No. 06-5754

In the Supreme Court of the United States

VICTOR A. RITA, JR.,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF FOR THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Was the district court's choice of within-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

As *amicus curiae*, NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL has an interest in this case insofar as it will determine whether within-guidelines sentences are presumptively reasonable and whether federal criminal defendants receive the full benefit of the individualized sentencing process required by Congress in the Sentencing Reform Act and this Court in *United States v. Booker*, 543 U.S. 220 (2005). We believe that it is imperative to the protection of our clients' rights and to the establishment of a more just sentencing system that courts of appeals consider all of the factors enumerated in 18 U.S.C. § 3553(a) when reviewing sentences for unreasonableness. Review of all of the statutory factors is necessary to ensure that district courts give reasoned consideration to each individual defendant's circumstances when "impos[ing] a sentence sufficient, but not greater than

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[1] Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from Respondent has been submitted concurrently with this filing. No counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

necessary" to comply with the statutory purposes of sentencing.

To assist this Court, NYCDL has undertaken an analysis of all post-*Booker* reasonableness review cases captured by its search terms (described in the appendix attached hereto ("App.")), from January 1, 2006 through November 16, 2006.[2] The complete results of NYCDL's work should help this Court appreciate the ways in which reasonableness review has been applied by the courts of appeals. The data suggest that all the courts of appeals—and especially those explicitly applying a presumption that within-guidelines sentences are reasonable—have failed to follow the parsimony command Congress set forth in Section 3553(a).[3]

SUMMARY OF ARGUMENT

In *Booker*, this Court developed a remedy for constitutional problems with the operation of the Sentencing Reform Act: It held that Section 3553(a) governs both district courts' sentencing decisions and appellate review of those decisions. Congress has directed district courts to consider all seven factors enumerated in Section 3553(a), not just the guidelines. In *Booker*, this Court instructed the circuits to review sentences for unreasonableness, guided by *all* of the factors listed in the statute. 543 U.S. at 261 (appellate courts are to assess unreasonableness "with regard to § 3553(a)").

When *Booker* was decided, "no one kn[ew] … how advisory Guidelines and 'unreasonableness' review w[ould] function in practice." 543 U.S. at 311 (Scalia, J., dissenting

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[2] The starting date was chosen to avoid the need to filter out the large number of early post-*Booker* decisions that did not involve unreasonableness review, but instead addressed issues such as whether a pre-*Booker* sentence should be vacated and remanded for resentencing in light of *Booker*. The end date is shortly after this Court granted certiorari in this case. *See* App. at 1a n.1. NYCDL's appendix is also available at http://www.nycdl.org.

[3] This brief focuses principally on the second question presented.

in part). In the almost two years since *Booker*, the courts of appeals appear to have created their own distinctive *de jure* and *de facto* standards of review, which find no basis in Congress's statutory text and are entirely inconsistent with the parsimony provision of Section 3553(a).

NYCDL's findings reveal that the courts of appeals are universally affirming within-guidelines sentences. NYCDL discovered that *only one* within-guidelines sentence has been reversed as substantively unreasonable in at least 1,152 appeals. *See* App. at 3a. Sentences outside the advisory-guidelines range, however, receive inconsistent treatment in favor of higher sentences. The courts have been deferential to above-guidelines sentences, but have collectively disfavored below-guidelines sentences appealed by the government. In those circuits formally applying a presumption of reasonableness nearly every below-guidelines sentence appealed by the government has been reversed.

The results of reasonableness review are especially telling in the Fourth Circuit, from which this case arises.[4] For example, the court affirmed all 201 within-guidelines sentences appealed. *See* App. at 3a-4a, 43a-71a. Nine of ten above-guidelines sentences appealed by defendants were affirmed as reasonable (including some sentences in which the district court doubled and tripled the term of imprisonment relative to the guidelines range). *See* App. at 4a, 39a-40a. Yet all of the nine below-guidelines sentences appealed by the government were found unreasonable and reversed (including some sentences only modestly below the guidelines). *See* App. at 4a, 42a-43a.

These patterns, which strongly suggest that courts are not applying review for unreasonableness in a manner consistent with Section 3553(a), especially the parsimony provision, likely result from two errors: (1) a general failure

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[4] The data from the Eighth Circuit are similar, as discussed in Brief of New York Council of Defense Lawyers, as Amicus Curiae Supporting Petitioner, *Claiborne v. United States*, No. 06-5618 (2006).

to attend to the words Congress used in Section 3553(a) and (2) a mistaken assumption that the guidelines incorporate all of the required Section 3553(a) considerations.

First, the plain language of Section 3553(a) requires a district court to "impose a sentence sufficient, but not greater than necessary to comply with the purposes of" sentencing set forth in Section 3553(a)(2), while "consider[ing]" seven specified factors, only one of which is the guidelines range. Very few courts of appeals have even mentioned this parsimony provision when reversing below-guidelines sentences and when affirming above-guidelines sentences. Moreover, the plain language does not contemplate—or leave room for—the extra-textual presumption adopted by the courts of appeals to consistently affirm within-guidelines sentences. *Cf. Koon v. United States*, 518 U.S. 81, 108 (1996) (explaining that "[s]o long as the overall sentence is 'sufficient, but not greater than necessary, to comply' with the above-listed goals, the statute is satisfied") (quoting § 3553(a)).

