No. 06-5618

In the Supreme Court of the United States

MARIO CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

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

2. In making that determination, is it consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

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OPINION BELOW

The opinion of the court of appeals (J.A. 88-91) is reported at 439 F.3d 479.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2006. A petition for rehearing was denied on April 27, 2006 (J.A. 93). The petition for a writ of certiorari was filed on July 26, 2006, and was granted on November 3, 2006, limited to the questions specified by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-30a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1), and possessing more than five grams of cocaine base, in violation of 21 U.S.C. 844(a). He was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated the sentence and remanded for resentencing.

1. On May 14, 2003, police detectives patrolling an area in St. Louis, Missouri, observed drug trafficking and decided to make a controlled purchase. An undercover detective drove past petitioner, who was standing on the sidewalk, and petitioner flagged him down. The detective stopped the car and told petitioner that he wanted $20 worth of crack cocaine. Petitioner got in the car and handed the detective a plastic bag containing what appeared to be crack. In return, the detective gave petitioner a marked $20 bill. When petitioner left the car, the police arrested him and seized the marked bill from his pocket. A laboratory analysis revealed that the substance in the plastic bag was .23 grams of cocaine base. Petitioner later admitted that he had been in the area to sell crack almost every night for about two and a half months before his arrest. J.A. 14, 50, 88-89; Sealed J.A. 4.

Petitioner was charged with a state drug offense and referred to a drug-court program, in connection with a deferred prosecution. On November 2, 2003, while subject to the diversion program, petitioner was arrested again. Police officers responded to complaints of drug sales at a house at 3455 Oregon. When they arrived, they saw petitioner and another person engaged in what appeared to be a drug transaction on the front porch of the house. When petitioner and the other man saw the officers, petitioner threw down a plastic bag con-

taining what appeared to be crack cocaine, entered the house with the other man, and locked the door. The two men then left the house through the rear. Petitioner ran back toward the front and entered a nearby house without the permission of the occupants, Mary Clemons and her daughter and grandchildren. Petitioner then ran out the back of that house and escaped. A short time later, the officers arrested petitioner at his own house, a few blocks away. A laboratory analysis of the substance petitioner had discarded revealed that it was 5.03 grams of cocaine base. J.A. 14-15, 50-51, 55-58, 89; Sealed J.A. 4-6.

Petitioner was charged in a superseding indictment with distributing cocaine base in May 2003 and possessing more than five grams of cocaine base in November 2003. He pleaded guilty to both charges. J.A. 1-2, 7-16; Sealed J.A. 3.

2. After the guilty plea but before sentencing, see J.A. 1-3, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. *Id.* at 226-244. As a remedy for that constitutional violation (*id.* at 244-268), the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-246 (citations omitted). The Court also severed an appellate-review provision, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which had served to reinforce the mandatory nature of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," under

which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261.

3. a. Petitioner faced a statutory sentence of up to 20 years of imprisonment on each count. J.A. 11. In calculating petitioner's offense level, the Presentence Investigation Report (PSR) began with a base offense level of 26 under the drug-trafficking Guideline, Section 2D1.1(a)(3) and (c)(7), because the amount of crack exceeded five grams; added two levels under Section 3C1.2 because petitioner recklessly created a substantial risk of death or serious bodily injury when he fled into the Clemons home; and subtracted three levels for acceptance of responsibility under Section 3E1.1. That calculation resulted in a total offense level of 25, which, when combined with a criminal history category of I, yielded a Sentencing Guidelines range of 57 to 71 months of imprisonment. Because the offense involved more than five grams of cocaine base, however, petitioner was subject to a statutory minimum prison term of five years under 21 U.S.C. 844(a). Under Sentencing Guidelines § 5G1.1(c)(2), the advisory range was therefore 60 to 71 months. Sealed J.A. 5-6, 9.

Petitioner objected to the PSR, claiming that an enhancement for reckless endangerment was unwarranted. He also claimed that he satisfied the "safety valve" criteria of 18 U.S.C. 3553(f) and Sentencing Guidelines § 5C1.2. The district court sustained the objections, thus lowering the advisory range and eliminating the statutory mandatory minimum. As a consequence of those rulings, petitioner's offense level was 21, and his Guidelines range was 37 to 46 months. J.A. 24-30, 53-63, 69; Sealed J.A. 15.

b. Petitioner urged the district court to impose a sentence below the advisory Guidelines range. He argued that a lower sentence was warranted because of the relatively small amount of drugs seized from him; his status as a street-level

dealer; the fact that he had not engaged in any dangerous or aggravating conduct; the disparity between crack-cocaine and powder-cocaine sentences; his family's reliance on him; his lack of criminal history and positive post-arrest conduct, which, he claimed, indicated that he was unlikely to commit crimes in the future; and his youth (he was born in December 1983). J.A. 19-23, 30-31, 63-67; Sealed J.A. 2.

