No. 10-5400

In The
Supreme Court of the United States

ALEJANDRA TAPIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* BY INVITATION OF THE COURT

STEPHANOS BIBAS
Counsel of Record
Amicus Curiae by Invitation of the Court
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
AMY WAX
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

Counsel for Amicus Curiae

STEPHEN B. KINNAIRD
SEAN D. UNGER
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street N.W.
Washington, DC 20005
(202) 551-1842

DOUGLAS A. BERMAN
THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
55 West 12th Avenue
Columbus, OH 43210
(614) 688-8690

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does 18 U.S.C. § 3582(a) allow a district court, when setting the length and term of imprisonment, to consider an individual defendant's need for an in-prison drug treatment program?

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INTEREST OF *AMICUS CURIAE*

On January 10, 2011, this Court invited Stephanos Bibas "to brief and argue this case, as *amicus curiae*, in support of the position that 18 U.S.C. § 3582(a) allows district courts to consider rehabilitative need in setting the length and term of imprisonment." This brief responds to that invitation.[1]

STATEMENT OF THE CASE

I. Statutory Background of the Sentencing Reform Act

Congress enacted the Sentencing Reform Act to repudiate the discredited belief, known as the rehabilitative ideal, that prisons could reform all criminals merely by isolating them from society. The nineteenth-century policymakers and activists who established America's penitentiary system believed that isolation and regimented prison routines would induce penitence and spiritual renewal. The criminal justice system pursued this goal through sentencing procedures known as the Rehabilitation Model. This Model left judges with standardless sentencing discretion, gave parole boards the power to determine

[1] No counsel for a party authored any part of this brief, and no person other than *amicus*, his employer (the University of Pennsylvania Law School), and his cocounsel made a monetary contribution to fund its preparation or submission.

ultimate release dates based on their subjective assessments that inmates had been reformed, and lacked meaningful appellate review.

In enacting the Sentencing Reform Act of 1984, Congress rejected the rehabilitative ideal and the notion that the "only way to rehabilitate a convict was 'to turn the mind in upon itself [and] awaken remorse.'" Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* 60 (1992) (quoting directors of an early nineteenth-century Massachusetts prison). The Act also rejected the Rehabilitation Model's opaque, unguided procedures for sentencing judges and parole boards. But it expressly sought to leave judges "sufficient flexibility to permit individualized sentences," and it expressly preserved providing "needed . . . correctional treatment" as one of four purposes of sentencing. 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3553(a)(2)(D).

A. The Rehabilitative Ideal and the Rehabilitation Model's Indeterminate Sentencing Procedures

1. The Substantive Rehabilitative Ideal and Its Model's Procedural Pillars

a. Nineteenth-century policymakers believed that bad social influences caused crime and that all criminals were redeemable. They thought that if a wrongdoer was separated from his criminogenic environment and left in silence with a Bible to ponder the sinfulness of his crimes, he would become

penitent and reform himself. Thus, New York and Pennsylvania established the first penitentiaries. *See* Lawrence M. Friedman, *Crime and Punishment in American History* 77-80 (1993); David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 75-78 (rev. ed. 1990); *see also* Gustave de Beaumont & Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France* 82-83 (Francis Lieber trans., S. Ill. Univ. Press 1964) (1833). The very words "penitentiary" and "correctional institution" reflect this faith in the ability of confinement, without more, to induce penitence and self-correction.[2]

Philadelphia's historic Eastern State Penitentiary embraced solitude most completely as the way to induce penitence, isolating inmates from all contact with one another day and night. Delegations from around the globe came to study it. Alexis de Tocqueville and Gustave de Beaumont described its perceived benefits of spiritual renewal for the inmate's soul:

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[2] Many corrections officials and activists believed that solitary confinement would "arous[e] remorse" for one's sins through the "painful monotony of self-contemplation." Hirsch at 60 (internal quotation marks omitted). Others put more faith in the power of silent labor to break bad habits and instill good ones. *Id.* at 61. By the 1830s, prisons blended silent labor and routine during the day with solitude at least at night. Friedman at 79.

> Thrown into solitude [the prisoner] reflects. Placed alone, in view of his crime, he learns to hate it; and if his soul be not yet surfeited with crime, and thus have lost all taste for anything better, it is in solitude, where remorse will come to assail him.
>
> . . .
>
> Can there be a combination more powerful for reform than that of a prison which hands over the prisoner to all the trials of solitude, leads him through reflection to remorse, through religion to hope . . . ?

de Beaumont & de Tocqueville at 55, 84. As prison populations burgeoned, strict silence and solitude proved too expensive to maintain, but the penitentiary system and the underlying rehabilitative ideal lived on.[3]

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[3] Later reformers embraced "indeterminate sentences [because they] provide[d] inmates with incentives to participate in [prison] activities that were reformative," especially academic and trade classes and counseling by social workers. Edgardo Rotman, *The Failure of Reform: United States 1865-1965*, *in The Oxford History of the Prison* 151, 155, 161-62 (Norval Morris & David J. Rothman eds., 1998). These were generic activities for all inmates, not tied to a diagnosis of a particular inmate's pathology or addiction. These activities continued indefinitely until an inmate proved that he had reformed himself. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 40 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3223 [Senate Report] (committee report to the Sentencing Reform Act of 1984) (rejecting the "t[ying of] prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons").

b. Corrections officials thought that the rehabilitative potential of isolation and prison routine depended on a Rehabilitation Model of sentencing procedures loose enough to let treatment continue until each inmate proved himself to be reformed. By the start of the twentieth century, the sentencing judge in each case imposed an indeterminate prison sentence within a broad range. *See Williams* v. *New York*, 337 U.S. 241, 248 (1949). Parole boards were charged with releasing each inmate from prison only after finding that he had reformed himself. *See id.* Few rules or procedures guided judges' and parole officials' exercise of that discretion. *See id.* at 247-51. "[P]arole officials' power to determine a sentence's duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit 'experts' to determine when sufficient rehabilitation had occurred to warrant release from prison." Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 227 (1993); *see also* Rotman at 155, 159. The main limitations on confinement were not *ex ante* but *ex post*, based primarily on parole boards' tacit, subjective judgments rather than legal rules. *See* Marvin E. Frankel, *Criminal Sentences: Law Without Order* 47-48 (1972). Thus, these sentences were largely unreviewable on appeal. *See id.* at 82-84.

2. Criticisms of the Rehabilitation Model's Opacity, Inconsistency, and Unpredictability

By the mid-twentieth century, reformers lamented problems with both the rehabilitative ideal and the Rehabilitation Model. It had long become clear that simply locking inmates in cells was not enough to induce reform. *See* Friedman at 159. Some studies questioned whether rehabilitation was feasible as a general goal of sentencing. *See, e.g.*, Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 Pub. Int. 22 (1974). The brunt of criticism, however, addressed not the feasibility of rehabilitation but "the debasement of the rehabilitative ideal in practical application." Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 56 (1981).

In particular, critics attacked the procedural shortcomings of the Rehabilitation Model of sentencing. First, indeterminate sentences were unpredictable and bred anxiety, as prisoners could never tell when they would be deemed cured and released. Andrew von Hirsch, *Doing Justice* xviii (1976). Second, sentencing judges did not have to state their reasons for imposing sentences, and their decisions were "in practical effect" not reviewable on appeal. Frankel at 39-46, 76-77. Finally, the Rehabilitation Model led to sentencing disparities that were "arbitrary, capricious, and antithetical to the rule of law." *Id.* at 23. Critics especially feared that paternalistic, biased judges were more likely to imprison poor and

minority defendants. *See id.* at 23-24, 42; Am. Friends Serv. Comm., *Struggle for Justice* 29-31, 41-43, 71-75 (1971).

In 1972, Judge Marvin Frankel, "the father of sentencing reform," published his influential criticism of the Rehabilitation Model's sentencing procedures. 128 Cong. Rec. 26,503 (1982) (statement of Sen. Edward Kennedy); Frankel, *supra*. He described federal sentencing authority as "almost wholly unchecked and sweeping" and "terrifying and intolerable for a society that professes devotion to the rule of law." Frankel at 5. He called for the creation of an administrative agency that would bring law to sentencing by developing formal guidelines for federal sentencing. *Id.* at 118-23.

Judge Frankel stressed that "[t]he great evil in [traditional] thinking [about the value of prison sentences] is the pair of false assumptions that (1) rehabilitation is *always* possible and (2) indeterminate sentences are *always* desirable." *Id.* at 98 (emphases in original). Notably, he did not reject targeted treatment programs, but only the "airy nonsense that everyone can be rehabilitated." *Id.* at 99. He excepted "specific kinds of defendants for whom we have plausible, if by no means certain, hopes of rehabilitation," including drug users, some sex offenders, and young offenders. *Id.* at 98. Judge Frankel endorsed programs such as the one at issue here, stating: "Unlike grand inanities about universal redemption, narcotics programs center upon a reasonably well-identified and defined species of pathology." *Id.* at 99.

