No. 10-5400

In The
Supreme Court of the United States

ALEJANDRA TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY BRIEF

REUBEN CAMPER CAHN*
SHEREEN J. CHARLICK
STEVEN F. HUBACHEK
JAMES FIFE
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Reuben_Cahn@fd.org

*Counsel of Record

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

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INTRODUCTION

> The 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) . . . , recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.[1]

The import of these words and the common understanding of their meaning are clear: Whether imposing or determining the length of prison sentences, judges must accept that imprisonment may not be used to further rehabilitation.

Amicus makes the counter-intuitive argument that this language *invites* courts to impose sentences of imprisonment to promote rehabilitation – so long as the sentencing court hopes that, in the future, the Bureau of Prisons ("BOP") will place the inmate in a "targeted treatment program" – something neither the Sentencing Reform Act ("Act") nor §3582(a) mentions. Amicus' "targeted treatment" interpretation is not so much statutory construction as statutory invention. In truth, the statute's plain meaning and structure forbid, rather than encourage, imprisonment to provide offenders with treatment. Judges sentence offenders to prison, not prison-based programs. The Act empowers judges to mandate treatment as a

[1] 18 U.S.C. §3582(a).

condition of probation or supervised release. But it entrusts solely to the BOP the decision to allow an inmate to participate in prison-based rehabilitation programs.

Legislative history confirms this understanding of the Act's plain language. That history evinces Congress' hostility to the rehabilitative model and the practice of "coercive rehabilitation" in which prison sentences were tied to the successful completion of treatment and rehabilitation programs. Perhaps more telling, as legislation that became the Act moved through successive iterations and Congresses, it changed from permitting rehabilitative imprisonment in exceptional circumstances, to barring it "generally," to banning it categorically.[2]

The plain language, structure, and legislative history of the Act confirm that it does not allow judges to impose or increase prison sentences to provide offenders the chance to participate in rehabilitative programs.

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[2] *See* S. 1722, 96th Cong., 2nd Sess. §2302 (as reported Jan. 17, 1980) (striking the word "generally" from the bill's instruction that courts must "recogniz[e] that imprisonment is not *generally* an appropriate means of promoting correction and rehabilitation") (emphasis added) (copy attached in Appendix at App. 2).

I. The Act's Plain Language Bars Imprisonment-For-Treatment.

A. The Statute Includes No Exception for "Targeted Treatment."

Amicus' principal argument is that the words "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" mean not what they say but rather "remind judges of the failure of the rehabilitative ideal" and instruct them "not [to] confuse 'grand inanities about universal redemption' with the statute's more specific and practical approach to treatment." Brief of Amicus Curiae ("AC") 11, 23. Amicus argues that the statute embraces "targeted treatment programs." *Id.* 23.

Amicus is not interpreting statutory language: The phrases "targeted treatment program" and "rehabilitative ideal" appear nowhere in the Act. The statute contains no discussion of the history of penology in America or its failures. It contains no discussion of treatment options, targeted or otherwise. As to imprisonment, the statute's commands are simple: Consider the purposes of retribution, deterrence, incapacitation, and rehabilitation; do not imprison for the sake of rehabilitation. Amicus' argument would create a very different statute, one that requires judges to "recollect" the history of the rehabilitative model and the debate over its efficacy and parse, without congressional guidance, the differences between "correction and rehabilitation" on the one hand and "targeted treatment" on the other. AC:24-25. Amicus argues, in effect, that Congress has

directed sentencing courts to bear in mind the failures of the rehabilitative model while simultaneously licensing courts to repeat those mistakes. That "targeted treatment programs" and the "rehabilitative ideal" are never mentioned in the Act, let alone identified as mandatory considerations for custody decisions, shows that Amicus' proposed reading of the statute does not interpret its words but re-writes them.

Amicus argues that imprisonment to make available a program does not contravene the statute's plain language because: "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' . . . that is the means of promoting rehabilitation." AC:22. But the statute does not require that judges recognize "imprisonment does not rehabilitate." It requires they recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a). "Promote" does not mean "effect." It means "advance the interests of" or "further the growth, development, progress, or establishment of." *Oxford English Dictionary* promote (def.I & I2a) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011) ("OED"). A judge imposing imprisonment to make accessible a rehabilitative treatment program is using imprisonment to "advance the interests of" or "further the growth, development, progress or establishment of" rehabilitation. Amicus' proposal falls squarely within §3582(a)'s express proscription.