In response, the government argued that the facts did not support petitioner's assertion that he was unlikely to commit additional crimes and that petitioner's commission of a second drug offense six months after his first arrest proved the contrary. In any event, the government pointed out, the "safety valve" had already substantially reduced petitioner's sentencing range based on his lack of criminal history and assumed lower likelihood of recidivism. The government also noted that petitioner's economic support for his family had, by his own admission, come in part from dealing drugs; that he had engaged in dangerous, aggravating conduct in invading the Clemons home; and that the difference in sentences between crack cocaine and powder cocaine reflected a permissible policy decision by Congress, the body with the authority to make such decisions. J.A. 34-35, 59-60, 67-69.

c. In announcing its sentence, the district court expressed concern that petitioner would commit additional drug offenses:

> You pled guilty to * * * two separate sales. You were arrested after the first sale, but that didn't stop you. You went ahead and sold again.
>
> * * * And I can't figure out if you were just unlucky or if you're stupid. I hope you are not stupid, because if you are, you're going to do this again. Selling drugs is not the way to support yourself [and] your family. * * *

> * * * I hope you give some serious thought to that, because I am very concerned that, because you're so young, you don't fully realize the effect of what you've done has on your family and what it is going to have on you and your future.

J.A. 69-70. The court also expressed the view that petitioner's drug crimes were "very serious" and that his invasion of the Clemons' home was "unforgivable." J.A. 71-72.

The district court went on to explain, however, that it believed that a sentence of 37 months, the bottom of the Guidelines range, would be excessive:

> I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.
>
> However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.
>
> I don't think that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger—a much [sic] amount of drugs—and the sentence that they receive, I don't believe that 37 months is commensurate in any way with that.

> As I said before, I do believe some term of imprisonment is appropriate in your case. And I hope that you don't view this as just the cost of doing business.

J.A. 71-72. The court then imposed a sentence of 15 months of imprisonment. J.A. 72, 78; Sealed J.A. 17.

4. The government appealed, contending that "the sentence [w]as unreasonable under 18 U.S.C. § 3553(a)." J.A. 88. Agreeing with the government, the court of appeals vacated the sentence and remanded for resentencing. J.A. 88-91.

The court of appeals noted that, although the Sentencing Guidelines are no longer mandatory, district courts are still required to take them into account, together with the other sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). J.A. 89. The court explained that, when, as in this case, the district court has correctly calculated the advisory Guidelines range, the court of appeals will "review the resulting sentence for reasonableness, a standard akin to * * * traditional review for abuse of discretion." J.A. 90. "A 'range of reasonableness,'" the court stated, "is within the [district] court's discretion." *Ibid.* (citation omitted). The court observed that a sentence within the advisory Guidelines range "is presumed reasonable," because the "Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study." *Ibid.* The court added, however, that a sentence outside the advisory Guidelines range will also be found reasonable "so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a)," with a proportionately more compelling justification required as the extent of the variance from the Guidelines range increases. *Ibid.* (quoting *United States* v. *Johnson*, 427 F.3d 423, 426 (7th Cir. 2005)). In particular, the court said, "[a]n extraordinary reduction must be supported

by extraordinary circumstances." J.A. 91 (quoting *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005)).

Applying those principles, the court of appeals held that the sentence imposed in this case was unreasonable. J.A. 90-91. The court explained that the 15-month sentence reflected a "sixty percent downward variance" from the bottom of the 37-to-46-month advisory Guidelines range, that 60% was "an extraordinary variance," and that it was "not supported by comparably extraordinary circumstances." *Ibid.* In finding a lack of extraordinary circumstances, the court explained that petitioner's lack of criminal history "was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence"; that the small quantity of drugs "was taken into account in determining his guidelines range" and that it was a "fair inference" that he "distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police"; and, finally, that petitioner "committed a second serious drug offense six months after his first arrest," such that he "has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency." J.A. 91.

SUMMARY OF ARGUMENT

I. A court of appeals conducting reasonableness review under *United States* v. *Booker*, 543 U.S. 220 (2005), should apply a principle of proportionality to assess whether a non-Guidelines sentence that varies significantly from the advisory range is a reasonable sentence. Such a principle is essential to fulfill *Booker*'s expectation that appellate review would move sentences in Congress's preferred direction of greater uniformity.

The undisputed central purpose of the Sentencing Reform Act of 1984 (SRA) was to reduce unwarranted disparities in sentencing. Among the means for achieving that aim were

creation of an expert agency to promulgate sentencing guidelines, a legislative definition of the purposes of sentencing, and appellate review to reduce disparate outcomes. *Booker* held that the mandatory character of the Sentencing Guidelines violated the Sixth Amendment. But the Court remedied that defect by severing the provisions mandating compliance with the Guidelines and leaving intact other critical features of the SRA that it believed would further Congress's "basic sentencing intent" of moving sentences towards greater uniformity. 543 U.S. at 264. One of those features was appellate review.

Proportionality review is a critical means of ensuring that appellate review succeeds in tending "to iron out sentencing differences." *Booker*, 543 U.S. at 263. Review for unreasonableness must be tied to objective, quantitative benchmarks or it cannot reduce unwarranted disparity. Courts of appeals cannot create national measures of generally fair and just sentences. And review of sentences ad hoc would defeat Congress's basic purpose of tending to increase sentencing uniformity. The Sentencing Guidelines provide the only nationally uniform, congressionally endorsed integration of the purposes of sentencing under the SRA.