B. The Sentencing Reform Act Rejected the Rehabilitative Ideal and the Rehabilitation Model

Judge Frankel's and other reformers' views quickly became influential. In the late 1970s, led by a bipartisan group of senators including Senator Edward Kennedy, Congress began to consider retreating from the rehabilitative ideal and the Rehabilitation Model. *See* Stith & Koh at 230-39. These efforts culminated in the Sentencing Reform Act of 1984. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 *et seq*. and 28 U.S.C. § 991 *et seq*.).

1. The Act Established More Honest, Predictable Sentencing Procedures

The Sentencing Reform Act rejected the procedures of the "outmoded rehabilitation model." Senate Report at 38; *accord id.* at 40. The government correctly notes that, "in rejecting the rehabilitation model, Congress specifically rejected" using indeterminate sentences and parole to tie prison release dates to later proof of "'successful'" rehabilitation. U.S. Br. 11, 13, 27-29 (quoting Senate Report at 40). As the Senate understood, that Model gave parole boards "unfettered discretion" to set release dates only when they determined that an inmate was finally reformed. Senate Report at 38; *accord id.* at 40; U.S. Br. 28-29. It gave sentencing judges no meaningful guidance, leading to widely disparate sentences in similar cases. Senate Report at 38 & n.6.

And it authorized no meaningful appellate review. *Id.* at 38 & n.7.

The Sentencing Reform Act dramatically scaled back each of these three pillars of the Rehabilitation Model. It promoted "certainty and fairness in meeting the purposes of sentencing" by abolishing parole and requiring determinate sentences. 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3624(a). It thus moved power to set the length of prison terms from parole boards at the back end to sentencing judges at the front end. The Act also sought to end "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). It did so in part by creating the U.S. Sentencing Commission, which promulgates sentencing guidelines to govern district courts' discretion. *Id.* §§ 991, 994(a). The Act also did so by requiring judges to state their reasons for particular sentences on the record, and by authorizing meaningful appellate review. 18 U.S.C. §§ 3553(c), 3742(a), (b).

While the Act assailed sentencing disparities, it also sought to preserve "sufficient flexibility to permit individualized sentences." 28 U.S.C. § 991(b)(1)(B). Congress understood that the Commission and sentencing judges each have "discrete institutional strengths." *Kimbrough* v. *United States*, 552 U.S. 85, 89, 109 (2007). The Commission, as a rulemaking body, can create only "general sentencing practices" suited for "a heartland of typical cases." *Rita* v. *United States*, 551 U.S. 338, 348 (2007) (quoting 28

U.S.C. § 991(b)(1)(B)); *Koon* v. *United States*, 518 U.S. 81, 94 (1996); *see also Kimbrough*, 552 U.S. at 109. The sentencing judge, by contrast, is familiar with the individual defendant and the particulars of each case. "He is therefore 'in a superior position to find facts and judge their import under § 3553(a)' in each particular case." *Kimbrough*, 552 U.S. at 109 (quoting *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). In applying the Commission's general guidelines to a particular case, the judge must consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The judge may consider any "information concerning the [defendant's] background, character, and conduct" without limitation. *Id.* § 3661; *see also Pepper* v. *United States*, No. 09-6822, slip op. at 1 (U.S. Mar. 2, 2011). In each case, the judge must "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in 18 U.S.C. § 3553(a)(2). 18 U.S.C. § 3553(a). Unlike the Commission, a sentencing judge needs discretion to tailor the application of the guidelines to each case.

2. The Act Prescribed Four Purposes of Sentencing, Including Targeted Treatment Programs

The Sentencing Reform Act did more than just reject the Rehabilitation Model's arbitrary sentencing procedures. It also "outline[d] in one place the purposes of sentencing, describe[d] in detail the kinds of

sentences that may be imposed to carry out those purposes, and prescribe[d] the factors that should be considered in determining the kind of sentence to impose in a particular case." Senate Report at 50. In particular, the Act requires that judges, when imposing sentences,

> shall consider . . .
>
> . . .
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with *needed educational or vocational training, medical care, or other correctional treatment* in the *most effective manner*.

18 U.S.C. § 3553(a) (emphases added). Instead of limiting judges to one purpose or excluding another, this provision directs judges to weigh all four to the extent that they apply in a particular case. Congress rejected the rehabilitative ideal, the amorphous hope of reforming every convicted criminal's soul through isolation and prison routine. *See* Senate Report at 38-39. At the same time, it required judges to consider more practical concerns in suitable cases, such as

providing specific "educational or vocational training, medical care, or other correctional treatment" where specifically "needed." 18 U.S.C. § 3553(a)(2)(D).

Cross-referenced eighteen times, § 3553(a) is the heart of the Sentencing Reform Act, guiding decisions at almost every stage of sentencing. For each offense, the Sentencing Commission must "independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2)." 28 U.S.C. § 994(m). In each case, a federal probation officer or the Bureau of Prisons must provide at sentencing a presentence report with information pertinent to the § 3553(a) factors. 18 U.S.C. § 3552(b); Fed. R. Crim. P. 32(c)(1)(A)(ii). Sentencing courts must then look to the applicable § 3553(a) factors when they consider imposing probation, fines, imprisonment, or supervised release. 18 U.S.C. §§ 3562(a) (probation), 3572(a) (fines), 3582(a) (imprisonment), 3583(c) (supervised release). They must also consider § 3553(a) when deciding whether to terminate or revoke probation and whether to run sentences concurrently or consecutively. *Id.* §§ 3564(c), 3565(a), 3584(b). Finally, appellate courts must use the § 3553(a) factors as criteria when assessing a district court's departure from the applicable guidelines range. *Id.* § 3742(e)(3)(B)(i).

Section 3553(a)(2)'s four purposes of sentencing have assumed even greater importance in the aftermath of this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the binding federal sentencing guidelines violated the

Sixth Amendment. *Id.* at 226-27 (Stevens, J., merits majority opinion). *Booker* thus changed the Sentencing Reform Act's structure by invalidating the guidelines' binding force, making them just one factor in sentencing, and inferring a more deferential standard of review. *See id.* at 245-46, 259-65 (Breyer, J., remedial majority opinion) (excising and severing 18 U.S.C. §§ 3553(b)(1), 3742(e)). Thus, in addition to considering the guidelines and other statutory factors, each sentencing judge must "tailor the sentence in light of" all four purposes of sentencing. *Id.* at 245-46; *see also Pepper*, slip op. at 26; *Gall*, 552 U.S. at 49-50.

Congress has continued to endorse targeted treatment programs as a purpose of prison sentencing. Since enacting the Sentencing Reform Act, it has repeatedly embraced treatment for "specific kinds of defendants for whom we have plausible, if by no means certain, hopes of rehabilitation." Frankel at 98. For example, Congress requires the Bureau of Prisons to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. § 3621(b); *see also id.* § 3621(f)(1) (same, for sex-offender treatment). Congress requires federal prisons to make residential drug treatment available "for *all* eligible prisoners." *Id.* § 3621(e)(1)(C) (emphasis added). And it authorizes sentence reductions of up to one year to encourage inmates to complete the treatment program. *Id.* § 3621(e)(2)(B).

II. Procedural History

Amicus adopts the government's statement of facts and procedural history (U.S. Br. 2, 4-9), but supplements that statement by emphasizing the following three points.

1. Judge Moskowitz imposed the 51-month sentence within the guideline range after expressly weighing the four purposes of sentencing specified in 18 U.S.C. § 3553(a)(2). He sought to "deter [petitioner] from committing other criminal offenses" and "to protect the public from further crimes of the defendant." JA 26-27. He wanted the sentence to reflect the seriousness of alien smuggling and the dangerous way in which petitioner had committed that offense. *Id.* at 25-26. The judge also noted that petitioner's prior conviction was for possessing marijuana for sale and that "while she [was] out on bail, she was ready to engage in identity theft, she was using meth, and she was in possession of a sawed-off shotgun." *Id.* at 26-27. To justify imposing a sentence at the top of the applicable guideline range, he stressed that petitioner was "launching into a new criminal career while she was a fugitive." *Id.* at 27-28. A lower sentence, the judge stated, would not have sufficed to deter petitioner and permit treatment of her drug problem. *Id.* at 28.

In accordance with § 3553(a)(1), the sentencing judge considered petitioner's past and the possibility that her history of physical and sexual abuse contributed to her crimes. *Id.* at 24-27. Following the

Presentence Report's (PSR) suggestion, he recommended in-prison drug treatment in the hopes of preventing her from sliding back into crime. S JA 17; JA 26-27. That consideration influenced not only the length of petitioner's prison term, but also the judge's recommendation of the FCI Dublin prison because that facility offered the necessary treatment resources. JA 28.