B. "Recognizing" Means "Accepting As True."

Amicus' argument turns on ascribing to the word *recognizing* in §3582(a) a meaning inconsistent with the grammatical structure of the sentence Congress wrote. Amicus contends that "recognizing" does not mean "acknowledge the existence or truth of" and "admit the fact, truth, or validity of" as Petitioner and the Government argue, Petitioner's Brief ("PB") 26 n.18; Solicitor General's Brief ("SB") 18. Amicus posits that "recognizing" means "'[t]o know again,' 'recollect,' or 'recall to mind.'" AC:23-24 (citing the *OED, Webster's Third International Dictionary,* and *Random House Dictionary of the English Language,* as well as two Latin dictionaries). Noting the word's origins in the Latin *recognōscere*, meaning "know again," "recall," and "recollect," Amicus asserts this is the intended meaning in §3582(a). However, the grammatical context of §3582(a) makes clear the meaning Congress intended – and that Amicus is wrong.

"Recognize" as defined by Amicus is a transitive verb. It takes a noun object, i.e., *recognize a face*. "Recognize" as defined by Petitioner may take a direct-object complement or may be followed by a subordinate *that*-clause, i.e., *recognize that Barack Obama is president*. *See OED* recognize (def.3c) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011). When recognize means "recall to mind," it cannot take a *that*-clause as its complement. Thus, "I recognize this place" can mean "I recall this place." But, "I recognize that this place is my home" means "I realize (or understand, apprehend, or accept) that this place

is my home." Because *recognize* in §3582(a) occurs in collocution with a *that*-clause ("recognizing that imprisonment is not . . . "), it cannot mean what Amicus asserts.[3]

As noted, Amicus argues his preferred sense of the word "recognize" from its Latin origin, but this view is anachronistic and oversimplified. Original senses of borrowed words are often a poor indication of current meanings. The modern English word *salary* derives from the Latin word for a soldier's allowance for his salt-ration, but that fact hardly elucidates its contemporary meaning. The verb *recognize* was not borrowed directly from Latin; it came into the language via Norman French legal usage after the Conquest, first appearing in Scottish legal texts with a specialized meaning. *See OED* recognize (3d ed.), http://www.oed.com (last visited Apr. 5, 2011).[4] One cannot simply consult a Latin

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[3] *See also* Thomas Herbst, et al., *A Valency Dictionary of English* 658-59 (2004) (listing a *that*-complement structure only for the "acknowledge" sense of *recognize*, not the "identify" sense). Note also that the second edition of the *OED* specifically states that the meaning "treat as valid, as having existence or as entitled to consideration" appears in absolute constructions, as Petitioner proposes for §3582(a). *OED* recognize (def.4a) (2d ed. 1989), http://www.oed.com/oed2/00199328 (last visited Apr. 5, 2011); *see* PB:17-18.

[4] The sense proffered by Petitioner and the Government first appeared in the 16th century, about 50 years before the first occurrence of the sense asserted by Amicus. *See id.* (def.2a, 3a & 5a). Amicus' claim that "[j]udges must re*cognize* – 'recall to mind' . . .," AC:24, seems to confuse this verb with the separate verb *re-cognize* (so spelled and with different pronunciation)

(Continued on following page)

dictionary and apply the definitions found there to another language's words two thousand years later.

Amicus also argues that his proposed meaning of "recognize" is proper because certain English dictionaries list "recall" as the word's first definition while listing Petitioner's and the Government's proffered meaning, "acknowledge the existence or truth of" and "admit the fact, truth, or validity of," as secondary. AC:23-24 & nn.4, 5; *cf.* PB:26 n.18; SB:18. Determining what, in §3582(a), *recognizing* means is not a matter of checking which definition dictionary editors place first under its listing. The order of entries may reflect the most common use, but also some other criterion, such as historical sequence or usage factors (standard before dialect, formal before colloquial, active before obsolete, etc.).[5] Even dictionaries from the same source, produced during the same time frame, may differ in the order of entries. Amicus notes that *Webster's Third* (published in 1971) lists "recall" as the first non-obsolete meaning of *recognize*,

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meaning "to cognize again." *See id.* re-cognize. Such uses of the verb *recognize* are noted to be obsolete and rare. *See id.* recognize (def.6a, b).