Proportionality review, which requires a substantial justification for a substantial variance from the Guidelines norm, comports with the remedial decision in *Booker,* the remaining provisions of the SRA, and Congress's intent to reduce sentencing disparity. Indeed, petitioner and his amici offer no alternative that would even roughly reduce disparity. To the contrary, petitioner's vision of reasonableness review would abdicate the appellate function and abandon any hope of avoiding the disparities that prompted the SRA.

Nothing in a proportionality approach contravenes the Sixth Amendment. The Court confirmed in *Booker* that a judge's selection of a sentence from within a defined range

does not implicate the Sixth Amendment; the Sixth Amendment is violated only when the judge is legally prohibited from increasing a sentence beyond a specified level absent the finding of a fact neither found by the jury nor admitted by the defendant. The proportionality principle does not require a factual finding to exceed a defined range. A judge may sentence outside the Guidelines based on the facts found by the jury alone and based on a virtually unlimited universe of facts. Proportionality review, of course, does limit the extent of such variances. But *Booker*'s provision for reasonableness review necessarily determined that the Sixth Amendment permits an appellate court to reject a statutorily authorized sentence where no persuasive justification supports it.

No other Sixth Amendment objection casts doubt on proportionality review. Appellate insistence on a strong justification for an usually harsh or lenient sentence does not reinstate mandatory Guidelines. And the experience of courts of appeals provides no support for the view that a proportionality principle deters district courts from exercising their discretion under *Booker*.

II. Petitioner's sentence violates the proportionality principle, and is unreasonable, because the district court varied substantially from the advisory Guidelines range without providing a substantial justification. The district court imposed a sentence of 15 months of imprisonment, which is 22 months, and nearly 60%, below the advisory Guidelines range of 37 to 46 months. The first three stated justifications—petitioner's lack of a criminal record; the drug quantities involved; and his eligibility for the "safety valve"—are common features in a drug case and are, indeed, fully accounted for in calculating the Guidelines range. That does not prohibit the court from relying on those considerations, but it does mean that they cannot justify a substantial variance without inviting widespread disparities. The district court did not find that the

first three considerations made the case unusual in any way, and there is no basis in the record for any such finding. If anything, petitioner's offense level and criminal history category *under*state his culpability: petitioner admitted that he sold crack nearly every day for approximately two and a half months before his first arrest, and he was arrested a second time less than six months later. Both facts point to an enhanced likelihood of recidivism, thus making the court's contrary view plainly unsound.

Nor can the last consideration—the assertion that the district court had imposed similar sentences on defendants who committed similar crimes—justify its substantial variance. Because the court did not identify the prior cases it had in mind, an appellate court cannot assess the accuracy of its assertion. Even if the assertion is credited, however, Congress's goal was one of *nationwide* sentencing uniformity, not uniformity in a single court. The goal of nationwide uniformity was undermined, not furthered, by the imposition of a sentence in this case far below the advisory Guidelines range.

ARGUMENT

I. APPELLATE REVIEW FOR REASONABLENESS SHOULD REQUIRE A STRONG JUSTIFICATION FOR A SENTENCE THAT SUBSTANTIALLY VARIES FROM THE ADVISORY GUIDELINES RANGE

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court preserved appellate review of sentences under the Sentencing Reform Act of 1984 (SRA or Act), 18 U.S.C. 3551 *et seq*., under an implied standard of review for "reasonableness." *Id.* at 261-264. Although the Court did not "claim that the use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure" in the SRA, the Court expressed confidence that such appellate review would "tend to iron out sentencing differences," *id.* at 264, and thus "move

sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-265 (citing 28 U.S.C. 991(b)). As a majority of the courts of appeals have held, courts reviewing sentences for unreasonableness should apply a principle of proportionality to evaluate whether the sentences are justified based on the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). When a sentence varies substantially from the advisory Guidelines range, a strong justification should be required to establish that the sentence is a "reasonable" one.[1]

A principle that requires substantial variations to be justified by correspondingly strong reasons is essential if appellate review of sentences is to fulfill the function envisioned by this Court. As *Booker* recognized, effective appellate review is vital to advance Congress's basic goal of reducing unwarranted sentencing disparity. The proportionality principle enables appellate review to work together with the advisory Guidelines to move sentencing towards Congress's "basic objectives" of "avoiding excessive sentencing disparities" with

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[1] Eight courts of appeals have adopted the proportionality principle, and none has rejected it. See *United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *Armendariz*, 451 F.3d 352, 358 (5th Cir. 2006); *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006); *United States* v. *Bishop*, 469 F.3d 896, 907 (10th Cir. 2006); *United States* v. *Crisp*, 454 F.3d 1285, 1291-1292 (11th Cir. 2006); cf. *United States* v. *King*, 454 F.3d 187, 195 (3d Cir. 2006) ("significant departure must be adequately supported by the record"); *United States* v. *Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005) (greater explanation is required for sentence outside Guidelines range), cert. denied, 126 S. Ct. 1809 (2006). Cf. *United States* v. *Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006) (court "ha[s] yet to adopt this standard").

sufficient room for individualized punishment. *Booker*, 543 U.S. at 265. Nothing in the SRA or the Sixth Amendment is inconsistent with use of a proportionality principle to identify unreasonable sentences that vary significantly from the advisory Guidelines.