Second, courts have wrongly assumed that the guidelines account for all of the other Section 3553(a) factors. But while the courts stress that the U.S. Sentencing Commission has studied and revised the guidelines for eighteen years, they have ignored the Commission's own declaration following its comprehensive study that "the reformed sentencing system has fallen short of th[e] ideal in several respects" and has failed to fully achieve "the goals of sentence reform." U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment Of How Well The Federal Criminal Justice System Is Achieving The Goals Of Sentencing Reform 144 (2004) ("USSC Assessment Report"). The Commission has expressly and repeatedly found that, in many circumstances, the guidelines are not parsimonious and do not serve the goals set forth in Section 3553(a)(2).

ARGUMENT

The plain language of Section 3553(a) does not support a presumption of reasonableness for within-guidelines

sentences and the Commission's own analysis undermines the basis for any presumption. Nevertheless, the data in our empirical study reveal that the courts of appeals are operating as if the guidelines fulfill the mandates of Section 3553(a). The consequences of these errors reinforce the conclusion that the courts of appeals have misunderstood and misapplied this Court's remedy in *Booker*, including its directive that "Section 3553(a) … sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts … in determining whether a sentence is reasonable." *Id.* at 261.

I. THE EMPIRICAL DATA REVEAL NON-PARSIMONIOUS PATTERNS IN THE APPLICATION OF REASONABLENESS REVIEW

The analysis conducted by NYCDL incorporated 1,152 within-guidelines sentences appealed by defendants. *See* App. at 2a-3a. These sentences were affirmed in 1,136 cases and vacated in only 16 cases. *Id.* at 3. Moreover, 15 of the sentences were vacated for *procedural* reasons—that is, the court of appeals held that the district court did not adequately explain its reasons for the sentence imposed and therefore adequate appellate review was not possible. *Id.* Only one sentence out of 1,152 within-guidelines sentences challenged on appeal for reasonableness has been found to be substantively unreasonable. *Id.* at 3a, 156a.

The Commission has in its reports, discussed *infra*, repeatedly stated that sentences recommended by the guidelines in many classes of cases are often greater than necessary to achieve the sentencing purposes Congress described in Section 3553(a)(2). The Commission's findings should prompt suspicion about an appellate pattern in which less than .08% of appealed within-guidelines sentences are reversed as substantively unreasonable.

Moreover, if the guidelines are truly viewed as a benchmark of reasonableness by the courts of appeals, even though the Commission itself does not espouse this view, *see generally* USSC Assessment Report, one would expect

those courts to be *equally* concerned about variances above the guidelines range *and* those that vary below the range. But the pattern of appellate review tells a different story.

NYCDL's study included 154 above-guidelines sentences appealed by defendants arguing that the sentence was unreasonable. Only seven of these sentences were found to be unreasonable. *See* App. at 2a. But, the courts of appeals have been far less deferential, and nearly intolerant, when a district court exercises its discretion to impose a below-guidelines sentence. The government has appealed 71 below-guidelines sentences and achieved *60* reversals. *Id.*[5]

NYCDL's study also reveals that the formal adoption of a presumption of reasonableness for within-guidelines sentences seems to affect the review of even those sentences not within the guidelines. In the circuits that have formally adopted this presumption, there were 51 below-guidelines sentences appealed by the government. *Forty-seven* of these sentences were vacated as unreasonable. *Id.* at 3a. In those circuits not formally invoking a presumption, the government has prevailed in 13 of its 20 appeals. *Id.*[6]

The reasonableness review outcomes are especially non-parsimonious in some circuits. In the First, Fourth, and Fifth Circuits, the government has been successful in all of

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[5] Although it is likely that the government is somewhat more selective in its appeals, the stark difference between the findings for above- and below-guidelines sentences suggests that selectivity cannot explain everything.

[6] Additionally, below-guidelines sentences have proved immune from reversal when a *defendant* appeals (0 reversals despite 138 appeals, App. at 2a), and some courts appear to have suggested that in these circumstances, defendants have nothing legitimate to complain about. *See, e.g.*, *United States v. Griffin*, 187 Fed. Appx. 13, at *3 (1st Cir. 2006) (rejecting defendant's argument for a lower sentence because "a sentence below the guideline range … suggests mitigating factors are already at work"); *United States v. Peyla*, 2006 WL 3610113, at *2 (7th Cir. 2006) (finding "nothing unreasonable" about a sentence that was already one month below the guidelines range).

its below-guidelines sentence appeals. *Id.* at 5a-6a (First Circuit, 4/4; Fourth Circuit, 9/9; Fifth Circuit, 5/5). In the Second, Third, Seventh, Tenth, and Eleventh Circuits, no defendant has successfully challenged an above-guidelines sentence as unreasonable. *Id.* at 5-6 (Second: 0/6; Third: 0/10; Seventh: 0/8; Tenth: 0/8; Eleventh: 0/23). The pattern in the Eighth Circuit exemplifies how far the circuits have strayed from the statute: there, only one of 22 above-guidelines sentences appealed by defendants has been reversed, in stark contrast to the *27 of 28* below-guidelines sentences appealed by the government that have been vacated as unreasonable. *Id.* at 4a, 132a-34a, 137a-41a.