2. The record at sentencing highlighted the link between petitioner's crimes and her drug use. When she was arrested six months after jumping bail, petitioner possessed methamphetamine paraphernalia and admitted using methamphetamine. S JA 6-7, 10; U.S. Br. 5. The judge could reasonably have concluded that her drug use had contributed to her jumping bail. In addition, petitioner's mother stated that petitioner had "used drugs off and on since her early teenage . . . years." S JA 16. Her mother attributed petitioner's crimes and neglect of her children to her drug use. *Id.* Because her crimes were linked to her drug addiction, the PSR recommended that petitioner take part in the Bureau of Prisons' 500-hour drug treatment plan, S JA 17, otherwise known as the Residential Drug Abuse Program (RDAP).

3. The sentencing judge's independent assessment of all of the § 3553(a)(2) factors led him to impose a sentence significantly lower than the government had recommended. The government had asked for a 63-month sentence, based in part on an enhancement for witness tampering. JA 16. The judge

found that a sentence of 51 months (46 months for alien smuggling plus five consecutive months for bail jumping) would suffice. JA 26-28. That term was a year shorter than the government had sought and within the guideline range of 41 to 51 months. The sentencing judge reiterated that the 51-month term was "the necessary sentence for *all* the reasons I stated, and it's the least sentence that can be imposed to effect *all* these reasons." JA 28 (emphases added).

SUMMARY OF ARGUMENT

The Sentencing Reform Act repudiated both the rehabilitative ideal's effort to reform every inmate's soul through isolation and prison routine and the Rehabilitation Model's arbitrary, indeterminate procedures. It did not, however, bar judges from considering treatment programs that target specific defendants' addictions or pathologies when imposing determinate prison sentences.

1. Sentencing judges may, indeed must, consider a defendant's need for a targeted treatment program as a factor in prison sentencing. The Act instructs judges to consider programs tailored to particular defendants' needs, distinguishing those treatments from the amorphous rehabilitative ideal. Here, the sentencing judge permissibly adjusted petitioner's prison sentence in part to facilitate treatment of her drug addiction.

a. 18 U.S.C. § 3582(a) instructs judges to consider the factors set forth in § 3553(a) while "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." Nothing in that text forbids considering a defendant's treatment needs at sentencing. Rather, the "recognizing" clause admonishes sentencing judges not to rely on discredited notions of reforming every inmate through indefinite incarceration. In warning against "imprisonment" as a "means of promoting rehabilitation," Congress cautioned against simply locking an inmate in a cell indefinitely to induce penitence. That instruction echoes Judge Frankel's indictment of the "airy nonsense that everyone can be rehabilitated." Frankel at 99.

When a judge tailors a prison term so that a defendant can enter a specific treatment program, it is the program – not imprisonment itself – that is the "means of promoting rehabilitation." The verb "recognizing" instructs judges to recall to mind and realize the failed history of the rehabilitative ideal, not targeted prison treatment programs.

b. The Act's stated purposes reinforce this understanding of § 3582(a)'s text. Section 3553 sets out four purposes of sentencing, including "provid[ing] the defendant with needed . . . correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). Unlike confinement itself, which is no longer "an appropriate means of promoting correction and rehabilitation," targeted "correctional treatment" specifically "needed" by a particular defendant

remains appropriate. *Compare id. with id.* § 3582(a). Congress would not have radically curtailed consideration of this express purpose of sentencing by inserting a subordinate clause in a different statutory provision many sections later. Unlike penitentiary-style indeterminate isolation, fixed terms of targeted treatment programs do not threaten the Act's goals of promoting certainty and avoiding unwarranted disparities in sentencing.

Likewise, the structure of the Act underscores that a sentencing judge, when imposing or lengthening a prison term, may consider a defendant's need for a targeted treatment program. In addressing supervised-release sentences, Congress instructed judges to consider deterrence, incapacitation, and needed correctional treatment, but specifically omitted retribution, the fourth general purpose of sentencing. *Id.* § 3583(c). Congress could easily have used similar phrasing in § 3582(a) but did not do so.

c. The legislative history of the Act reflects Congress's desire to retain the need for targeted treatment programs as a factor in prison sentencing. Congress considered a bill that would have limited consideration of targeted treatment programs to determining "a sentence *other than* a sentence to a term of *imprisonment*." S. 1555, § 102(a), 97th Cong., 1st Sess. (1981) (emphases added). But it declined to enact this provision.

d. Finally, Congress has endorsed and continued to support in-prison drug treatment programs,

which have proven to be effective means of treating drug addiction and reducing recidivism. Congress's support of these programs confirms that it wanted judges to consider drug treatment in prison sentencing decisions.

2. Even if the "recognizing" clause applies to means of rehabilitation beyond imprisonment per se, at most it discourages judges from relying solely on targeted treatment programs in prison sentencing. Section 3582(a) does not categorically bar this consideration; indeed, it encourages its use as one of several factors. Congress knew how to bar consideration of factors at sentencing and did so in another section of the same statute. 28 U.S.C. § 994(d) provides that the Sentencing Commission "shall assure that the guidelines and policy statements are entirely neutral as to . . . race, sex, national origin, creed, and socioeconomic status." Section 3582(a), by contrast, does not use such categorical, prohibitory language. While the Senate Report mentions that reliance on treatment as the *sole* basis for imprisonment is discouraged, the Act itself encourages judges to "balanc[e] all the relevant considerations," including targeted treatment programs. Senate Report at 119. Here, the sentencing judge permissibly balanced several considerations, including petitioner's demonstrated need for drug treatment, in imposing a prison term within the applicable guideline range.

3. The best reading of the Act allows judges to consider targeted treatment programs both in imposing terms of imprisonment and in determining their

length. But even if one reads the Act as forbidding consideration of targeted treatment programs in deciding whether to impose a prison sentence at all, judges may still consider them in setting a prison term's length. The directive to the Sentencing Commission not to rely solely on rehabilitation in creating guidelines applies only to "imposing a sentence to a term of imprisonment" and not to adjusting the length of a term. 28 U.S.C. § 994(k). Thus, once any other purpose of sentencing "authorize[s]" imposing a prison sentence, judges may "balanc[e] all the relevant considerations," including targeted treatment programs, in determining the prison term's length. Senate Report at 119.

4. The statute is clear, so the rule of lenity does not apply. The rule is particularly inapposite here because petitioner had fair warning of the sentence she received, which fell within the applicable guideline range.

ARGUMENT

I. A Sentencing Judge May Consider a Defendant's Need for a Targeted Treatment Program in Imposing a Prison Term and Setting Its Length

A. The Text of 18 U.S.C. § 3582(a) Allows a Judge to Consider a Defendant's Need for a Targeted Treatment Program

When interpreting a statute, this Court begins with its text. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). Under 18 U.S.C. § 3582(a), the sentencing court, "in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment* is not an appropriate means of promoting correction and rehabilitation" (emphasis added). This text warns judges to "recogniz[e]" the failure of the rehabilitative ideal. In light of that historical lesson, imprisonment itself is "not an appropriate means" of rehabilitating. That clause says nothing about using targeted treatment programs to address the specific needs of particular defendants.

1. "[I]mprisonment" means primarily "[t]he act of confining a person, esp. in a prison" and secondarily "[t]he state of being confined; a period of confinement." *Black's Law Dictionary* 773 (8th ed. 2004); *see* 7 *Oxford English Dictionary* 746 (2d ed. 1989)

("The action of imprisoning, or fact or condition of being imprisoned . . . ."); Pet'r Br. 21-22; U.S. Br. 17-18.

The text mentions "imprisonment" per se, not targeted treatment programs in prison. Section 3582(a) thus cautions sentencing judges against the rehabilitative ideal's faith that isolation and prison routine by themselves will lead inmates to repent. Congress realized that merely warehousing inmates indefinitely does not reform them.

But the "recognizing" clause does not address targeted treatment programs that are available in prison. When a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program, not "the act of confining a person" or "the state of being confined," that is the means of promoting rehabilitation. A judge may consider that such programs may be useful in treating an individual inmate's specific needs.

Petitioner and the government, however, put the two clauses of § 3582(a) at war with each other. The main clause of § 3582(a) requires sentencing judges to "consider" the four purposes of sentencing in § 3553(a)(2), including the defendant's need for targeted treatment programs, in imposing or setting the length of a prison term. Yet petitioner and the government read the subordinate "recognizing" clause as undercutting the main clause by forbidding a judge to lengthen a prison sentence to facilitate a defendant's entry into a treatment program. They read the subordinate clause as carving out a massive exception, as

if it expressly said: "except that judges shall not consider needed education or vocational training, medical care, or other correctional treatment in imposing or lengthening a prison term." But that is not the language that Congress used.

The subordinate "recognizing" clause does not undercut the main clause but complements it. Rather than forbidding consideration of targeted treatment programs, the subordinate clause warns judges not to confuse "imprisonment" by itself with "appropriate means of promoting correction and rehabilitation," namely targeted treatment programs. This reading harmonizes the subordinate clause (which forbids the former) with the main clause (which expressly authorizes the latter). The two clauses, in short, differentiate the forbidden rehabilitative ideal from permissible treatment programs.