A. The Primary Goal Of the Sentencing Reform Act Is To Reduce Unwarranted Disparities In Sentencing

1. For almost a century before the SRA's enactment in 1984, the federal system "employed * * * a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long." *Mistretta* v. *United States*, 488 U.S. 361, 363 (1989). Further, the district court's "determination as to what sentence was appropriate met with virtually unconditional deference on appeal." *Id.* at 364.

As a result of that broad discretion, "[s]erious disparities in sentences * * * were common." *Mistretta*, 488 U.S. at 365. Disparities occurred "between Federal courts in different parts of the country, between adjoining districts, and even in the same districts." H.R. Rep. 85-1946, at 6 (1958). "[E]mpirical studies repeatedly showed that similarly situated offenders were sentenced [to], and did actually serve, widely disparate sentences." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 883 (1990); see *id.* at 895-897; Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 306-307 (1996); United States Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 8 (1987) (Supplementary Report). Even more troubling, sentencing disparity was often highly correlated with the defendants' race, gender,

and class. See Nagel, 80 J. Crim. L. & Criminology at 883-884, 895-896; Gelacak, 81 Minn. L. Rev. at 306-307.

As early as 1958, Congress recognized and attempted to address the problem of disparity with "the creation of judicial sentencing institutes and joint councils, see 28 U.S.C. § 334, to formulate standards and criteria for sentencing." *Mistretta*, 488 U.S. at 365. But, despite those and numerous other efforts, intolerable disparity continued. See *id.* at 365-366; Supplementary Report 1-4. The underlying source of the problem—unguided and unreviewed judicial discretion in sentencing—remained. See S. Rep. 95-605, at 10, 881-883 (1977); S. Rep. 98-225, at 38, 41 (1983); Edward M. Kennedy, *Toward A New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353, 353-354 (1979); Gelacak, 81 Minn. L. Rev. at 307; *Appellate Review of Sentences*, 32 F.R.D. 249, 270 (1962). Ultimately, Congress—as well as jurists, practitioners, and academics—recognized that the "shameful disparity in criminal sentences [was] a major flaw in the existing criminal justice system" that demanded fundamental reform. S. Rep. 98-225, at 65; see Supplementary Report 8 & n.53; *e.g.*, The Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976); Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972). The call for reform culminated in the passage of the SRA in 1984. See Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987.

2. As this Court emphasized repeatedly in *Booker*, Congress's "basic goal" in enacting the SRA was to promote "increased uniformity" in sentencing and to reduce the unwarranted disparities that had plagued the prior discretionary sentencing regime. 543 U.S. at 253.[2] Even the dissenters

[2] See, *e.g.*, 543 U.S. at 250 ("Congress' basic statutory goal" was "a system that diminishes sentencing disparity"); *id*. at 252 ("the sentencing statute's basic aim" was "ensuring similar sentences for those who have committed similar crimes in

agreed that "[t]he elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim." *Id.* at 292 (Stevens, J., dissenting). And legislators repeatedly stressed the disparity-avoidance goal in supporting the bills that led to the SRA. See, *e.g.*, 121 Cong. Rec. 37,562 (1975) (statement of Sen. Kennedy in introducing legislation that culminated in the enactment of the SRA); S. Rep. 95-605, at 10, 881-883 (describing legislation reported by Senate Judiciary Committee adopting sentencing reform proposal); S. Rep. 98-225, at 37-38, 41-49, 51-53, 65 (Senate Judiciary Committee Report describing bill that was ultimately enacted as the SRA).

The text of the Act embodies the disparity-avoidance goal in numerous provisions that are independent of the provision that made the Guidelines mandatory. The Act created the Sentencing Commission and required it to develop guidelines that "provide certainty and fairness in meeting the purposes of sentencing, [and] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. 991(b)(1)(B); see 28 U.S.C. 994(f). The Act also defined the purposes of sentencing that, "[f]or the first time, * * * will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy." S. Rep. 98-225, at 59; 18 U.S.C. 3553(a)(2). See also S. Rep. 98-225, at 38 (because pre-Guidelines sentencing was often based on an "outmoded rehabilitation model," and federal law failed to provide otherwise,

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similar ways"); *id*. at 253 ("Congress' basic goal in passing the [SRA] was to move the sentencing system in the direction of increased uniformity."); *id*. at 255 ("Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing"); *id*. at 256 ("Congress' basic statutory goal" was "uniformity in sentencing"); *id.* at 267 ("Congress' basic objective" was "promoting uniformity in sentencing").

"each judge [was] left to apply his own notions of the purposes of sentencing," with the "result [that], every day Federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances"). And appellate review of sentences was understood as a vital means of checking unwarranted disparity. See 18 U.S.C. 3742 (2000 & Supp. IV 2004); S. Rep. 98-225, at 65 ("a mechanism to appeal" out-of-Guidelines sentences was considered "essential" if "the reforms [were] to be effective in reducing unwarranted sentencing disparity and achieving overall fairness"); *id.* at 151 (appeals by the government enable "the reviewing courts to correct the injustice arising from a sentence that was patently too lenient"; "This consideration has led most Western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considered it to be a critical part of the foundation for the bill's sentencing structure.").