[5] Amicus cites *Webster's Third*'s designation of the "admit the fact, truth, or validity of" sense as obsolete. AC:24 n.5. That dictionary gives no dated attestations to support its classification. The current edition of the *OED*, on the other hand, lists this sense as the first, non-obsolete definition and gives a 1998 quotation. *OED,* recognize (def.2b), http://www.oed.com (last visited Apr. 5, 2011).

but it is the third meaning listed in *Webster's 9th New Collegiate Dictionary* 984 (1984) and *Merriam-Webster's Collegiate Dictionary* 1039 (11th ed. 2007). The "recall" sense is listed as the second non-obsolete meaning in 2 *New Shorter Oxford English Dictionary* 2503 (1993) and the second edition of the *Oxford English Dictionary* (1989), but it is listed seventh in the current, third edition. The sequence of entries is not particularly telling.

C. Section 3582's Language Is Mandatory.

Alternatively, Amicus argues that even if Congress meant what it said, that "imprisonment is not an appropriate means of promoting correction and rehabilitation," the *recognizing*-clause is merely hortatory. It only discourages sole reliance on rehabilitative concerns to justify imprisonment. AC:43-51. As Petitioner has noted, PB:26-27, no court – not even those which hold that §3582(a) allows lengthening imprisonment for rehabilitation – has questioned the mandatory force of the "recognizing" language. *United States v. Duran*, the fountainhead of such caselaw, describes §3582(a) as a "prohibition," 37 F.3d 557, 561 (9th Cir. 1994), not as a mere "warn[ing] . . . against the lure of the rehabilitative ideal's siren song." AC:43.

Amicus contends that the Act's use elsewhere of clearly mandatory language like "shall" and "assure" shows the word "recognizing" in §3582(a) to be merely precatory. AC:44-46. But, properly understood,

"recognizing" communicates categorical disapproval of prison-for-rehabilitation: "accept the authority, validity, or legitimacy of; *esp.* to accept the claim or title of (a person or group of people) to be valid or true." *OED* recognize (def.2b) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011); likewise, "acknowledge the existence or truth of," *id.* (def.3a), and "perceive clearly; to realize, understand, or apprehend *that*." *Id.* (def.3c). It would be a contorted reading of this sentence to require judges accept as true that imprisonment-for-rehabilitation is inappropriate while simultaneously allowing them to impose or lengthen custody for that purpose. PB:26-27. Thus, context confirms the meaning urged by Petitioner and the Government as the one Congress intended. *See generally Deal v. United States*, 508 U.S. 129, 131-32 (1993).

Moreover, the mandatory nature of the prohibition inheres in the structure of the sentence Congress wrote. Petitioner's plain-meaning analysis of §3582 demonstrates that the phrase, "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation," must be either an absolute phrase modifying the entire sentence or a participial modifier of the main clause's subject, "the court." PB:15-18. That main clause utilizes the verb *shall*, whose use indicates Congress' intent to "impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001). The mandatory sense of the modal verb *shall* extends throughout the entire sentence,

including the "recognizing" proviso, in accord with the usual rules of grammar.[6]

II. The Act's Structure and Context Confirm That It Bans Imprisonment-For-Rehabilitation.

A. Judges Sentence Offenders to Prison, Not Treatment Programs.

While Amicus proposes that it invites judges to impose or increase terms of imprisonment to make treatment available, the Act gives courts no authority to require the BOP to provide such treatment or mandate that offenders participate if treatment is made available. A Congress that intended judges to imprison offenders in order to put them in treatment would not have stripped those same judges of the power to accomplish this.

Courts may sentence an offender to a term of probation, a fine, or a term of imprisonment. 18 U.S.C. §3551(b). When imposing probation or supervised release, a judge – employing any of numerous standard and special conditions – has broad authority to tailor the sentence to the specific needs and characteristics of the defendant. *See* 18 U.S.C. §§3563(b) & 3583(d). Conversely, "sentencing judges have no authority to order the Bureau of Prisons to place a defendant in any given rehabilitative program that

[6] *See* F.R. Palmer, *Mood and Modality* 2 (1986) (noting that modality is not just a verbal category but a grammatical characteristic of the entire sentence).

might be offered, though they may offer recommendations." *United States v. Manzella*, 475 F.3d 152, 158 (3d Cir. 2007). This allocation of power shows that Congress intended courts to address rehabilitative concerns through probation and supervised release, not prison.