2. Congress chose the word "recognizing" to remind judges of the failure of the rehabilitative ideal. The word "recognizing" would be a peculiar way to impose a ban, but it makes perfect sense as a reminder and warning to judges. Congress cautioned judges not to confuse "grand inanities about universal redemption" with the statute's more specific and practical approach to treatment. Frankel at 99.

"Recognizing" derives from the Latin "recognoscere," which means "[t]o know again," "recollect," or "recall to mind." 13 *Oxford English Dictionary* at 343; *Webster's Third New International Dictionary* 1896 (1981) [*Webster's Third*]; *Random House Dictionary of the*

English Language 1611 (2d ed. 1987) [*Random House*]; Charlton T. Lewis & Charles Short, *A Latin Dictionary* 1534 (1966); *see also Oxford Latin Dictionary* 1583 (2d ed. 1982). Dictionaries define "recognize" as "to identify as something or someone previously seen [or] known"[4] and to "realize" or "perceive clearly."[5]

Congress chose the word "recognizing" to guide sentencing judges' *cognitive* processes. Judges must re*cognize* – "recall to mind," "realize," or "perceive clearly" – the inappropriateness of imprisonment itself as a means of rehabilitation. They must recall the cautionary history of the rehabilitative ideal and the Rehabilitation Model of indefinite imprisonment.

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[4] *Random House* at 1611; *accord, e.g.*, *Cambridge Dictionary of American English* 716 (2d ed. 2008); *Oxford Modern English Dictionary* 844 (2d ed. 1996); *The American Heritage Dictionary of the English Language* 1509 (3d ed. 1992); *Webster's New International Dictionary* 2079 (2d ed. 1949) (including "to recover or recall knowledge of").

[5] *Webster's Third* at 1896 (listing first non-obsolete definition as "to recall knowledge of : make out as or perceive to be something previously known," followed by "to perceive clearly : be fully aware of : REALIZE"); 13 *Oxford English Dictionary* at 343 (listing second non-obsolete definition as "[t]o know again; to perceive to be identical with something previously known," followed later in the same definition by "[t]o perceive clearly, realize").

In an effort to transform the "recognizing" clause into a categorical bar, the government defines "recognizing" to mean "to admit the fact, truth, or validity of." U.S. Br. 18 (quoting *Webster's Third* at 1896 (listing this definition as obsolete)). That definition is consonant with recalling it to mind as discussed above.

The instruction guides judges' cognition about the sentencing process as they "consider the factors set forth in section 3553(a)." 18 U.S.C. § 3582(a). It is phrased not as a categorical ban but as a warning. Before the Sentencing Reform Act, judges had long confused isolation and prison routine with treatment and needed to be reminded not to repeat the error. Now, judges must recognize the difference between forbidden indeterminate, penitentiary-style isolation and determinate treatment programs targeting specific pathologies. Only the latter remain permissible "means of promoting correction and rehabilitation." *Id.*

B. The Sentencing Reform Act's Purposes and Structure Support Consideration of Targeted Treatment Programs

Section 3553(a)(2)(D) of the Sentencing Reform Act expressly preserves the provision of targeted treatment programs as a central purpose of sentencing. Congress would not have hobbled this purpose by inserting an oblique subordinate clause into § 3582(a), an entirely separate provision of the Act.

The Act also sought to end the unpredictability, opacity, and unwarranted sentencing disparities created by the Rehabilitation Model. Fixed terms tailored to targeted treatment programs, however, do not threaten certainty or uniformity. Allowing judges to consider targeted treatment programs also promotes the Act's other purposes of individualizing sentences and remaining open to evolving knowledge.

Other provisions of the Act categorically ban consideration of other sentencing factors. Congress thus knew how to expressly ban consideration of certain factors, but chose not to do so with targeted treatment programs.

1. The Act Sought to Promote Certainty, Uniformity, and Individualization While Preserving Targeted Treatment Programs as a Purpose of Sentencing

a. The Sentencing Reform Act explicitly embraced the provision of targeted treatment programs as one of its four enumerated purposes of sentencing. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). These purposes include not only retribution, deterrence, and protection of the public, but also providing "needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.* § 3553(a)(2)(D). The sentencing judge "shall consider" each of these four purposes of sentencing "in determining the particular sentence to be imposed." *Id.* § 3553(a).

Section 3582(a) should be read in harmony with § 3553(a)'s command that a sentencing judge "shall consider" all four purposes of punishment in choosing a sentence appropriate to each case. *See* Senate Report at 119; *Booker*, 543 U.S. at 260 (Breyer, J.,

remedial majority opinion) (noting, in the context of reviewing a decision setting the length of a term of imprisonment, that judges must "impose sentences that . . . effectively provide the defendant with needed educational or vocational training and medical care"); *Rita*, 551 U.S. at 347-48 (same).

Consistent with this framework, the contrast in phrasing between § 3582(a) and § 3553(a)(2)(D) emphasizes that Congress rejected the rehabilitative ideal but embraced targeted treatment programs. The Act addresses two "means of promoting" rehabilitation: penitentiary-style isolation, on the one hand, and focused treatment programs for particular inmates' pathologies, on the other. Section 3582(a) cautions judges against equating "imprisonment" itself with "correction and rehabilitation." Indefinite isolation through imprisonment has proven to be ineffective and arbitrary and is not targeted to particular inmates' needs, so it "is not an appropriate means."

In contrast, § 3553(a)(2)(D) requires judges to consider focused interventions targeting specific pathologies or conditions: "educational or vocational training, medical care, or other correctional *treatment*" that is specifically "*needed*" (emphases added). This "means of promoting correction and rehabilitation" is very different from the indefinite isolation and generic prison routines of the rehabilitative ideal. Following Judge Frankel's approach, Congress disavowed penitentiary-style isolation but endorsed determinate terms that

facilitate treatments of specific pathologies. *Supra* pp. 7-8, 11-13.[6]

Section 3553(a)(2)(D) also calls upon judges to consider how to deliver "correctional treatment in the most effective manner." The sentencing judge could reasonably have doubted that petitioner, a bail jumper, would attend outpatient treatment faithfully or at all. He thus chose an intensive, in-prison residential treatment program as "the most effective manner" of treating her drug addiction and preventing her from committing more crimes.

b. Petitioner and the government argue that § 3582(a) creates an exception to § 3553(a)(2)(D) for sentences of imprisonment. This proposed exception, however, would swallow the rule. The vast majority of federal felons are sentenced to imprisonment. U.S. Sentencing Comm'n, *2009 Annual Report* 36 (2010) (89.6% in 2009); U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 43 fig.2.2 (2004) (roughly 64% in 1984 and roughly 70% when the Guidelines first took effect in 1987). Petitioner's and the government's interpretation of § 3582(a) would

[6] The government's repeated citation of *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989), hardly illuminates the role of rehabilitation in setting prison terms under the Sentencing Reform Act. *See* U.S. Br. 9, 14. *Mistretta* was a separation-of-powers challenge to the U.S. Sentencing Commission and its sentencing guidelines. This Court was not faced with, and cannot be assumed to have resolved, the question presented here, concerning the role of targeted treatment programs in prison sentencing.

thus thwart consideration of targeted treatment programs in most federal sentencing decisions. It would prohibit judges in most cases from even considering targeted treatment programs in deciding whether to impose or lengthen a prison term. Pet'r Br. 8, 9, 44, 46, 51-53; U.S. Br. 9-13, 15, 27, 30, 32, 35. Having made targeted treatment programs a central purpose of sentencing in § 3553(a)(2)(D), and having repeatedly embraced in-prison drug treatment (*supra* p. 13 & *infra* pp. 40-41), Congress would not have slipped a massive limitation on its use into an oblique subordinate clause many sections later.

Moreover, petitioner's position would undermine not only § 3553(a)(2)(D), but also § 3553(a)(2)(C), which expresses the purpose of protecting the public from a defendant's further crimes. If judges cannot tailor prison sentences to promote treatment of dangerous criminals, those criminals may go untreated and will be more likely to recidivate after release. Judges may instead be forced to lengthen their sentences to protect the public. *See United States* v. *Story*, No. 09-6261, 2011 WL 590353, at *7 (10th Cir. Feb. 22, 2011) (Hartz, J., concurring) (noting that if a judge fears that an inmate will recidivate unless he receives treatment, "the judge may think that a longer sentence is appropriate to protect the public"); *see also Pepper*, slip op. at 14 (noting RDAP participation as a factor that reduced Pepper's need for deterrence and incapacitation); *infra* pp. 40 (discussing empirical evidence that in-prison drug treatment works). Here, for example, the judge feared that

petitioner posed a danger to the public because the officers who rearrested her found not only methamphetamine paraphernalia, but also a sawed-off shotgun. *Supra* p. 14.

c. Determinate terms tailored to targeted treatment programs are likewise consistent with the Act's other central purposes. First, the Act seeks to "maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). The Sentencing Commission creates only "general sentencing practices" suited for "a heartland of typical cases." *Id.*; *Koon*, 518 U.S. at 94. Individual sentencing judges must tailor the application of these rules to particular cases. In doing so, they "shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). "No limitation shall be placed on the information concerning the [defendant's] background, character, and conduct" that a sentencing judge "may receive and consider for the purpose of imposing an appropriate sentence." *Id.* § 3661; *Pepper*, slip op. at 2.