The message that emerges from this pattern of appellate review is one that discourages district courts from the exercise of thoughtful discretion in service to the full range of considerations Congress articulated in Section 3553(a).[7] The influence of the circuits' singular focus on the guidelines is illustrated by cases like Mr. Rita's where substantial evidence is presented regarding the particular defendant's circumstances indicating that a sentence below the guidelines range would be "sufficient, but not greater than necessary," to achieve congressional sentencing purposes. Mr. Rita was a decorated veteran who served in the Vietnam and Gulf Wars; suffers from serious health problems due to exposure to Agent Orange and an injury suffered in military service; and made a strong showing that he would likely be the target of prison violence due to his lengthy civilian government service including as an immigration officer and investigator for the Department of Homeland Security. Petition for Writ of Certiorari, *United*

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[7] NYCDL's findings may underestimate the non-parsimonious impact of the courts of appeals reasonableness review. These numbers do not capture those within-guidelines sentences that were not appealed, or the significant number of appeals that continue to challenge *only* the guidelines calculation. *E.g.*, *United States v. Hernandez-Castillo*, 449 F.3d 1127, 1130 (10th Cir. 2006) ("Mr. Hernandez-Castillo does not challenge the reasonableness of the sentence imposed by the district court.").

States v. Rita at 13-16, No. 06-5754 (2006). Surely these facts provide a sound basis under Section 3553(a) for a sentence below the nearly three-years' imprisonment suggested by the guidelines. But the district judge and court of appeals, drawn to the anchors provided by the guidelines, rotely opted for a guidelines sentence without any clear justification other than that it was a guidelines sentence.

A presumption in favor of guidelines sentencing, and the actual results of that presumption, necessarily pressure district courts—especially in close cases—toward imposing within-guidelines sentences to avoid the risk of reversal. It is therefore not surprising that the Commission's latest data show that, as the guideline-centric patterns and rulings have emerged from the courts of appeals, district judges over the last six months have less frequently sentenced outside of the guidelines. U.S. Sentencing Commission, Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2006 Data Through September 30, 2006. The message sent is clear when the courts of appeals affirm nearly all within- and above-guidelines sentences and reverse most below-guidelines sentences.[8] The signal is to employ less discretion, except if imposing a higher sentence—which is precisely the *opposite* of what the parsimony provision of Section 3553(a) expressly requires.

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[8] The circuits not expressly adopting a presumption have still made clear to district courts that sentences within the guidelines range will ordinarily be affirmed. *See*, *e.g.*, *See United States v. Pelletier*, 2006 U.S. App. LEXIS 29214, at *26-27 (1st Cir. 2006) ("[A] defendant who attempts to brand a within-the-range sentence as unreasonable must carry a heavy burden."); *United States v. Fernandez*, 443 F.3d 20, 27 (2d Cir. 2006) ("We recognize that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances."); *United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) ("[A] within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range …."); *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005) ("[O]rdinarily we would expect a sentence within the Guidelines range to be reasonable.").

See, e.g., *United States v. Hartley*, CR No. 2:06-00017, Tr. 7:24-9:24, Aug. 10, 2006, *available at* www.fd.org/HartleyTranscript8.10.06 (The Court: "[T]he Fourth Circuit Court of Appeals … has established a pretty rigid view that the guidelines are not only presumptively reasonable, but the requirement is that in order to sentence outside the guidelines, you have to show that the guideline sentence is in some fashion unreasonable it almost seems.").

II. INATTENTIVENESS TO THE TEXT OF SECTION 3553(a) HAS SKEWED REASONABLENESS REVIEW

This Court has instructed the courts of appeals to review district courts' compliance with Congress's parsimony statute for unreasonableness, "guid[ed]" by "Section 3553(a)['s] … numerous factors." *Booker*, 543 U.S. at 261, 264.