B. *Booker* Envisions That Appellate Review And Advisory Guidelines Will Work Together To Achieve the SRA's Goal Of Reducing Unwarranted Disparities

1. In *Booker*, this Court held that the Sixth Amendment is violated when a district court imposes a sentence under mandatory Guidelines based on judicial fact-finding that increases the sentence beyond the maximum authorized by the facts reflected in the jury verdict or admitted by the defendant. 543 U.S. at 232-235. The Court therefore concluded that the mandatory Guidelines system enacted by the SRA was not constitutionally permissible. *Ibid.*

But the Court made clear that both the Guidelines and appellate review still have important roles in furthering the Act's original goal of reducing unwarranted sentencing dis-

parities. The Court selected the appropriate remedy for the Sixth Amendment violation by determining which of the available options would be most consistent with Congress's primary goal in enacting the SRA—"a system that diminishes sentencing disparity." *Booker*, 543 U.S. at 250. First, the Court concluded that requiring the jury to determine the facts that increase a defendant's sentence in a mandatory Guidelines scheme would impermissibly frustrate Congress's objectives, in particular its "basic goal in passing the Sentencing Act to move the sentencing system in the direction of increased uniformity." *Id.* at 253. Next, the Court rejected a return to the pre-SRA fully discretionary sentencing regime, with no appellate review, because, as compared with the limited severance that the Court ordered, it would manifestly fail to achieve Congress's purposes. *Id.* at 264-265. The Court concluded that neither of those options would advance the SRA's "basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." *Id.* at 252; see *id.* at 246-258.

The Court held that a third option—severing the statutory provisions that made the Guidelines mandatory—would best advance Congress's basic goal in enacting the SRA. *Booker*, 543 U.S. at 264 ("the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent"). The Court therefore "severe[d] and excise[d] two specific statutory provisions"—18 U.S.C. 3553(b)(1) (Supp. IV 2004), which required district judges to sentence within the Guidelines range absent an aggravating or mitigating circumstance not adequately taken into account by the Guidelines, and 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which set forth stringent standards of appellate review designed to reinforce the mandatory character of the Guidelines. 543 U.S. at 259. Although the Court recognized that a non-mandatory Guidelines system is "not the system Con-

gress enacted," the Court concluded that it is "consistent with Congress' initial and basic sentencing intent" of reducing sentencing disparity. *Id.* at 264.

2. In reaching that conclusion, the Court stressed that two "features of the remaining system" will together "continue to move sentencing in Congress' preferred direction." *Booker*, 543 U.S. at 264. The first feature is a continued important role for the Sentencing Guidelines. The Court noted that "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." *Id.* at 264. The Court emphasized that, although the Guidelines will no longer be binding, district courts will be required to "consult those Guidelines and take them into account when sentencing." *Ibid.* A continuing role for the Guidelines will, the Court explained, help "avoid excessive sentencing disparities while maintaining flexibility to individualize sentences where necessary," as Congress intended when it enacted the SRA. *Id.* at 264-265.

The second feature on which the Court relied in concluding that the modified SRA will still advance Congress's original goal is appellate review. Noting that the Act, as modified, continues to provide for appellate review of sentences, *Booker*, 543 U.S. at 260 (citing 18 U.S.C. 3742(a) and (b)), the Court inferred a standard to guide that review. The Court held that courts of appeals should review sentences to determine whether they are "unreasonable," considering the sentencing factors in Section 3553(a) and "the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." *Id.* at 261 (quoting 18 U.S.C. 3742(e)(3)). The Court emphasized that unreasonableness review will play a central role in advancing Congress's original aim in enacting the SRA because it will "tend to iron out sentencing differences." *Id.* at 263. The

alternative—district court sentencing without the limits imposed by effective appellate review—"would cut the statute loose from its moorings in congressional purpose." *Id.* at 262.

The Court also indicated that appellate review will reinforce the role of the Guidelines in reducing disparity. Immediately after noting that the district courts are still required to take the Guidelines into account, the Court reiterated that the courts of appeals will "review sentencing decisions for unreasonableness." *Booker*, 543 U.S. at 264. The Court thus indicated that appellate review will work in tandem with a continuing important role for the Guidelines to ensure that the SRA as modified still advances its basic purpose.[3]

C. Proportionality Review, Using The Guidelines As A Benchmark, Is Essential To Implement The Remedial Scheme Adopted in *Booker*

Booker's remedial holding necessarily contemplates appellate review based on proportionality principles as applied to sentences that vary considerably from the advisory Guidelines range. A court's imposition of a sentence within the properly calculated advisory Guidelines range provides objective assurance that the sentence will likely accord with "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). A court's imposition of a sentence outside that range, however, must be subject to some

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[3] Petitioner incorrectly suggests (Br. 26) that *Booker* does not "grant the Guidelines * * * priority" over any other factor in Section 3553(b). Tellingly, petitioner relies for that assertion on quotes from the dissenting opinions. *Ibid.* (quoting *Booker*, 543 U.S. at 300 (Stevens, J., dissenting), and 543 U.S. at 304-305 (Scalia, J. dissenting)). The Court, however, did not embrace the dissent's view but instead stressed the role of the Guidelines in ensuring that the SRA (after severance) would promote Congress's basic objectives. See *Booker*, 543 U.S. at 264 (distinguishing the role that the Court envisioned the Guidelines would play from the dissent's description).

substantive proportionality review in order for appellate review to play the role that *Booker* envisioned of "iron[ing] out sentencing differences." *Booker*, 543 U.S. at 263.