The defendant's characteristics include her amenability to and specific need for targeted treatment programs. *See id.* § 3553(a)(2)(D). Thus, in appropriate cases, judges must take into account targeted treatment programs "to the extent that they are applicable." *Id.* § 3582(a). Petitioner's and the government's reading, however, would curtail considering

treatment needs in prison sentencing, undercutting § 3553(a)(2)(D) and § 3661 in the vast majority of cases.

Second, the guidelines must "reflect, to the extent practicable, advancements in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C); *accord* Senate Report at 161. The Senate Report repeatedly qualifies its disfavor of rehabilitative prison sentencing with the phrase "in light of current knowledge." *Id.* at 67 n.140, 76, 119. The Act envisions an iterative process in which the Commission periodically reviews and updates the guidelines in light of new data. 28 U.S.C. § 994(*o*); Senate Report at 178. "The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita*, 551 U.S. at 350; *accord* Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988) (explaining that "the system is evolutionary," using data from actual sentencing to "revis[e] the Guidelines over time"). That feedback loop requires that judges have latitude to adapt particular treatments to particular defendants' needs in order to learn what works. Foreclosing discretion in prison-based targeted treatment programs would prevent judges and the Commission from developing new, effective sentencing approaches.

Third, the Act promotes "certainty and fairness in meeting the purposes of sentencing" by abolishing

parole, indeterminate sentencing, and back-end release decisions. 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3624(a) (abolishing parole). Rehabilitation cannot continue indefinitely until an inmate is perhaps eventually cured. A determinate prison sentence that allows an inmate to participate in a treatment program for a fixed term, in contrast, comports with certainty and fairness.

Fourth, the Act seeks to "avoi[d] unwarranted disparities" by establishing sentencing guidelines and facilitating appellate review. 28 U.S.C. §§ 991(b)(1)(B), 994(a); 18 U.S.C. § 3742(a), (b). So long as judges consider the guidelines and justify their sentences subject to appellate review, targeted treatment for finite terms will not lead to unwarranted sentencing disparity. Here, petitioner's sentence was within the guideline range, further alleviating concerns about disparity.

2. The Structure of the Act Underscores the Appropriate Role of Targeted Treatment Programs

Another provision of the Sentencing Reform Act reinforces the conclusion that Congress did not intend to prevent judges from considering defendants' needs for drug or medical treatment in setting prison sentences. Congress knew how to forbid all consideration of a particular purpose of sentencing, as it did explicitly in a parallel section of the Act. It chose not to do so in § 3582(a).

The Act's four provisions governing the imposition of particular types of sanctions are nearly identical in structure and phrasing. Each instructs that "[t]he court," in deciding whether to impose a particular punishment and how much of it to impose, "shall consider" the § 3553(a) factors in varying formulations. 18 U.S.C. §§ 3562(a) (probation), 3572(a) (fines), 3582(a) (imprisonment), 3583(c) (supervised release).

This parallelism is unsurprising, since Congress debated and enacted the sections together as components of a single bill. Given the close parallels, differences in phrasing are presumably deliberate and significant, not accidental. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted) (alteration in original).

Section 3583(c), governing the imposition of supervised release, mirrors the structure of the other three provisions but prevents judges from imposing supervised release to serve the goal of retribution. "The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B) [deterrence], (a)(2)(C) [protection

of the public], (a)(2)(D) [targeted treatment programs], (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. § 3583(c). Notably, § 3583(c) omits any reference to § 3553(a)(2)(A), which directs sentencing judges to consider retribution. Under the expressio unius canon of construction, Congress's listing of the other three purposes precludes judges from considering retribution in supervised-release sentencing. *See* Senate Report at 124; *cf. Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (applying expressio unius canon).

Unlike § 3583(c), § 3582(a) does not clearly exclude or omit any of the § 3553(a) purposes of sentencing. If Congress had wanted to impose a similar ban on considering targeted treatment programs in prison sentencing, it would have used the exact language it used in the very next section. *Russello*, 464 U.S. at 23 ("Had Congress intended to [achieve a particular statutory result], it presumably would have done so expressly as it did in the immediately following subsection . . . ."). Or Congress would have enacted language found in S. 1555, a 1981 predecessor bill to the Act, which would have explicitly limited the purpose of providing targeted treatment programs to nonprison sentences. *Infra* pp. 38-39. "'The short answer'" to petitioner's and the government's attempt to read in this limitation "'is that Congress did not write the statute that way.'" *Russello*, 464 U.S. at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).

C. The Legislative History Confirms the Propriety of Targeted Treatment Programs in Prison Sentencing

The main Senate Judiciary Committee report on the enacted legislation confirms that Congress intended to retain targeted treatment programs as one of the four purposes of sentencing, both generally and in prison sentencing. Congress chose not to enact a bill that would have authorized consideration of targeted treatment programs only in nonprison sentencing.

1. Congress explicitly rejected "arguments . . . that rehabilitation should be eliminated completely as a purpose of sentencing." Senate Report at 76. "Instead, the Committee . . . retained rehabilitation and corrections as an appropriate purpose of a sentence . . . ." *Id.*; *see also id.* at 50 (recognizing targeted treatment programs among the four "purposes of sentencing"). "[E]ach of the four stated purposes [of sentencing] should be considered in imposing sentence in a particular case." *Id.* at 68.

Though critics had debated whether there should be a presumption in favor of or against imprisonment, Congress avoided taking sides on that issue. "[I]nstead, [it] rel[ied] on the general purposes of sentencing" – "deterrence, incapacitation, just punishment, and rehabilitation" – to guide decisions about "whether imprisonment in an individual case is appropriate or not." *Id.* at 122. This language in the committee report's section-by-section analysis of

§ 3582 embraces rehabilitation as a purpose of prison sentencing.

Far from rejecting in-prison targeted treatment programs, Congress encouraged using them "to enhance the possibility of rehabilitation." *Id.* at 76. Indeed, Congress believed that "because of the increased certainty of release dates, the bill should enhance prison rehabilitation efforts because prison officials will be able to work with prisoners to develop realistic work programs and goals within a set term of imprisonment." *Id.* at 57.

2. Petitioner and the government cite two predecessor bills to the Act: S. 1437, 95th Cong., 1st Sess. (1977) (as reported by the S. Comm. on the Judiciary Nov. 15, 1977), and S. 1722, 96th Cong., 1st Sess. (1980) (as reported by the S. Comm. on the Judiciary Jan. 17, 1980). Pet'r Br. 58-59; U.S. Br. 31-35. The first bill instructed the Commission to treat imprisonment as inappropriate "for the purpose of providing . . . correctional treatment, other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact." S. 1437, § 124 (proposed 28 U.S.C. § 994(j)). "It is only in those cases . . . that the guidelines may recommend a term of imprisonment *with the possibility of early release by the Parole Commission*." S. Rep. No. 605, 95th Cong., 1st Sess. 1128 (1977) (interpreting S. 1437, § 124 (proposed 28 U.S.C.

§ 994(j)) (emphasis added).[7] Thus, in this first proposal, the exception for correctional treatment depended on back-end parole and its resulting indeterminacy.

The second bill eliminated that exception, making all sentences determinate and without parole. S. 1722, § 125 (proposed 28 U.S.C. § 994(j)); S. Rep. No. 553, 96th Cong., 2d Sess. 983-85 (1980).[8] This change did not bar judges from considering treatment programs in prison sentencing. *Contra* Pet'r Br. 58-59; U.S. Br. 33-34. It simply abolished the last vestige of the Rehabilitation Model's procedures. Its target was the rehabilitative ideal yoked to indeterminate sentences and parole boards (U.S. Br. 28-29), not focused treatment programs.

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[7] *See also id.* at 924-25, 929 (reading the "exceptional case" proviso as requiring "a specific reason for an indeterminate sentence" to justify "the rare exception" to "the rule" of determinate sentences (internal quotation marks omitted)); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 Am. Crim. L. Rev. 353, 370 & n.76 (1979) (describing the "exceptional case" proviso quoted in the text as the only remnant of indeterminate sentencing in S. 1437); Stith & Koh at 241.

[8] *See also* Edward M. Kennedy, *Commentary – The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. Va. L. Rev. 423, 431 & nn.34-35 (1980) ("Eventually, complete elimination of indeterminate sentences won out." (citing in the following footnote S. 1722, § 101 (proposed 18 U.S.C. § 2302(a)), the provision paralleling the current 18 U.S.C. § 3582(a))); Stith & Koh at 241-42.