A. Section 3553(a) Requires District Courts To Consider Seven Factors And To Impose A Sentence Sufficient But Not Greater Than Necessary To Comply With Congress's Statement Of The Purposes Of Sentencing

"[I]n any case of statutory construction, [this Court's] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted). The language of Section 3553(a) is plain: it instructs district courts to "consider" a number of factors, but has only one mandate—the "court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." 18 U.S.C. § 3553(a) (emphasis added).[9]

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[9] Previously, the parsimony provision had to be applied in conjunction with the statute's primary mandate—§ 3553(b)'s requirement that the court *shall* impose a guidelines sentence unless there was a basis for a guidelines departure. In *Booker*, however, this Court excised § 3553(b), after concluding that "[t]he remainder of the Act 'functions independently,'" 543 U.S. at 259 (citation omitted), leaving the parsimony

The words of Section 3553(a) should be given their "ordinary meaning." *Jones v. United States*, 529 U.S. 848, 855 (2000) (citation omitted). Here, the parsimony provision uses "the mandatory [term] 'shall,' which normally creates an obligation impervious to judicial discretion." *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Bd. of Pardons v. Allen*, 482 U.S. 369, 374 (1987) (The "use of the word shall" signifies "mandatory language."); *United States v. Vonner*, 452 F.3d 560, 565 (6th Cir. 2006) ("Complying with Section 3553(a) is not optional."), *vacated by* 2006 U.S. App. LEXIS 27661 (6th Cir. 2006). This Court's opinion in *Booker* itself recognizes that "shall" binds district judges. 543 U.S. at 249 (explaining that Section 3553(b), providing that courts "shall" follow the guidelines, renders them "mandatory").

In serving the statute's parsimony mandate, a district court "shall consider" seven specific sentencing factors in determining the parsimonious sentence that the court *shall impose*. 18 U.S.C. § 3553(a) (emphasis added).[10] "Consider," of course, is commonly understood to mean, "to think about," Webster's New World Dictionary 303 (2d College Ed. 1984), and it requires contemplation, but does

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provision as the only direct statutory mandate that the district court must follow. The purposes that Congress set forth in paragraph (2) are "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and 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)(2)(A)-(D).

[10] The factors (apart from the guidelines, *see* 18 U.S.C. § 3553(a)(4)) that a district court shall "consider" are: "the nature and circumstances of the offense and the history and characteristics of the defendant," the sentencing policies set forth by Congress, "the kinds of sentences available," pertinent policy statements from the Commission, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," and "the need to provide restitution to any victims of the offense." *Id.* §§ 3553(a)(1)-(3), (5)-(7).

not go so far as to require action based on that contemplation. The statute thus instructs district courts to impose a "sentence sufficient, but not greater than necessary to comply with the purposes of paragraph (2)" and in the process of reaching that determination, the court must think carefully about six additional factors, only one of which is the advisory-guidelines range. "[S]ubsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence." *Booker*, 543 U.S. at 234. There is no hierarchy among the factors a district court must "consider" and nothing in the statutory language supports an interpretation that Section 3553(a)(4)(A) is entitled to more weight than other factors. As Justice Scalia observed, "[t]he statute provides no order of priority among all those factors." *Id.* at 304-05 (dissenting in part). "Where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989) (citation omitted).

B. A Presumption Of Reasonableness For Within-Guidelines Sentences Is Incompatible With The Text Of Section 3553(a)

At least seven circuits have adopted an explicit presumption of reasonableness and endorsed an approach to sentencing that is less parsimonious and less individualized than the statute unambiguously requires. This is true of at least the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits,[11] where a "defendant can rebut this presumption only by demonstrating that his or her [guidelines] sentence is unreasonable *when measured*

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[11] *See United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006).

against the factors set forth in § 3553(a)." *Mykytiuk*, 415 F.3d at 608 (emphasis added).

Because the guidelines had primacy and were legally binding before *Booker*, it is perhaps not surprising that circuit courts have elevated the guidelines above the other factors enumerated in Section 3553(a) when conducting reasonableness review. But an affinity for within-guidelines sentences—whether through a formal presumption of reasonableness or a pattern of affirmances—is inconsistent with Section 3553(a) in two respects.

First, it endows the guidelines with a special, most-favored status among Section 3553(a)'s factors that is nowhere in the words of the statute enacted by Congress (and left unchanged in two years since *Booker*) or this Court's opinion in *Booker*. Such a construction would effectively read out of the statute and functionally nullify Sections 3553(a)(1)-(3) and Sections 3553(5)-(7). Courts, however, "are obliged to give effect, if possible, to every word Congress used," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), and where "[t]he statute admits a reasonable construction which gives effect to all of its provisions … [this Court] will not adopt a strained reading which renders one part a mere redundancy," *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 308 (1961).

This Court has invalidated other judicially created presumptions based on the satisfaction of one factor where Congress has enumerated a list of factors to be "considered." In *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994), the Court held that a presumption against fair use based solely on the commercial nature of a parody was incompatible with section 107 of the Copyright Act, which lists four factors for courts to "consider[]" in determining whether an artistic work is fair use. *Id.* at 577. This Court explained: "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis … . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed

together, in light of the purposes of copyright." *Id.* at 577-78 (citations omitted).