B. Amicus' Interpretation Conflicts with Congress' Directive to the Sentencing Commission.

The Act requires the Sentencing Commission ("Commission") to "insure [sic] that the 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) (emphasis added). Section 3582 should be read consistently with §994(k). Allowing judges to impose prison-for-treatment cannot be reconciled with requiring them to abide by mandatory guidelines that bar rehabilitative imprisonment. Amicus' reading of §3582(a) as permitting imprisonment for correctional treatment cannot be squared with the categorical language of §994(k).

C. Amicus' Exception to §3582 Swallows the Rule.

Moreover, allowing judges to consider rehabilitation when a defendant may benefit from a "targeted

treatment program" creates an exception that swallows the rule. By exhibiting drug dependence or abuse, nearly half of all federal prisoners might qualify for treatment. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Drug Use and Dependence, State and Federal Prisoners, 2004* tbl. 5 (Oct. 2006) (45.5% of federal prisoners exhibit drug dependence/abuse). The portion of prisoners who reported using drugs "regularly" is even higher. *See id.* tbl. 2 (64.3% reported using drugs at least once a week for at least a month). Even without adding in alcohol abusers, at least one-half to two-thirds of custodial sentencing decisions involve defendants who might benefit from drug treatment alone. The exception Amicus reads into the overtly categorical ban in §3582(a) thus extends to the majority of the prison-eligible defendants in federal courts.

D. Statutory Context and Structure Support Petitioner's Interpretation.

Amicus claims that Petitioner's reading of "the subordinate 'recognizing' clause . . . undercut[s] the main clause by forbidding a judge to lengthen a prison sentence to facilitate a defendant's entry into a treatment program." AC:22 (also stating that Petitioner's analysis puts the clauses "at war with each other"). It does not. As Petitioner reads the statute, a need for rehabilitation must be considered when deciding whether to imprison, and for how long; but this need will counsel only against incarceration or in favor of a shorter term, not the converse. Rehabilitation

is considered, but it points only one way. The same is true for other considerations. A need for incapacitation will point only toward imposing or increasing imprisonment. That §3582(a) constrains a judge's consideration of rehabilitation is not surprising. The entire Act directs and constrains a judge's previously unlimited sentencing discretion.

Beyond this, it is common that legislation contains general, guiding principles limited by later provisos. *See, e.g.,* 18 U.S.C. §3553(a)(4)(A)(ii); (a)(5)(B); (b)(1); (c)(2) (all including exceptions/conditions on more general procedures). Indeed, the same sentence in §3582(a) limits its directive to consider the factors set forth in §3553(a) by requiring that courts both 1) recognize prison does not promote rehabilitation and 2) apply the §3553(a) factors "only to the extent they are applicable." 18 U.S.C. §3582(a). Such provisos condition and tailor general principles; it is inaccurate to describe them as "undercutting" the broader rule. This pattern of legislative drafting is so common that it gives rise to a familiar canon of statutory construction: "a more specific statute will be given precedence over a more general one. . . ." *Corley v. United States*, 129 S. Ct. 1558, 1568 (2009) (quotation omitted).

There is no incongruity that requires the two parts of the sentence to be "harmonize[d]." AC:23. The conflict is imaginary, arising out of Amicus' assertion that Congress wanted to exempt "targeted treatment programs" from its ban on rehabilitative imprisonment. On the other hand, directing sentencing judges to acknowledge that incarceration does not rehabilitate

while allowing them to impose or lengthen imprisonment to further rehabilitation is not merely disharmonious, it is outright contradictory. PB:26-27. It is difficult to conceive that Congress could have expected judges to embrace such a contradiction without, at least, identifying this exception for "targeted treatment" and explaining how it differs from the treatment modes rejected with passage of the Act.