Petitioner and the government nevertheless read this legislative history as progressively eradicating every kind of rehabilitation as a factor in prison sentencing. *See* Pet'r Br. 58-59; U.S. Br. 30-35. While Congress considered making rehabilitation irrelevant to prison sentencing, in the end it retreated from that extreme. S. 1555, a still later bill introduced by Senator Kennedy in 1981, would have limited consideration of targeted treatment programs to nonprison sentencing, yet Congress chose not to go that far. In proposed § 3579(a)(2)(D), the functional equivalent of what is now § 3553(a)(2)(D), S. 1555 phrased the treatment purpose of sentencing as follows:

> (a) The court, in determining the particular sentence to be imposed, shall consider –
>
> . . .
>
> (2) the need for the sentence imposed –
>
> . . .
>
> (D) *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, § 102(a) (proposed 18 U.S.C. § 3579) (emphasis added).

Congress chose not to pass this version of the bill or to carry its categorical exclusion forward into the bill eventually enacted. Instead, the final bill directs

judges to recognize the inappropriateness of "imprisonment" per se, but not targeted treatment programs, as a "means of promoting . . . rehabilitation." 18 U.S.C. § 3582(a). By eliminating S. 1555's categorical exclusion, Congress rejected its blanket ban. *See Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 539 (1984) (noting that a decision by Congress not to include explicit language "strongly suggests" that courts should not read such language into the provision); *see also Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983) ("[I]t would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected."); *Busic* v. *United States*, 446 U.S. 398, 406 n.11 (1980).

D. Congress Has Endorsed In-Prison Drug Treatment as an Effective Program That Should Remain a Factor in Prison Sentencing

1. Several years after passing the Sentencing Reform Act, Congress manifested its dedication to providing drug treatment in prison. It required the Bureau of Prisons to "make available appropriate substance abuse treatment" to all prison inmates with addictions. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4913 (codified as amended at 18 U.S.C. § 3621(b)). Today, the Residential Drug Abuse Program (RDAP) is one of the Bureau of Prisons' most widely used and effective programs.

The penitentiary-style model of rehabilitation left inmates isolated so they could reform themselves through solitary contemplation. In contrast, inmates in RDAP are placed in a special housing unit "for the purpose of building a treatment community." Fed. Bureau of Prisons Office of Research & Evaluation, *TRIAD Drug Treatment Evaluation Project Final Report of Three-Year Outcomes: Part I*, at 5 (2000) [*TRIAD Final Report*]. Participants receive 500 hours of care over nine to twelve months, followed by up to twelve months' follow-up care in the general prison population and more follow-up care in a halfway house after release. *Id.* at 4-5.

The program's fixed length, focus on drug addiction, and proven effectiveness differentiate it from the rehabilitative ideal's amorphous, ineffective, and universal aspirations. RDAP participants are 15% to 18% less likely to recidivate or use drugs within three years after release and are significantly less likely to misbehave in prison. *Id.* at 3-4, 11-12; Neal P. Langan & Bernadette M.M. Pelissier, *The Effect of Drug Treatment on Inmate Misconduct in Federal Prisons*, 34 J. Offender Rehab. 21, 27 (2001). Congress considered the program so valuable that it authorized sentence reductions of up to one year to encourage inmates to take part. H.R. Rep. No. 320, 103rd Cong., 1st Sess. 4 (1993); 18 U.S.C. § 3621(e)(2)(B).

Congress continues to support RDAP and similar programs with an $87 million annual budget. *See* Exec. Office of the President, *National Drug Control Strategy FY 2011 Budget Summary* 115 (2010). In

fiscal year 2009, 18,732 inmates at 62 federal prisons participated in RDAP. Fed. Bureau of Prisons, *Annual Report on Substance Abuse Treatment Programs Fiscal Year 2009*, at 3, 7, 10 (2010). Congress thus views in-prison drug treatment as complementing rather than undercutting the Act's goals.

2. Congress valued drug treatment as a means of preventing recidivism. Releasing untreated addicts from prison, it saw, would "virtually guarantee future crime." H.R. Rep. No. 103-320, at 3. "Incarceration may offer the best opportunity for society to reach substance-abusing individuals who are committing other crimes." *Id.* Many inmates do whatever they can to enroll in RDAP, even occasionally requesting longer sentences to become eligible for RDAP treatment. *See, e.g.*, Def.'s Sentencing Mem. at 3, *United States* v. *Blumenfeld*, No. CR-06-267-S-BLW (D. Idaho May 1, 2007); *see also United States* v. *Hurt*, 345 F.3d 1033, 1036 (9th Cir. 2003) (denying defendant's request to lengthen sentence to maximize in-prison rehabilitation); *United States* v. *Keifer*, 12 F. App'x 702, 703-05 (10th Cir. 2001) (same).

Federal policy requires that participants ordinarily have at least twenty-four months left on their sentences when they begin RDAP. Bureau of Prisons, *Program Statement: Psychology Treatment Programs* P5330.11, ch.2, at 9 (2009). Waiting lists often lengthen this period. *See* Def.'s Sentencing Mem. at 3, *Blumenfeld* (requesting thirty-six-month sentence). Given the possibility of a one-year sentence reduction, increasing sentences a few months over

what is required for treatment can doubly benefit inmates, by making them eligible both for treatment and for early release.

3. Admittedly, sentencing judges cannot guarantee that any particular defendant will enter RDAP. U.S. Br. 29-30. Petitioner was not admitted to RDAP, nor even placed in the prison recommended by the district court.[9] Sentencing judges cannot guarantee these results any more than they can guarantee that any particular defendant will be deterred from committing future crimes. The uncertainty inherent in predicting the future does not require judges to ignore deterrence or targeted treatment programs

[9] The sentencing judge had good reason to believe that petitioner would enter RDAP. Congress meant to make the program available to all defendants with drug addictions and enough time left on their sentences. 18 U.S.C. § 3621(e)(1)(C); 28 C.F.R. § 550.53(b) (2009). While petitioner claims that the Bureau of Prisons did not give her access to RDAP (Pet'r Br. 7, 43), it is unclear why she would have been ineligible. Petitioner mistakenly argues that her prior weapons-possession conviction might have disqualified her from the program, citing Bureau of Prisons regulations. Pet'r Br. 44 n.32 (citing 28 C.F.R. § 550.55(b)(5)(ii) (2009)). Those regulations deny eligibility only for the one-year sentence reduction, not for the RDAP program itself. And they apply only to a *current* felony weapons conviction, not a prior one. Nothing in petitioner's criminal history would prevent her from enrolling in the program. *See* Drug Abuse Treatment Program, 74 Fed. Reg. 1892, 1895 (Bureau of Prisons Jan. 14, 2009) (to be codified at 28 C.F.R. pts. 545 & 550) ("[I]nmates [convicted of violent crimes] are not precluded from participating in the drug abuse treatment program.").

altogether. It merely calls for appropriate caution and the additional check of appellate review.

Furthermore, the government acknowledges that sentencing judges can and must make such predictions. Judges, the government admits, can consider the need for treatment in deciding whether to incarcerate defendants for violating the conditions of supervised release. 18 U.S.C. § 3583(e)(3); U.S. Br. 25 n.5. Nothing in § 3621 or § 3583, however, guarantees sentencing judges control over defendants' placement in RDAP after a supervised-release violation, any more than after an initial sentence of imprisonment. The government's logic compels the conclusion that judges may weigh targeted treatment programs in both scenarios.

II. Even if the Act Discourages Sole Reliance on Targeted Treatment Programs, It Does Not Forbid Their Consideration, Particularly as One of Several Factors

Section 3582(a)'s "recognizing" clause does nothing more than warn judges against the lure of the rehabilitative ideal's siren song. Even if Congress intended it to reach more broadly, at most it meant to discourage basing prison sentences *solely* on targeted treatment programs. Congress did not forbid judges to consider them, particularly as one factor among others. On the contrary, the Act encourages judges to consider treatment as one factor among others.