The courts adopting a presumption of reasonableness for within-guidelines sentences have effectively done what *Campbell* prohibits—they have interpreted Section 3553(a)'s directive to "consider" the guidelines to mean "follow unless," by some undefined quantum of evidence, the defendant can prove that a guidelines sentence is inappropriate. The presumption "indicate[s] that the Guideline range *is* to be used unless (by some evidentiary standard) a party can prove to the contrary. That is much more than a mere consult for advice, and the Guidelines are to be no more than that." *United States v. Zavala*, 443 F.3d 1165, 1169 (9th Cir.) (emphasis in original), *vacated by* 462 F.3d 1066 (9th Cir. 2006); *accord United States v. Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006). Because of heavy criminal caseloads, it is perhaps understandable why circuits might look for convenient "bright-line rules" like a presumption of reasonableness to simplify their appellate task. But, as in *Campbell*, this Court should make clear that, when the statutory text demands a refined case-by-case analysis, courts of appeals may not create extra-textual doctrines in an effort to evade congressionally-imposed responsibilities.

Second, the "guidelines unless" approach promotes an unthinking and reflexive adherence to the guidelines, especially in close cases where, absent the presumption, a below-guidelines sentence would be "sufficient, but not greater than necessary" to meet the purposes of sentencing.[12] The presumption, therefore, cannot be

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[12] Though the courts of appeals half-heartedly reject the suggestion that the presumption says anything about sentences outside of the range, *Green*, 436 F.3d at 457 ("A sentence falling outside of the properly calculated Guidelines range is not *ipso facto* unreasonable."), at the very least, the presumption "cast[s] a discouraging shadow on trial judges who otherwise would grant variances in exercising their independent judgment." *United States v. Buchanan*, 449 F.3d 731, 740 (6th Cir. 2006) (Sutton, J., concurring).

reconciled with the parsimony provision established by Congress as the primary directive in Section 3553(a).[13]

Confronted by text intolerant of that presumption, most courts have simply chosen to ignore the parsimony provision. *See United States v. Jimenez-Beltre*, 440 F.3d 514, 525 n.8 (1st Cir. 2006) (en banc) (Lipez, J., dissenting) (noting that the parsimony provision has received "scant attention"). Only a handful of the more than 1,500 decisions examined in NYCDL's study even mention the parsimony provision. *Cf.* Douglas A. Berman, *Crack sentencing and the anti-parsimony pandemic*, Sentencing Law & Policy Weblog, available at http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/crack_sentencin.html (noting that circuit courts reversing below-guidelines crack sentences have consistently avoided any mention of the parsimony provision).

Some courts applying the presumption of reasonableness have all but acknowledged that the presumption is inconsistent with parsimony. In *United States v. Wurzinger*, 467 F.3d 649, 653 (7th Cir. 2006), for example, the Seventh Circuit held that "[w]hile we say nothing about whether a lower sentence would have been equally reasonable, age and illness do not, in the face of the circumstances presented here, make Wurzinger's sentence unreasonable." But, if the parsimony provision has any meaning, then in the face of two equally sufficient sentences, the court *must* impose the lower sentence. *See*, *e.g.*, *United States v. Carey*, 368 F. Supp. 2d 891, 895 n.4 (E.D. Wis. 2005) (Adelman, J.) ("When two sufficient and reasonable sentences are potentially applicable, the statute directs the

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[13] *See*, *e.g.*, Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 83 (2005) (concluding that "the structure of section 3553(a), which begins with the parsimony provision "sets overall limits on the crime-control and other purposes which follow"); David L. McColgin & Brett G. Sweitzer, *Grid & Bear It*, 29 Champion 50, 50 (2005) (stating that the parsimony provision "is not just another 'factor' to be considered along with others set forth in Section 3553(a) … —it sets an independent limit on the sentence a court may impose").

court to choose the lesser one."); *United States v. Yopp*, 453 F.3d 770, 774 (6th Cir. 2006) (finding that a higher sentence imposed by the district court violated the parsimony provision where the district court also articulated a lower sentence that would satisfy the purposes of sentencing).

Some courts have even concluded that other statutory factors to be "consider[ed]" can outweigh the mandate of the parsimony provision. *See, e.g.*, *United States v. Davis*, 458 F.3d 491, 495-96, 500 (6th Cir. 2006) (vacating below-guidelines sentence and concluding that adherence to the guidelines in order to avoid sentencing disparities outweighed parsimony provision's directive). More courts have suggested that the guidelines sentences themselves embody "sufficient" punishment—a conclusion supported by the courts of appeals' penchant for affirming all within-guidelines sentences and finding below-guidelines sentences unreasonable. *See, e.g.*, *United States v. Charles*, 467 F.3d 828, 833 (3d Cir. 2006) (rejecting defendant's challenge to a high-end guidelines range sentence based on the parsimony provision). That a sentence is "sufficient," however, says nothing about whether it is "greater than necessary."

III. THE SENTENCING COMMISSION'S OWN ANALYSIS HIGHLIGHTS THE FLAWS OF A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES

Several courts have presumed that within-guidelines sentences are reasonable because they believe that the guidelines take into account all of the other Section 3553(a) factors and that they further all of the goals of sentencing. Both beliefs are misguided. The guidelines were not promulgated to comply with the parsimony provision, and the Commission itself has found that the guidelines sentencing system "has fallen short … in several respects." USSC Assessment Report at 144.