Amicus also argues that any limitation on using *imprisonment* to rehabilitate would be inconsistent with legislative intent because, in 18 U.S.C. §3553(a)(2)(D), Congress cited rehabilitative needs as a factor in determining a defendant's overall *sentence*. *See* AC:26-32. Amicus confuses "sentence" with "imprisonment" and misunderstands "consider." Federal judges have multiple sentencing options: fines, probation, imprisonment, supervised release, restitution, and forfeiture. Judges must consider rehabilitation in relation to each of the statutory sentencing options: probation, fines, and imprisonment. In considering imprisonment, the need for rehabilitation will militate only in favor of no or less imprisonment. That this factor points always away from incarceration does not mean it is not considered. Thus, there is no disharmony between the mandatory sentencing factors in §3553(a) and §3582's limitation on the manner in which rehabilitation may be considered. AC:26.

By confounding these various sentencing options, Amicus ignores the very real differences between custodial and non-custodial sentences, treating prison

as if it were just the incidental venue for a treatment program. *See* AC:22 ("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' . . . that is the means of promoting rehabilitation."). It is a nice semantic distinction, but it misunderstands the Act, which allows judges to sentence defendants only to *prison*, not to *prison programs*. *See* AC:28 (stating the district court here "chose" an in-prison treatment program for Petitioner). That is why, despite the trial court's wishes, Petitioner sits in prison, without access to the recommended program. PB:42-45; SB:29-30.

Amicus claims that a rehabilitation ban in §3582(a) undermines the incapacitation goal in §3553(a)(2)(C), stating that it would force judges who doubt eventual rehabilitation to "lengthen their sentences to protect the public." AC:29. The logic of Amicus' imaginary judge would need be: "Prison rehabilitates; at the end of X term, the offender will be rehabilitated, and incapacitation will be unnecessary." Such reasoning is premised on a rejection of the principle Congress required judges to accept, that imprisonment is not an appropriate means of rehabilitating offenders. A sentencing judge who acts as Amicus describes defies the will of Congress.

Moreover, Amicus' reasoning would only invite speculative trade-offs between rehabilitation and incapacitation in setting prison terms to qualify for programs – programs that may never be available to the defendant. That adds up to more uncertainty,

unwarranted disparity, and arbitrariness, not less. As Amicus observes, the intent of the Act was to reduce these. AC:26.

Amicus also argues that Petitioner's approach deprives judges of the flexibility the Act intended, AC:30-31, 53, prevents judges and the Commission from adjusting to evolving knowledge, AC:31, and creates potential unfairness. AC:31-32. The breadth and detail of conditions Congress made available to a judge designing a non-custodial sentence address flexibility concerns far better than the imprison-and-hope-she-gets-the-program method Amicus extols. Because neither a district judge nor the Sentencing Commission controls availability of programs in federal prisons, a prison-rehabilitation ban does not prohibit either from acting on new knowledge, consistent with limits set by Congress.[7] Finally, as regards certainty and fairness, AC:31-32, this case shows that the only certainty in imposing extra prison time to qualify Petitioner for treatment is that she will indeed serve that extra time, despite not being enrolled in the program. It is difficult to see the fairness in that.

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[7] It may be that new knowledge will lead in the future to a reversion to the former indeterminate-sentencing model, *see* Bill Von Sternberg, *Bill Seeks to Keep Sex Offenders Jailed*, Minneapolis Star Tribune, http://www.startribune.com/politics/statelocal/118054904.html (Mar. 15, 2011) (reporting state effort to move to indeterminate criminal sentences for certain sex offenders), but certainly a judge cannot defy the present scheme of determinate sentencing, even if convinced it is a failure.

III. Legislative History.

A. The Rehabilitative Model of Isolation, Silence, Routine, and Work Died in the Nineteenth Century. The Targeted Treatment Regime Amicus Proposes Is the Model That Congress Rejected.

Amicus posits that, in requiring judges to "recognize imprisonment is not an appropriate means of promoting rehabilitation," Congress insisted only that courts acknowledge the failure of the "rehabilitative ideal," the "amorphous hope of reforming every convicted criminal's soul through isolation and prison routine." AC:11. In making this argument, Amicus relies on his understanding of the history of the penitentiary and his belief that the rehabilitative ideal rejected by Congress was that "amorphous hope." History shows that this "amorphous hope" had died a century before Congress took up sentencing reform and that it was an approach identical to Amicus' "targeted treatment" regime against which Congress legislated.