1. Appellate review cannot limit unwarranted sentencing disparities unless it includes proportionality review based on a quantitative benchmark

a. Review for reasonableness requires benchmarks to support a judgment whether a sentence is consistent with the Section 3553(a) factors as applied to a particular case. Unless appellate review includes a tool for assessing whether a particular sentence is proportionate to the degree of punishment that is warranted and whether other judges would typically impose such a sentence in comparable cases, it cannot succeed in reducing unwarranted sentencing disparity. This is particularly important for sentences that vary substantially from the norm based on facts that are plainly unexceptional. If typical defendants can always receive sentences from zero months to the maximum punishment allowable under the statute, without any means for correction on appellate review, then appellate review will fail to move sentencing in the direction of uniformity, as *Booker* envisioned. And, by the same token, appellate review will fail to promote differentiation of the punishment of those who truly warrant exceptionally lenient or severe sentences. See, *e.g.*, *United States* v. *Davis*, 458 F.3d 491, 499 (6th Cir. 2006) ("most extreme variance" for defendant who does not deserve the most lenient punishment "leav[es] no room to make reasoned distinctions" between that defendant and other "more worthy defendants"), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006). As a result, unjustified and extreme sentencing disparities will evade reversal. To avoid that result, sentences that vary dramatically from the baseline must be reserved for those cases that present comparably strong justifications: sentences at or

near the top or bottom of the statutory range are unlikely to be reasonable unless those cases present either significantly egregious facts or significantly mitigating equities.

b. Appellate review must also include a proportionality inquiry if it is to advance the sentencing purposes set out in 18 U.S.C. 3553(a)(2). As Congress recognized when it enacted the SRA, a sentencing system cannot provide just punishment, promote respect for the law, afford adequate deterrence or protect the public if it permits typical offenders to receive sentences equal to those received by the most aggravated and dangerous offenders or the least culpable and threatening ones. See S. Rep. 98-225, at 38-39, 46, 75-76. Proportionality of the sentence to a defendant's actual conduct and particular circumstances is therefore inherent in the purposes of sentencing that Congress prescribed.

c. Courts of appeals cannot succeed in identifying typical cases and weeding out extreme sentences that lack justification unless they have an objective, consistent, and quantitative standard to use as a starting point. Absent such a benchmark, reviewing courts will be unable to compare the circumstances of different offenders and will be reduced to focusing only on the record in a particular case. But "[t]o construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective." *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc)), cert. denied, No. 06-5727 (Jan. 8, 2007).

2. The Sentencing Guidelines are the appropriate benchmark because they provide a concrete and generally accurate application of the factors in Section 3553(a)

a. The Sentencing Guidelines are the most suitable benchmark for proportionality review. The Guidelines provide con-

crete, quantitative applications of the factors in Section 3553(a) to various categories of federal offenses and offenders. And a sentence within the Guidelines range will generally be a reasonable one based on the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). As explained more fully in the government's brief in *United States* v. *Rita*, No. 06-5754 (*Rita* Br.), that is true for several related reasons.

First, the Guidelines integrate the congressional sentencing objectives in Section 3553(a). Congress required the Commission, in formulating the Guidelines, to consider factors identical to the ones that Section 3553(a) requires a district courts to consider when imposing a sentence. And, consistent with Congress's direction, the Commission's formulation of the Guidelines sought "to balance all the objectives of sentencing." Supplementary Report 16. See *Rita* Br. 17-18, 19-20.

Second, the Guidelines reflect the expert and reasoned judgment of the Sentencing Commission about how to weigh the Section 3553(a) factors for particular categories of offenses and offenders, taking into account "the aggregate sentencing experiences of individual judges" across the country. *United States* v. *Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring), petition for cert. pending, No. 06-6155 (filed Aug. 23, 2006). The initial Guidelines were formulated based on a careful examination of a wide range of sentencing practices, coupled with congressional guidance on what sentences and considerations promote the SRA's objectives. Over the past two decades, the Commission has continued to collect information about actual sentencing determinations and appellate decisions reviewing those determinations, and has revised the Guidelines accordingly. See *Rita* Br. 22-23.

Third, Congress has played an active role in reviewing and shaping the Guidelines over the years. It provided detailed guidance on the contours of Guidelines when it enacted the SRA, and it has reviewed all of the Guidelines before they have

taken effect. Congress has rejected some Guidelines, directed the Commission to modify others, and has even enacted Guidelines itself. See *Rita* Br. 18. Consequently, the Guidelines currently represent nearly two decades' worth of careful consideration of the appropriate sentences for the various categories of federal offenses and offenders. See *United States* v. *Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005).