A. The Guidelines Do Not Take Into Account All Of The Sentencing Factors That Congress Requires District Courts To Consider

Many courts have justified the presumption of reasonableness on the theory that the guidelines already take into account all of the other Section 3553(a) factors. That is wrong as a textual matter. The statutory instructions that Congress gave to the Commission do not task it with deciphering Section 3553(a)'s command that sentencing courts "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment. Additionally, when developing and revising the guidelines, the Commission has never fully explored—nor even formally addressed—whether the guidelines serve this mandate.

Further, the process by which the guidelines were created, and the Commission's own statements regarding their deficiencies, undermine any claim that the guidelines render the Section 3553(a) factors extraneous. Congress directed the Commission to promulgate guidelines to further the purposes of sentencing enumerated in Section 3553(a)(2)—just punishment, deterrence, protection of the public, and effective education and treatment for offenders. The Commission, however, was comprised of members with wide-ranging beliefs on criminal justice. Consequently, the guidelines represent "compromises and contradictions in both the goals to be achieved by sentencing reform and in the mechanisms created to achieve them." USSC Assessment Report at 3. Importantly, the original Guidelines Manual suggests that the Commission considered only "just deserts" and "crime control," rather than all of the statutory purposes, when promulgating the guidelines. *See* U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988).

In addition, the Commission itself has recognized that it could not "anticipate and describe in general guidelines every possible circumstance relevant to sentencing in every case." USSC Assessment Report at 32. The "difficulty of foreseeing and capturing a single set of Guidelines that

encompasses the vast range of human conduct potentially relevant to a sentencing decision" prompted the Commission to permit departures from the guidelines, even under a mandatory guidelines scheme. United States Sentencing Commission, Downward Departures from the Federal Sentencing Guidelines 3 (2003) (quoting U.S.S.G., Ch. 1, Pt. A (4)(B) (Apr. 13, 1987)). The belief that the guidelines account for all relevant sentencing factors is also inconsistent with this Court's decision in *Koon*. There, this Court observed that "the Commission chose to prohibit consideration of only a few factors, and not otherwise to limit, as a categorical matter, the considerations that might bear on the decision to depart." 518 U.S. at 94.

At the same time, however, the Commission has added additional, only marginally relevant, factors to be evaluated in calculating a defendant's offense level. This has led to what the Commission has called "factor creep" in which "[a]djustments that appear necessary to achieve proportional punishment may in actuality result in arbitrary distinctions among offenders." USSC Assessment Report at 137. According to the Commission, "[c]omplex rules with many adjustments may foster a perception of a precise moral calculus but on closer inspection this precision proves false." *Id.* And, "as more and more adjustments are added to the sentence rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness." *Id.* "Factor creep" has also been largely upward, while the Commission has rejected consideration of significant mitigating factors that bear upon personal culpability. *See*, *e.g.*, *United States v. Davern*, 970 F.2d 1490, 1503 (6th Cir. 1992) (en banc) (Merritt, C.J., dissenting) ("The Commission has simply ignored many of the provisions of the statute that weigh in favor of leniency … .").

The Commission's own series of reports on recidivism also show that many factors affecting deterrence (a statutory goal) are not captured by the guidelines. These reports indicate that factors such as age, marital status,

employment history, and educational advancement affect recidivism rates. *See* U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, a Component of the 15 Year Report 29 (2004). Yet the guidelines' policy statements proclaim that these factors "are not ordinarily relevant" to a district court's sentencing decision. U.S.S.G. §§ 5H1.1 (age), 5H1.2 (education), 5H1.5 (employment record) 5H1.6 (family ties) (2006).

More specifically, Section 3553(a)(1) requires a district court to "consider the nature and circumstances of the offense and the history and characteristics of the defendant." *See also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). The guidelines, of course, are generalizations and cannot possibly take into account the history and characteristics of any particular defendant. And, the guidelines specifically *prohibit* consideration of many of a defendant's personal characteristics, including lack of guidance as a youth, U.S.S.G. § 5H1.12, drug or alcohol dependence, *id.* § 5H1.4, and post-sentencing rehabilitation, *id.* § 5K2.19. Other discouraged factors include mental or emotional conditions, *id.* § 5H1.3, physical condition, *id.* § 5H1.14, family responsibilities, *id.* § 5H1.6, and public service or military contributions, *id.* § 5H1.11. But, as Judge Merritt has pointed out: "that the Commission has abdicated its duty to consider the 'purposes' of sentencing and the personal characteristics of defendants does not authorize a court to abdicate its duty to impose a sentence 'not greater than necessary' under § 3553(a)." *Davern*, 970 F.2d at 1503 (dissent). Rather, as this Court held in *Booker*, sentencing courts must "consider 'the nature and circumstances of the offense and the history and characteristics of the defendant.'" 543 U.S. at 249 (quoting § 3553(a)(1)).