The rehabilitative ideal Amicus describes, an ideal which relied on isolation, silence, routine, and work to reform the prisoner's soul, was abandoned a century ago. *See generally* David J. Rothman, *Perfecting the Prison, United States, 1789-1865, in The Oxford History of the Prison* 100, 112-14 (Norval Morris & David J. Rothman, eds., 1998); Lawrence M. Friedman, *Crime and Punishment in American History* 82, 156-59 (1993).

Through successive waves of prison reform, the rehabilitative model evolved from its original understanding. Edgardo Rotman, *The Failure of Reform, United States 1865-1965, in The Oxford History of the Prison* at 152-71; Friedman, 159-63. By the 1950s, the prevailing corrections philosophy was that rehabilitation could be achieved through "treating" the "sick" offender. Treatment programs multiplied. These included group therapy, individual therapy, educational remediation, vocational training, and narcotics addiction treatment. Rotman, 169-71; *see also* James Robison and Gerald Smith, *The Effectiveness of Correctional Programs*, 17 Crime and Delinquency 67, 68 (1971); Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 Public Interest 22, 29-33 (1974). The model of the postwar era was one of coercive rehabilitation: Prisoners were reformed, not by silence, isolation, routine, and work, but by participation in treatment programs. S. Rep. No. 98-225, at 40 (1983), *as reprinted in* 1984 U.S.C.A.A.N. 3182 ("Senate Report"). It was this model of reform through prison-based rehabilitation programs that Congress rejected with the Act. Amicus' reading turns this history, and the Act, on its head.

Congress rejected a system of prison-based treatment because it doubted its worth and suspected that it was used as a rationale to imprison disproportionately the poor and minorities. By the 1960s, a backlash against the prevailing correctional treatment model was born. From the mid-1960s through 1975, as the homicide rate more than doubled from

4.6 to 9.4 per 100,000, this backlash grew. James Alan Fox & Marianne W. Zawitz, Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States: 2002 Update* 1 (2004). Increasingly, academic criticism of these prison-based programs questioned their efficacy. *See* Senate Report 40 n.16. In 1974, researchers employing meta-analysis assessed all evaluations of criminal rehabilitation programs between 1945 and 1967, concluding: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." D. Lipton, et al., *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975). By the late 1970s, the *cri de coeur* of the system's academic critics was "nothing works." Martinson, 40. Another set of critics complained that the poor and minorities were unnecessarily incarcerated with the hope that prison-based treatment programs would aid their reformation. *See* Senate Report 171 & n.408.

These critics' views drove Congress' rejection of the rehabilitative model. It is their criticisms Congress cites in abandoning this model: "[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Id.* 38; *see also id.* 40 & n.16. The system Congress rejected is this system in which imprisonment is designed to rehabilitate and freedom is

obtained through successful completion of prison-based treatment programs. *Id.* 40.

Congress' rejection of this model is emphasized by the repeal of its prior mandate for prison-based treatment. During the 1960s and '70s, the federal government's most prominent treatment program was drug treatment, made widely available through the Narcotics Addict Rehabilitation Act of 1966 ("NARA"). *See* 18 U.S.C. §§4251 *et seq*. This statute required a court finding an "eligible offender" to be an addict and "likely to be rehabilitated through treatment" to sentence that offender to the custody of the Attorney General for treatment. Senate Report 118-19. The Act repealed NARA. *See* Pub. L. No. 98-473, tit. II, §218(a)(6), 98 Stat. 1837, 2027 (1984). Congress' repeal of NARA cannot be reconciled with a view that it intended to allow judges to incarcerate people to make treatment available (if BOP grants it). Amicus has offered no meaningful distinction between the treatment programs Congress rejected and those which Amicus espouses. And appending the adjective "targeted" to these programs' descriptions does not provide it. Congress did the opposite of what Amicus proposes. It banned imprisonment-for-treatment and shifted mandatory participation in treatment programs and attention to rehabilitative concerns to non-incarceration sanctions, probation and supervised release. Only with regard to these sanctions did Congress give judges power to impose participation in treatment programs as a condition of freedom.