The Guidelines are therefore the appropriate benchmark for proportionality review. A sentence that varies substantially from the Guidelines' assessment of the appropriate sentence should prompt an appellate court to seek a substantial justification. That approach permits the courts of appeals to operate from a consistent nationwide starting point so that a drug defendant does not receive inexplicably harsher or more lenient punishment in New York compared to a similarly situated defendant in St. Louis or San Francisco. And it provides the court of appeals with a detailed means of assessing whether the reasoning advanced by the district court for its sentence identifies important factors for a sentence far from the norm, or instead rests only on ordinary factors that the vast majority of judges would weigh differently. Such review permits appellate judges in different circuits to apply common standards and reach generally consistent outcomes.

b. Petitioner points out (Br. 24) that the Commission has acknowledged that the Guidelines cannot account for all the facts and circumstances that may be relevant in a particular case. Of course that is true. But it does not undercut the usefulness of the Guidelines as the benchmark for proportionality review. The proportionality principle recognizes that a Guidelines sentence is not the only reasonable one and that a sentence outside the Guidelines range may be justifiable. See, *e.g.*, *United States* v. *Wadena*, 470 F.3d 735, 739-740 (8th Cir. 2006) (applying proportionality principle and concluding that "substantial" downward variance was justified); *United States*

v. *Baker*, 445 F.3d 987, 993 (7th Cir. 2006) (justification for downward variance "was sufficiently proportional to the district court's deviation from the Guidelines"); *United States* v. *Valtierra-Rojas*, 468 F.3d 1235, 1240-1243 (10th Cir. 2006) ("substantial" divergence from Guidelines range was justified); *United States* v. *Moreland*, 437 F.3d 424, 435-437 (4th Cir. 2006) (some downward variance from Guidelines range was reasonable but extent of variance was not justified), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *Jordan*, 435 F.3d 693, 697 (7th Cir.) ("quite compelling reasons" justified "significant upward variance"), cert. denied, 126 S. Ct. 2050 (2006).

Proportionality review also does not displace the sentencing judge's on-the-scene appraisal of the defendant's crime and its circumstances. The discretion of the sentencing judge under *Booker* means that the court is not bound by the Guidelines and that the courts of appeals will respect reasoned judgment in the application of the Section 3553(a) factors. But a wide variance from the advisory Guidelines range raises the question whether the sentencing judge *has* reasonably applied those factors. The proportionality principle allows appellate courts to structure their review in a consistent and rational fashion, rather than leaving them to fashion a common law of sentencing review from whole cloth.[4]

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[4] A number of petitioner's amici (*e.g.*, NACDL Br. 12-21, 21-28; WLF Br. 22-25; Lee Br. 16) contend that the Guidelines do not adequately account for the Section 3553(a) factors and have not actually reduced sentencing disparities. As explained in the government's brief in *Rita* at 16-22, 24-32, the Guidelines do account for the Section 3553(a) factors and have fostered uniformity in sentencing similarly situated offenders. Petitioner's amici (*e.g.*, WLF Br. 10-22, 25-26; NYCDL Br. 9-11, 15; FAMM Br. 15-16) also raise various other criticisms of the Guidelines that the Sentencing Commission's amicus brief shows are without merit. More fundamentally, as this Court recognized in *Booker*, the fact that the Guidelines are not perfect does not form a basis to reject their continued use to advance the goals of the SRA. The usefulness of the Guidelines must be assessed in the context of the available alternatives.

3. There is no other appropriate benchmark for proportionality review

No measure, other than the Guidelines, provides an appropriate benchmark for proportionality review. See *Buchanan*, 449 F.3d at 738 (Sutton, J., concurring) ("Where else, at any rate, would a court of appeals start in measuring the reasonableness of a sentence?"). In particular, neither the other sentencing factors in Section 3553(a) nor the "parsimony provision" provides a consistent and quantitative standard for assessing the reasonableness of a sentence.

The non-Guidelines factors in Section 3553(a) provide a frame of reference, but they are too qualitative and general to function as the exclusive benchmark for comparing sentences or identifying disparate applications of the factors. The sentencing purposes in Section 3553(a)(2) provide only "broad, open-ended goals" that will be applied differently by different courts. *Koon* v. *United States*, 518 U.S. 81, 108 (1996); see *United States* v. *Davenport*, 445 F.3d 366, 370 (4th Cir. 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005). The nature of the offense and characteristics of the defendant, 18 U.S.C. 3553(a)(1), and the "kinds of sentences available," 18 U.S.C. 3553(a)(3), are more concrete, but they cannot be translated into a particular sentence unless they are filtered through the broad, open-ended goals in Section 3553(a)(2). Thus, they ultimately provide no more concrete or consistent a benchmark than the purposes of sentencing themselves.

The mandate in 18 U.S.C. 3553(a)(6) "to avoid unwarranted sentencing disparity" likewise does not itself provide a standard by which to judge when unwarranted disparity exists. Nor can any district court singlehandedly reduce the kind of disparity that the SRA seeks to reduce. The SRA is in-

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See *Booker*, 543 U.S. at 255-256, 263. And, as explained below, there is no alternative benchmark on which to base effective proportionality review.

tended to reduce disparity *nationwide*. See *United States* v. *Thurston*, 456 F.3d 211, 216 (1st Cir. 2006), petition for cert. pending, No 06-378 (filed Sept. 14. 2006); *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006). Each district court sees only a limited portion of the sentences imposed even within its own circuit.[5] Each court of appeals has a broader overview of sentences imposed by various courts, but it cannot consider cases nationwide or establish nationwide standards. The Sentencing Commission, in contrast, has the institutional competence to consider sentencing practices on a national basis. The Commission is charged with collecting and analyzing nationwide sentencing data and revising the Guidelines as appropriate. 28 U.S.C. 994(o), (p): 28 U.S.C. 994(w) (Supp. III 2003); see *Booker*, 543 U.S. at 263-264; *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Indeed, the Commission took nationwide data into account in formulating the Guidelines. Supplementary Report 16. Treating the Guidelines as a benchmark—but not a mandate—therefore provides the only reliable mechanism to reduce disparity on a nationwide basis.