B. The Sentencing Commission Has Found That The Guidelines Can Result In Sentences That Do Not Effectively Serve The Goals Of Section 3553(a)

The courts of appeals have ignored the Commission's own findings that in some respects the guidelines are flawed and have not "worked as intended." USSC Assessment Report at xvi.

The Commission Has Reported Disparity At The Pre-Sentencing Stages

The Commission has reported that "a variety of evidence developed through the guidelines era suggests that the mechanisms and procedures designed to control disparity arising at presentencing stages are not all working as intended," USSC Assessment Report at xii, 82, and that "significant evidence suggests that presentencing stages introduce disparity in sentencing," *id.* at xvi. Charging decisions and the non-uniform standards for the preparation of pre-sentencing reports foster and perpetuate disparities between similarly situated offenders. *Id.* at 82-86. Statutory enhancements are unevenly charged by prosecutors in different districts across the country. *Id.* at 90. Regional disparities, which "may have even increased among drug trafficking offenses" under the guidelines, *id.* at 94, are also caused by prosecutors' decisions with respect to substantial assistance motions, *id.*, and by "irregular and inconsistent policies and practices among the various districts," *id.* at 104.[14] In addition, many pre-sentencing decisions "disproportionately disadvantage minority offenders." *Id.* at 91. Not only have the guidelines mechanisms designed to address these disparities failed to work as intended, they work badly "*in one direction*," *id.* at 92 (emphasis added), by authorizing enhanced sentences

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[14] Commentators have found that regional disparity has "more than tripled after implementation of the Guidelines." Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 101 (2005).

even for uncharged or dismissed conduct, but by providing no comparable mechanism to reduce sentences for conduct that was inflated by charging decisions, *id.*

A chief goal of the remedy this Court adopted in *Booker* was to minimize the impact of prosecutorial charging and bargaining choice at sentencing. 543 U.S. 257 (rejecting the dissenters' remedy in part because it would vest prosecutors with discretionary power that properly resides with judges). Moreover, as Justices of this Court and lower court judges have recognized, "[m]ost of the sentencing discretion should be with the judge, not the prosecutors" and "a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided." Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; *see also Davern*, 970 F.2d at 1508 (Merritt, C.J., dissenting) (stating that under the mandatory guidelines, "[t]he prosecutors … effectively control both the charging and the sentencing system[] [a]nd to an ever-increasing extent, the two are one and the same"). Unfortunately, the Commission's assessments have revealed that, under rigid enforcement of the guidelines, "discretionary decisions by law enforcement officers and prosecutors at presentencing stages have greater influence …, since later actors [that is, judges] have fewer opportunities to ameliorate any effect of disparate treatment prior to sentencing." USSC Assessment Report at 99. After *Booker*, however, the guidelines are only one of seven factors for the judge to consider in fashioning a sentence, and judges now have greater opportunity to remedy disparate presentencing treatment through reasoned decisions to move away from the guidelines' recommendations in appropriate cases.

Problems With The Drug Guidelines

Drug offenses make up the largest portion of the federal criminal docket, but "the guidelines' Drug Quantity Tables[] fail in some cases to reflect the relative harmfulness of

different drugs." USSC Assessment Report at vii. The guidelines' quantity-based approach and relevant conduct rules have "had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." *Id.* at 49. These tables, as a result, greatly elevate the importance of *quantity* over other offense characteristics. *Id.* at 50. As the Commission has found, quantity can be "a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making." *Id.* at 52. The Commission's findings point out that rigid adherence to all of the drug trafficking guidelines can and will result in sentences that are *greater than necessary* to comply with the purposes of sentencing set forth by Congress.[15]

Problems With The Career Offender Guideline

The Commission has also found that the career offender guideline has a disproportionate impact on low-level and minority drug offenders without serving any justifiable purpose. The Commission's evidence shows that "recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions … are much lower than [for] other offenders who are assigned to criminal history category VI." USSC Assessment Report at 134. In fact, these offenders' recidivism rates are more similar to those of offenders in lower criminal history categories "in which they would be placed under normal criminal history scoring rules" absent the career offender guideline. *Id.* at 134. The Commission has concluded that "[t]he career offender guideline … makes the criminal history category a *less* perfect measure of

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[15] Although some of these problems result from the statutory mandatory minimum, the guidelines themselves often dictate the actual sentence, significantly increasing average sentence length by "[a]bout 25 percent, or eighteen months" *above* the mandatory minimums. *Id.* at 54 (Commission statistic for offenders sentenced in 2001).

recidivism than it would be without the inclusion of offenders qualifying only because of prior drug offenses." *Id.* (emphasis in original).

Other Sources Of Unwarranted Guidelines Disparity

The guidelines have also *increased* sentencing disparities based on race, USSC Assessment Report at 115, and "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation." *Id.* at 137.[16] The Commission also reports that "unexplained differences in the sentencing of women compared to men are greater than any unexplained differences in the sentencing of different racial and ethnic groups." *Id.* at 118. The Commission's empirical work indicates that a nine-month gender disparity in the average sentence imposed before the guidelines has been replaced by a 23-month gender disparity in the average sentence imposed during the guidelines regime. *Id.* at 127-28 & fig. 4.9.