1. The structure of the Act confirms that Congress knew how to enact a categorical bar when it wanted to do so.

a. For example, Congress categorically barred the Sentencing Commission from considering particular factors in drafting the Guidelines. With respect to a defendant's "race, sex, national origin, creed, and socioeconomic status," Congress insisted that the Sentencing Commission "*shall* assure" that its guidelines and policy statements are "*entirely* neutral." 28 U.S.C. § 994(d) (emphases added). The phrases "shall assure" and "entirely neutral" stand in stark contrast to § 3582(a)'s language of cognitive guidance ("recognizing"). Congress could easily have phrased § 3582(a) similarly, or added: "The court shall not impose or lengthen a term of imprisonment to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." That is not the statute Congress enacted. *Cf. United States* v. *Duran*, 37 F.3d 557, 561 (9th Cir. 1994).

b. Other subsections of § 994 direct that the Sentencing Commission, as opposed to sentencing judges, "shall assure that the guidelines" reflect particular policies or achieve particular results. *See* 28 U.S.C. § 994(e), (h), (i), (n); *accord id.* § 994(j), (k), (*l*), (m) ("shall insure"); § 994(v) ("shall ensure").[10]

[10] In other subsections of § 994, Congress used the phrase "shall consider" to leave the Commission discretion to decide

(Continued on following page)

Section 3582(a), in contrast, does not require sentencing judges to "assure," "insure," or "ensure" any particular rule or result. It merely guides their decisionmaking, requiring only that they "consider" the inappropriateness of the rehabilitative ideal. Congress was more willing to prescribe or proscribe that the Commission adopt across-the-board policies

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whether to treat certain factors as relevant. *See* 28 U.S.C. § 994(c) (the Commission "shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance . . . ."); *accord id.* § 994(d); *cf.* 18 U.S.C. § 3582(a) (sentencing judge "shall consider").

Several of § 994's subsections instruct the Sentencing Commission that it "shall assure that the guidelines . . . reflect the general inappropriateness" of certain factors. 28 U.S.C. § 994(e); *accord id.* § 994(*l*)(2) ("shall insure"). The government argues that by omitting "general" from § 3582(a), Congress signaled that it was enacting a categorical bar. U.S. Br. 22-23. It is hazardous, however, to compare the guidance Congress gave the Sentencing Commission to the guidance § 3582(a) gives to judges imposing sentences in individual cases. Congress was more willing to constrain the Commission's rule-writing than judicial discretion to customize specific sentences. *See supra* pp. 9-10 (explicating the Act's distinction between the roles of the Commission and sentencing judges). That is particularly true since, as the text notes, the Commission "shall assure" certain outcomes while judges merely "shall consider" all four factors while "recognizing" that imprisonment itself is inappropriate. The phrase "not . . . appropriate" in § 3582(a) may be more restrictive than the phrase "general[ly] inappropriat[e]" in § 994(e) & (*l*)(2), but it is less restrictive than the phrase "entirely neutral" in § 994(d). If it applies to targeted treatment programs at all, § 3582(a)'s phrase "not . . . appropriate" adopts at most an intermediate level of guidance, not a categorical ban.

and rules. Section 3582(a)'s cognitive phrasing acknowledges a judge's distinctive role in weighing case-specific factors, tailoring particular sentences, and providing reasons in the course of developing sentencing case law.

c. Even if Congress meant to discourage or prevent sentencing judges from imprisoning defendants *solely* to treat them, Congress permitted judges to weigh targeted treatment programs as *one* factor among others.[11]

The Act instructs the Sentencing Commission (not judges) to enact guidelines reflecting "the inappropriateness of imposing a sentence to a term of imprisonment for *the* purpose of rehabilitating the defendant or providing . . . correctional treatment." 28 U.S.C. § 994(k) (emphasis added). Petitioner concedes that it "may seem more natural" to read § 994(k)'s legislative history as forbidding "the imposition of imprisonment only when rehabilitation is the 'sole' purpose that incarceration would serve." Br. 50 n.33; *see also United States* v. *Manzella*, 475 F.3d 152, 161 (3d Cir. 2007) (forbidding judges to lengthen prison

[11] The government acknowledges that "the court can express its hope that the defendant will receive treatment while incarcerated or note that an otherwise validly imposed term of imprisonment will provide the collateral benefit that the defendant will receive treatment." U.S. Br. 26. That insight is correct but incomplete. Appellate courts should not have to police the shadowy line between judges' expressed hopes and sentencing factors.

terms "for the sole purpose of rehabilitation"); *Shum* v. *Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010) (stressing the singular, exclusive import of the definite article "the"). If the Sentencing Commission may consider targeted treatment programs as one factor among many in formulating guidelines, a fortiori sentencing judges may do so when tailoring sentences to individual defendants' treatment needs.

Likewise, Congress instructed the Sentencing Commission that "[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason" for later reducing the defendant's sentence. 28 U.S.C. § 994(t) (emphasis added). That provision reflects Congress's rejection of the Rehabilitation Model, under which proof of rehabilitation alone could ultimately shorten a sentence.[12] Even in that scenario, however, Congress understood that judges could weigh defendants' rehabilitation not "alone" but among other factors. *See United States* v. *Jimenez*, 605 F.3d 415, 423-24 (6th Cir. 2010) (affirming sentence where judge acknowledged defendant's

[12] The Senate Report notes that this provision, formerly § 994(s), is "consistent with the rejection by the Committee of the rehabilitation theory as the basis for determining the length of a term of imprisonment." Senate Report at 179. Petitioner and the government overread the quoted phrase as rejecting rehabilitation as a judicial sentencing factor. Pet'r Br. 52; U.S. Br. 36. In context, this phrase simply notes that Congress rejected the Rehabilitation Model's procedures, in which courts imposed indeterminate sentences and parole boards dictated back-end sentence reductions based solely on evidence of eventual rehabilitation. *Supra* pp. 6-9.

individual need for medical and mental health treatment along with the other § 3553 factors). Here, the sentencing judge rightly weighed the relevant factors, considering deterrence, retribution, protection of the public, and the need for targeted drug treatment, to arrive at a suitable sentence.

2. Similarly, the Act's legislative history reflects that at most Congress intended to discourage sole reliance on targeted treatment programs as the goal of prison sentencing, not to ban their consideration.

a. In its section-by-section analysis of § 3582, the Senate Report stated that the "recognizing" clause, though not a prohibition, had some hortatory force: "This *caution* concerning the use of rehabilitation as a factor to be considered in imposing sentence is 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 at 119 (emphases added). Other sections of the report reiterate this language of caution rather than blanket prohibition. "[I]n situations in which rehabilitation is the *only* appropriate purpose of sentencing, that purpose *ordinarily may* be *best* served by release on probation subject to certain conditions." *Id.* at 92 (emphases added). "[W]hen 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." *Id.* at 91 (emphases added). Thus, if the "recognizing" clause applies to targeted treatment programs at all, at most it offers guidance rather than imposing an outright ban.

b. The Senate Report affirmatively embraces a sentencing judge's consideration of targeted treatment as one factor among others in prison sentencing. As the examples quoted above show, Congress discouraged imprisonment "on the *sole* ground" of correctional treatment, where rehabilitation is "*the* purpose of sentencing" or "the *only* appropriate purpose of sentencing." *Id.* at 119, 91, 92 (emphases added); *accord 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'" (emphasis added)).[13]

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[13] Footnote 410 of the Senate Report begins: "[I]f an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation . . . ." Senate Report at 171 n.410. "This qualifying language in [28 U.S.C. § 994](d), when read with the provisions in proposed section 3582(a) of title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the *sole* purpose of rehabilitation, makes clear that a defendant should not be sent to prison *only* because the prison has a program that 'might be good for him.'" *Id.* at 171-72 n.410 (emphases added). In quoting the latter sentence, the government emphasizes the word "precludes." U.S. Br. 36. One cannot put so much emphasis, however, on a single word in a committee-report footnote more than forty pages from the section-by-section analysis of the provision it purports to interpret. *See* Senate Report at 119; *supra* p. 48 (noting that the section-by-section analysis of § 3582(a) is to the contrary).

(Continued on following page)

Where another purpose of sentencing authorizes imprisonment, consideration of targeted treatment programs is undoubtedly appropriate. As the Senate Report noted in parsing § 3582(a), sometimes imprisonment may "be appropriate to serve only one or two of the listed purposes of sentencing." *Id.* at 119. "[I]f imprisonment is found to be justified for any one of the purposes, except as noted [in the "recognizing" clause], its imposition is authorized under this section. In such a case, whether it should be imposed when authorized is a question to be resolved after balancing *all* the relevant considerations." *Id.* (emphasis added); *accord id.* at 176 ("A term [of imprisonment] imposed for another purpose of sentencing may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence.").

Targeted treatment programs, Congress understood, would remain one of "the relevant considerations" and "an appropriate secondary purpose" in prison sentencing. *Id.* at 119, 176. Here, a three-year

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Regardless, the word "precludes" cannot bear the weight the government places on it. It is singular, referring back to the immediately preceding antecedent, namely § 994(k)'s directive to the Sentencing Commission, not judges. Even if it does apply with equal force to judges, as long as rehabilitative need is not the "only" or "the sole purpose" in "sen[ding a defendant] to prison," judges may freely weigh it. That is particularly true where an offense "warrant[s] imprisonment for some other purpose of sentencing." *See* Pet'r Br. 50 n.33 (acknowledging that this reading "may seem more natural").

mandatory minimum sentence applied. 8 U.S.C. § 1324(a)(2)(B)(ii). Thus, Congress had already decided by statute that other considerations required imprisonment. That decision did not foreclose the sentencing judge from considering rehabilitation in adjusting the length of petitioner's term, particularly as he imposed a sentence within the guideline range.

