisonment would frustrate entirely Congress's intent to repudiate the rehabilitation model. Under that interpretation, courts could not only impose or increase an imprisonment term to take advantage of prison treatment programs or services. Courts could also imprison defendants on the theory that isolation alone would promote their rehabilitation, a result that amicus himself agrees Congress intended to "forbid[]" when it rejected the rehabilitation model. Br. 23.

III. THE PROHIBITION IN SECTION 3582(a) APPLIES TO A DECISION TO LENGTHEN A TERM OF IMPRISONMENT

A. As his second back-up argument (Br. 52-56), amicus interprets Section 3582(a) as did the court below—to prohibit courts from relying on a defendant's rehabilitative needs only in making the initial determination to impose a term of imprisonment, but not to prevent a

[4] Amicus's interpretation is also not supported by statements that an imprisonment term "imposed for another purpose of sentencing may * * * have a rehabilitative focus" if rehabilitation is "an appropriate secondary purpose of the sentence." Br. 50 (quoting Senate Report 176). Such statements simply reflect that, when a court imposes imprisonment based on other sentencing goals, Section 3582(a) does not prohibit prison treatment programs "to enhance the possibility of rehabilitation." Senate Report 76. Nor does it prohibit sentencing courts from considering "the availability of rehabilitative programs" in "recommending a particular facility." *Id.* at 119.

court from relying on rehabilitative needs to lengthen an imprisonment term that the court has decided to impose for other reasons. That argument conflicts with the plain text of the statute, the initial clause of which makes clear that its prohibition applies both "in determining whether to impose a term of imprisonment" and "in determining the length of the term." 18 U.S.C. 3582(a); see U.S. Br. 16-18.

Amicus's alternative reading would give the word "imprisonment" two different meanings in the same statutory provision. Amicus asserts that, in Section 3582(a)'s "recognizing" clause, "imprisonment" means "the act of confining," rather than "[t]he state of being confined." Br. 52-53. But "imprisonment" clearly does not mean "the act of confining" in the initial clause of Section 3582(a). That clause speaks of a court's "determining whether to impose a term of imprisonment." 18 U.S.C. 3582(a). The clause uses the word "impose" to refer to the act of confining. Therefore, in Section 3582(a)'s initial clause, "imprisonment" necessarily means "[t]he state of being confined." Nothing overcomes the presumption that Congress intended the same term to have the same meaning in the "recognizing" clause just a few words later. See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Amicus's contention that Section 3582(a) permits courts to lengthen a term of imprisonment for rehabilitative purposes also cannot be squared with his earlier acknowledgment that the SRA "forbids" courts from using "'imprisonment' by itself" to promote rehabilitation. Br. 23. If Section 3582(a) applied only to the initial decision whether to imprison, nothing would prevent courts from basing the length of an imprisonment term on that "forbidden rehabilitative ideal." *Ibid.* Thus,

once a court decided to impose even a day of imprisonment based on other considerations, the court could extend the term for years based on the theory that confinement alone would rehabilitate the defendant—a theory that even amicus agrees the SRA repudiated.

B. Contrary to amicus's contention (Br. 53), Section 994(k) does not support his argument. Unlike Section 3582(a), Section 994(k) refers only to "the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant" and does not separately mention the inappropriateness of increasing the length of the term. 18 U.S.C. 994(k). But that omission in Section 994(k) does not mean that the prohibition in Section 3582(a) encompasses only the decision to impose imprisonment in the first instance. First, whatever the omission suggests about the scope of Section 994(k), Section 3582(a) expressly includes a reference to the "length" of imprisonment. Second, Section 994(k)'s reference to "imposing a sentence to a term of imprisonment" is easily understood to encompass both the fact and length of imprisonment, because the word "term" means "the time or period through which something lasts." *Random House* 1958; accord *Webster's Third* 2358; see *Cullen* v. *Pinholster*, No. 09-1088 (Apr. 4, 2011), slip op. 12 n.7 (declining to attach significance to the omission of additional clarifying language even though that language was included in a related provision).

Amicus also mistakenly argues (Br. 54) that his alternative interpretation of Section 3582(a) is supported by the absence of a prohibition against relying on rehabilitation in 18 U.S.C. 3584(b), which addresses consecutive sentences. Because a decision to impose consecutive prison sentences is, as amicus himself contends, "in sub-

stance, a decision to lengthen the term of imprisonment" (Br. 54), the prohibition in Section 3582(a) itself applies to that determination. See 18 U.S.C. 3582(a) (stating that its prohibition applies "in determining the length of the term"). Congress therefore did not need to include an additional prohibition in Section 3584(b). In any event, Congress's failure to include a similar prohibition in Section 3584(b) would not justify disregarding the prohibition imposed by the plain text of Section 3582(a).

C. Finally, amicus errs in contending (Br. 54-55) that the legislative history supports limiting Section 3582(a) to the initial decision whether to impose a term of imprisonment. Although one passage in the Senate Report describes Section 3582(a) without expressly stating that it applies when a court determines the length of an imprisonment term, neither that passage nor anything else in the Report affirmatively states that courts may lengthen terms of imprisonment to promote rehabilitation. That isolated passage therefore cannot overcome the clear statutory text and confirmation elsewhere in the Report that Section 3582(a)'s prohibition applies "in determining the length of the term." 18 U.S.C. 3582(a); see U.S. Br. 37-38; Senate Report 67 & n.140, 179.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be vacated and the case remanded for consideration whether petitioner can demonstrate reversible plain error.

Respectfully submitted.

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