All of these findings have led the Commission to conclude that "some of the gap may result from sentencing rules that have a disproportionate impact on a particular offender group *but that serve no clear sentencing purpose*." *Id.* at 131 (emphasis added). The courts of appeals' assumption that "disparities are at their ebb when the Guidelines are followed," *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006), is thus contradicted by the Commission's own empirical evidence and statements.

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In sum, the Sentencing Commission, after comprehensive study and in-depth analysis of actual sentencing data, has concluded that "[a]ttention might fruitfully be turned to asking whether [certain guideline] policies are necessary to achieve *any legitimate purpose of*

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[16] *See also* Alschuler, *Disparity*, at 103; Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161 (1991).

sentencing," USSC Assessment Report at 135, and "the reformed sentencing system has fallen short of th[e] ideal in several respects," *id.* at 143-44, by failing to fully achieve "the goals of sentence reform," *id.* at 144. The Commission's compelling evidence shows that many of the effects of the guidelines are neither deliberate nor in furtherance of any legitimate sentencing purpose, and that these flaws have led to sentences that are greater than necessary to achieve the goals of sentencing, thus contravening the parsimony provision. As a result, sentences under the guidelines as well as rates of imprisonment have increased dramatically from pre-guidelines levels. *Id. a*t vi.[17] These facts undermine the basis for the courts of appeals' ill-conceived presumption and slavish adherence to the suggested sentencing ranges.

IV. A DISTRICT COURT MUST STATE ON THE RECORD ITS REASONS FOR THE SENTENCE IMPOSED

Although a detailed discussion of the third question presented is beyond the scope of this brief, NYCDL does believe that in order for the post-*Booker* sentencing system to operate in a fair, just, and individualized manner, and to allow for meaningful appellate reasonableness review, district courts must state, on the record, the reasons for the sentence imposed. Prior to the guidelines, "[j]udges were not required to explain the reasons for their sentences, and the sentences themselves were largely immune from appeal." USSC Assessment Report at xviii. The Sentencing Reform Act and the guidelines were designed to inject transparency into the sentencing system. As the Commission has noted, "appellate courts cannot perform their assigned functions without the cooperation of other participants in the system. Appellate review depends on

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[17] "Between November 1987 and 1992, the average prison terms served by federal felons more than doubled." USSC Assessment Report at vi; *see also id.* ("[F]ederal offenders sentenced in 2002 will spend almost twice as long in prison as did offenders sentenced in 1984.").

clear fact findings and statements of reasons by the sentencing courts to provide a sufficient record for review." *Id.* at 35; *see also* 18 U.S.C. § 3553(c); *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) (Posner, J.) ("[W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise. A rote statement that the judge considered all relevant factors will not always suffice."). The absence of a requirement that district courts explain the reasons for the sentence imposed (like the presumption) increases the incentives for a "busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors." *Cunningham*, 429 F.3d at 679. This risk "cannot be ignored." *Id.*

CONCLUSION

A proper interpretation of Section 3553(a) and an appreciation of the limitations of the guidelines is necessary for courts to exercise reasoned judgment when "impos[ing] sentences sufficient, but not greater than necessary to comply with the purposes of paragraph (2)." "Although the guidelines were legally complex … the bottom-line judgments were largely mechanical once the offense level and the criminal history numbers were calculated. … But now the bottom-line judgments are not mechanical. They must now be more nuanced judgments that reflect both the guidelines analysis and the larger context of the sentencing factors and purposes identified in section 3553." *Jimenez-Beltre*, 440 F.3d at 528 (Lipez, J., dissenting). The nuanced approach mandated by Section 3553(a) "requires courts of appeals to evaluate each sentence *individually* for reasonableness." *Booker*, 543 U.S. at 312 (Scalia, J., dissenting in part). Indeed, as this Court acknowledged in its remedial opinion, because of the *individualized* review required for each *defendant*, reasonableness review perhaps may not provide the same degree of national uniformity for

groups of offenders that Congress originally sought to secure. *Id.* at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."). If courts comply with the text of Section 3553(a), however, sentencing outcomes will be more reasoned and more consistent than those produced by rigid, unthinking adherence to the guidelines.

There is neither room in the text nor any basis for a presumption that within-guidelines sentences are reasonable applications of Section 3553(a) in light of the Commission's findings. The picture of appellate review that has emerged since *Booker*, as reflected in the NYCDL data, suggests that the courts of appeals are operating in a strongly non-parsimonious fashion. This sends a powerfully discouraging—if not flatly prohibitive—message about the exercise of discretion to district courts. This message has precisely the opposite effect that *Booker* contemplated.

Guidelines sentences should not be presumed reasonable. Instead, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon*, 518 U.S. at 113. Section 3553(a) requires nothing less.

Respectfully submitted,

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