The section-by-section analysis of § 3582(a) flatly contradicts petitioner's and the government's position. It describes the "recognizing" clause as a mere "caution . . . to discourage" judges from relying on a defendant's need for treatment as "the sole ground" for imprisonment. Senate Report at 119. Congress thus accepted that sentencing judges may use imprisonment to facilitate providing targeted prison treatment programs in at least some circumstances. Judges may consider treatment even as the sole ground for imprisonment and certainly as one of several factors.

Petitioner and the government, in stark contrast, read the "recognizing" clause as categorically forbidding imprisonment on these grounds. The Senate Report could easily have described § 3582(a) as adopting a *rule* (not a caution) that the "recognizing" clause *forbids* (not discourages) using imprisonment based even *in part* (not solely) on a treatment program. Had Congress intended the statute to mean what petitioner and the government say it does, the Senate Report would not have analyzed that clause as it did.

III. Even if District Courts May Not Consider Targeted Treatment Programs at All in Determining Whether to Impose Imprisonment, They May Consider Them in Setting the Length and Term of Imprisonment

As discussed above, § 3582(a) simply cautions judges against reviving the discredited rehabilitative ideal both in imposing and in lengthening prison terms. It does not forbid consideration of targeted treatment programs, especially in a case such as this one where treatment was only one of several factors informing the judge's decision. Even assuming arguendo that this analysis does not hold when sentencing judges are deciding whether to imprison, it applies at least when a judge has already decided to imprison and is determining the length of the prison term. Here, for example, the sentencing judge had to imprison petitioner because of the three-year mandatory minimum sentence; he had discretion to adjust only the length of her term.

A. In the first clause of § 3582(a), Congress carefully distinguished between "determining whether to impose a term of imprisonment" and "determining the length of the term." But it referred to just one of these determinations in the "recognizing" clause, mentioning only "imprisonment." The first, primary meaning of "imprisonment" is "the act of confining a person, esp. in a prison." *Black's Law Dictionary* at 773. "The state of being confined; a period of confinement" is a secondary meaning that Congress is less likely to have intended. *Id.*

B. Two related provisions in the Act confirm that Congress limited the "recognizing" clause to sentencing judges' decisions whether to imprison, not decisions to lengthen prison terms. First, 28 U.S.C. § 994(k) directs the Commission to avoid relying on "*the* purpose of rehabilitating the defendant" when promulgating guidelines that authorize imprisonment but not when adjusting the length of prison terms. In the other subsections of § 994, Congress repeatedly distinguished between "the imposition of sentences" and "the length of a term." 28 U.S.C. § 994(c), (d); *see also id.* § 994(e) (distinguishing "a term of imprisonment" from the "length of a term of imprisonment").

But in § 994(k), Congress discouraged as "inappropriate" the Commission's sole reliance on rehabilitation only in "imposing a sentence to a term of imprisonment," not in adjusting the length of the term. If Congress left the Commission this much flexibility to promulgate broad rules, a fortiori it meant to leave judges at least as much "flexibility to [tailor] individualized sentences" to each case and each defendant's needs. 28 U.S.C. § 991(b)(1)(B). The distinction Congress drew in this provision confirms that in the "recognizing" clause, Congress understood "imprisonment" to apply only to the initial decision to imprison, not to the duration of imprisonment. *See United States* v. *Jackson*, 70 F.3d 874, 879-80 (6th Cir. 1995); *United States* v. *Duran*, 37 F.3d 557, 561 (9th Cir. 1994); *see also United States* v. *Hawk Wing*, 433 F.3d 622, 630 (8th Cir. 2006).

Second, nothing in the Act limits a sentencing judge's discretion to lengthen a term of imprisonment by imposing consecutive sentences pursuant to 18 U.S.C. § 3584(b). That section closely tracks the language of § 3582(a), providing that "[t]he court, in determining whether" to impose consecutive sentences, "shall consider" "the factors set forth in section 3553(a)." 18 U.S.C. § 3584(b). While a consecutive-sentencing decision is, in substance, a decision to lengthen the term of imprisonment served, § 3584(b) contains no qualification akin to the "recognizing" clause in § 3582(a). Congress's decision not to include such a clause in a parallel and functionally similar provision strongly suggests that § 3582(a)'s guidance applies at most to the decision whether to imprison, not to setting the prison term's length.

C. The legislative history likewise reflects Congress's understanding that the "recognizing" clause governs only the initial decision to imprison. In its section-by-section analysis of § 3582, the Senate Report described subsection (a) as specifying "that the judge should recognize, in determining *whether* to impose a term of imprisonment, 'that imprisonment is not an appropriate means of promoting correction and rehabilitation.'" Senate Report at 119 (emphasis added). That sentence referred verbatim to only one of the two determinations described in § 3582(a)'s first phrase – "whether to impose a term of imprisonment," but not "the length of the term." Congress did not intend the "recognizing" clause to apply to the decision setting a prison term's length. *United States*

v. *Giddings*, 37 F.3d 1091, 1096 & n.17 (5th Cir. 1994).

Once any other purpose of sentencing "authorize[s]" imposing imprisonment, judges may "balanc[e] all the relevant considerations" in imposing and lengthening the prison term. Senate Report at 119. "A term imposed for another purpose of sentencing may [thus] have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence." *Id.* at 176; *see also supra* pp. 49-50 & n.13.

In response, the government cites a contrary footnote more than fifty pages earlier in the report. U.S. Br. 37 (citing Senate Report at 67 & n.140). But in voting on the bill, members of Congress presumably relied on the section-by-section analysis of § 3582 for their understanding of § 3582(a), rather than on a footnote to the discussion of § 3551.[14]

D. There are significant practical differences between imprisoning someone solely to rehabilitate

[14] Likewise, the section-by-section analysis of the enacted bill better describes Congress's intent than two committee reports explaining different sections of two unenacted bills three and six years earlier. *Cf.* U.S. Br. 32, 34-35 (relying on S. Rep. No. 605, 95th Cong., 1st Sess. 883, 891, 1168 (1977) and S. Rep. No. 553, 96th Cong., 2d Sess. 942 (1980)). Far from accurately describing the enacted bill, the language the government quotes from these reports was omitted from the final report on the enacted bill. That omission signals that Congress had repudiated, or at least ignored, that language.

her and determining the length of her prison term in part to facilitate treatment. *Contra* Pet'r Br. 37-39; U.S. Br. 28. The effects of imprisonment plateau a short while after the initial incarceration. "[T]he difference in harm between longer and shorter prison terms is smaller than typically assumed . . . ." John Bronsteen et al., *Happiness and Punishment*, 76 U. Chi. L. Rev. 1037, 1039 (2009). Thus, it is more reasonable to weigh targeted treatment programs as a factor in lengthening a prison term than in imposing one in the first place.

IV. The Rule of Lenity Does Not Dictate a Different Result

The rule of lenity, which petitioner invokes (Pet'r Br. 59-65), is inapposite here. The rule applies only to the rare criminal statute that contains a "grievous ambiguity or uncertainty such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508-09 (2010) (internal quotation marks and citation omitted). Disagreement among lower courts about a statute's meaning does not necessitate applying the rule of lenity. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). The rule is not "an overriding consideration of being lenient to wrongdoers," but rather an interpretive tool that "comes into operation at the end of the process of construing what Congress has expressed." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). It operates only if the statute remains deeply ambiguous even

after considering its "text, structure, history, and purpose." *Barber*, 130 S. Ct. at 2508.

Section 3582(a) contains no "grievous ambiguity" that would trigger the rule. The Sentencing Reform Act's text, structure, history, and purpose all indicate that Congress intended to reject the rehabilitative ideal's ambition to cure every inmate through isolation and prison routines and the Rehabilitation Model's opaque, unpredictable procedures. Congress did not, however, mean to bar a sentencing judge from considering targeted treatment programs, particularly as one of many factors in setting the length of a prison term.

Furthermore, the rule of lenity's primary concern is providing fair warning about the scope of the criminal law and its penalties. *See Liparota* v. *United States*, 471 U.S. 419, 427 (1985); *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (analogizing the rule of lenity to the void-for-vagueness doctrine). Here, petitioner had clear warning that smuggling illegal aliens violated federal law and that the sentencing guidelines prescribed 41 to 51 months' imprisonment. She had fair notice that she might receive a sentence anywhere within that range, as she did.

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CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

STEPHANOS BIBAS
Counsel of Record
Amicus Curiae by Invitation of the Court
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
AMY WAX
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

STEPHEN B. KINNAIRD
SEAN D. UNGER
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street N.W.
Washington, DC 20005
(202) 551-1842

DOUGLAS A. BERMAN
THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
55 West 12th Avenue
Columbus, OH 43210
(614) 688-8690

Counsel for Amicus Curiae

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