B. Congress Intended That Rehabilitative Needs Would Never Justify Imprisonment.

Amicus also argues that, even if an offender's need for treatment cannot *alone* justify imposing or increasing a term of imprisonment, in combination with other factors, it may. Amicus derives support for this argument from a misreading of legislative history. As discussed in Petitioner's opening brief, Congress intended that imprisonment would serve purposes of retribution, deterrence, or incapacitation, not rehabilitation, and where rehabilitation is a court's primary aim, it will choose an option other than incarceration. PB:53-57. But Congress did not intend that an offender who deserves imprisonment, whether for retribution, deterrence, or incapacitation, would necessarily avoid prison because he also needed rehabilitation. So Congress did not ban the use of incarceration whenever rehabilitation is a court's primary concern. If a need for retribution, deterrence, or incapacitation justifies imprisonment, Congress allowed a court to impose it, Senate Report 119, but the court may not impose or lengthen imprisonment to further rehabilitation. *Id.* 76, 119, 176. Misreading language which recognizes this principle, Amicus finds support for the idea that Congress believed incarceration for rehabilitative purposes could be appropriate.[8] *See, e.g.,* AC:49 ("Congress discouraged

[8] Amicus also incorrectly argues that "Petitioner concedes that it 'may seem more natural' to read [28 U.S.C.] §994(k)'s legislative history as forbidding 'the imposition of imprisonment

(Continued on following page)

imprisonment 'on the *sole* ground' of correctional treatment, where rehabilitation is '*the* purpose of sentencing' or 'the *only* appropriate purpose of sentencing.'") (quoting Senate Report 91, 92, 119) (emphasis added by Amicus). Amicus misunderstands these words by viewing them in isolation, without reference to Congress' understanding that courts were authorized to impose imprisonment whenever a need for retribution, deterrence, or incapacitation justified it. In light of this principle, it would have been illogical for Congress to state without qualification that, if the primary purpose of sentencing is rehabilitation, the court must impose a non-prison sentence.

In her opening brief, Petitioner described how, in revising legislation that would become the Act, Congress eliminated provisions which would have allowed rehabilitative incarceration. Petitioner and the Government argue this demonstrates the legislature's intent to ban completely this practice. PB:57-59; SB:33-34. Amicus disagrees, arguing that Congress' intent in deleting this provision was merely to eliminate the option of indeterminate sentencing, not the

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only when rehabilitation is the "sole" purpose that incarceration would serve.'" AC:46. The language Amicus selectively quotes from Petitioner's brief discusses a single sentence in the Senate Report and concludes that it is ambiguous because, while a reading that this one sentence means Congress intended to bar imprisonment only when rehabilitation is its sole justification is natural, the whole of the Act's legislative history supports the opposite conclusion. PB:50 n.33.

use of imprisonment for rehabilitation. AC:37. Amicus is wrong, for, in Congress' view, the two were bound tightly together: S. 1437, 95th Cong., 1st Sess. (as reported by S. Comm. on the Judiciary, Nov. 15, 1977) would have allowed a partially indeterminate prison sentence *if* the judge found the defendant's participation in a specific type of rehabilitation program served a sentencing purpose and the *sole* way to make that program available was through imprisonment. S. Rep. No. 95-605, 95th Cong., 1st Sess. 883 (1977); *see also id.* 929. Indeterminate sentencing would not have been available except in this instance.

The Judiciary Committee report on S. 1437 confirms, first, that Congress understood a need for rehabilitation generally would not justify imposing or increasing a prison sentence to further rehabilitation, and, second, that it viewed this provision as the only portion of the bill under which a judge could do that:

> The Committee recognizes that the purpose of rehabilitation is not currently thought to be sufficient in most cases as the sole purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment. . . . The purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case. The Committee in no way means to suggest that we should abandon our efforts to rehabilitate prisoners. On the

> contrary, the Committee views rehabilitation as a proper purpose of criminal sanctions other than imprisonment. In addition, there is limited authority for the Sentencing Commission to provide a partially indeterminate sentence to a term of imprisonment if the judge finds that a purpose of sentencing is served by the defendant's participation in a specific type of rehabilitation program and the sole way to make that program available to the defendant is through imprisonment.

Id. at 891-92. A need for rehabilitation or treatment might militate against incarceration, but it could not justify imposing or increasing imprisonment – except under this one limited exception to the general rule. When the 96th Congress did away with the exception, it banned both indeterminate sentencing and imprisonment for rehabilitation. *See* S. 1722, 96th Cong., 1st Sess. (1979).

Other actions of the 96th Congress confirm that it intended to ban absolutely imprisonment for rehabilitation. That Congress moved language directing courts to recognize the inappropriateness of imprisonment for rehabilitation from a section addressing general purposes of sentencing to one addressing specifically imprisonment. As introduced, that language was not absolute. It read:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length, shall consider the factors set forth in section 2003(a) to the extent that

> they are applicable, recognizing that imprisonment is *generally* not an appropriate means of promoting correction and rehabilitation.

S. 1722 §2302 (emphasis added).

When the Judiciary Committee reported S. 1722, it struck the word "generally." S. 1722, 96th Cong., 2nd Sess. (as reported Jan. 17, 1980). *See* App. 2. In doing so, Congress made the prohibition not "general" but absolute. This absolute ban was carried forward unchanged into S. 1762, 98th Cong., 1st Sess. (1983) and eventually into the Act. Together with deletion of the provision allowing a court to imprison an individual so that he might participate in a specific correctional program, this striking of the word "generally" makes clear that Congress intended to do away entirely with the use of imprisonment for rehabilitative purposes.

Amicus further argues that the legislative history supports its view because, in another bill, S. 1555, 97th Cong., 1st Sess. §102(a) (1981), Congress considered and rejected language banning rehabilitative incarceration in terms clearer than those in §3582. AC:38-39. As discussed elsewhere, the language of §3582 is clear in banning rehabilitative imprisonment. That Congress could have been more clear has no relevance in determining the meaning of a statute that is, on its face, clear. *See Manzella*, 475 F.3d at 160. But beyond this, Amicus is simply wrong in contending that Congress considered and rejected

S. 1555's ban on rehabilitative punishment. The bill was indeed introduced by Senator Kennedy. But the Congressional Record nowhere reflects that the bill was reported by the Judiciary Committee, let alone considered and rejected by the House or Senate. The failure of Congress to enact the language of S. 1555 is thus no evidence of its views.

Amicus also contends that Congress' creation and support of prison-based drug-treatment programs evinces its intention to allow courts to consider such programs in imposing or lengthening prison sentences. AC:39-43. The short answer to this is that Congress created these programs through the Violent Crime Control and Law Enforcement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4913 (1990) (codified as amended at 18 U.S.C. §3621(b)). That occurred some six years after passage of the Act. The actions of another Congress, years later, reveal nothing about the intent of the legislature in passing the Act. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *see also United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring in part and concurring in judgment) ("[T]he will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones."); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative

history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."). The Congress that passed the Act repealed NARA, 18 U.S.C. §§4251 *et seq*., which required judges to incarcerate addicts for treatment. *See* Pub. L. No. 98-473, tit. II, §218(a)(6), 98 Stat. 1837, 2027 (1984). This is far more relevant evidence of Congress' view of the propriety of incarcerating offenders to allow their participation in prison-based treatment.

CONCLUSION

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

Respectfully submitted,

REUBEN CAMPER CAHN*
SHEREEN J. CHARLICK
STEVEN F. HUBACHEK
JAMES FIFE
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Reuben_Cahn@fd.org

**Counsel of Record*

APPENDIX

Calendar No. 587

96TH CONGRESS
1ST SESSION **S. 1722**

[Report No. 96-553]

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 7 (legislative day, JUNE 21), 1979

Mr. KENNEDY (for himself, Mr. THURMOND, Mr. HATCH, Mr. DECONCINI, and Mr. SIMPSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JANUARY 17 (legislative day, JANUARY 3), 1980

Reported by Mr. KENNEDY, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Code Reform Act of 1979".

* * *

"CHAPTER 23 – IMPRISONMENT

"Sec.

"2301. Sentence of Imprisonment.

"2302. Imposition of a Sentence of Imprisonment.

* * *

"§ 2302. Imposition of a Sentence of Imprisonment

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT. – The 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 2003(a) to the extent that they are applicable, recognizing that imprisonment is ~~generally~~ not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

* * *