Nor does the "parsimony provision" provide an objective benchmark for proportionality review. 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). That provision requires the sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in Section 3553(a)(2). But it does not provide a concrete or objective

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[5] Petitioner incorrectly asserts (Br. 44-45 & n.5) that a district court occupies the best position for deciding whether a particular sentence promotes or reduces sentencing disparity. District courts may see many cases that do not come before the courts of appeals, but they have little institutional basis for forming a view on how other district courts sentence similarly situated defendants. Nor do they have a ready way of assessing whether the individualized factors that prompted them to impose an especially harsh or especially lenient sentence even roughly correspond with the approaches of other judges.

measure of a sufficient sentence. Thus, the parsimony provision, like the other sentencing factors in Section 3553(a), provides no more practical a benchmark to assess an outlier sentence than the highly general and potentially conflicting purposes of punishment themselves.

Finally, although it might theoretically be possible for appellate courts to fashion a common law of sentencing review in which certain kinds of sentences for certain kinds of crimes would be deemed unreasonable, there is no conceivable reason to ignore the Guidelines. A common law system of review—if it were even feasible—would require tremendous resources and then suffer the same flaws petitioner and his amici attribute to the Guidelines. The Guidelines, moreover, benefit from the full attention of the Commission and the involvement of Congress. And, of course, the Court in *Booker* emphasized the continuing relevance of the Guidelines. Under the circumstances, it would be irrational to ignore the ready benchmark of the Guidelines in conducting the necessary proportionality review.

4. *The proportionality principle is consistent with the appellate review contemplated by* Booker

Petitioner contends (Br. 38-47) that the proportionality principle is inconsistent with the standard of appellate review contemplated by *Booker*. That is incorrect.

Under the standard used before 2003 to review departures from the Guidelines, a sentence was "reasonable" if "the reasons given by the district court" were "sufficient to justify the magnitude of the departure." *Williams* v. *United States*, 503 U.S. 193, 204 (1992). *Booker* cited the pre-2003 standard of review in describing the "reasonableness" standard it adopted. 543 U.S. at 261. Proportionality review using the Guidelines

as a benchmark is therefore fully consistent with the standard of review adopted in *Booker*.[6]

Petitioner incorrectly contends that the proportionality principle "inappropriately substitutes the appellate court's" judgment "for the district court's evaluation of section 3553(a)'s factors and purposes in particular cases." Pet. Br. 42. Contrary to that contention, the courts of appeals that apply the proportionality principle continue to defer to the district court's institutional advantage in making case-specific determinations about the individuals and cases before it. The courts of appeals review district court findings of fact under the clear-error standard. See, *e.g.*, *United States* v. *Orozco-Vasquez*, 469 F.3d 1101, 1107 (7th Cir. 2006). And the appellate courts understand unreasonableness review to be "deferential," *United States* v. *Rodriguez-Alvarez*, 425 F.3d 1041, 1045 (7th Cir. 2005), petition for cert. pending, No. 05-8615 (filed Jan. 5, 2006), and akin to review for abuse of discretion. See, *e.g.*, *United States* v. *Spears*, 469 F.3d 1166, 1170 (8th Cir. 2006) (en banc); *United States* v. *Reinhart*, 442 F.3d 857, 862 (5th Cir.), cert. denied, 127 S. Ct. 131 (2006).

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[6] The Court noted in *Booker* that a similar reasonableness standard also applied to review of sentences imposed following the revocation of supervised release, and the Court cited several illustrative cases. See 543 U.S. at 262. Petitioner erroneously contends (Br. 18-19, 38-39) that the proportionality principle is inconsistent with those cases. None of those cases rejects a proportionality principle. And given the more limited statutory ranges typically available in cases of supervised release revocations and the narrower focus of those ranges, see Sentencing Guidelines Ch. 7, Pt. A(3)(b) (adopting primarily a "breach of trust" rationale), it is doubtful that those cases could furnish a comprehensive model for the review of all federal sentences, where a single crime carries a wide range and covers a wide array of conduct, offenders, and sentencing purposes. Whether or not a proportionality principle is needed in the review of supervised-release-revocation sentences, it is needed for the review of the thousands of initial federal sentences.

Petitioner also argues that proportionality review "produces absurd results" because it requires a focus "on the arithmetical degree of variation from the Guideline" range. Pet. Br. 39. Contrary to that contention, nothing about the proportionality principle requires a single-minded focus on the percentage by which the sentence imposed deviates from the applicable Guidelines range. Courts of appeals can and do apply the proportionality principle without turning "the reasonableness inquiry into a numbers game that relies only on a numerical or percentage line for reductions." *United States* v. *Wallace*, 458 F.3d 606, 613 (7th Cir. 2006). Instead, appellate courts should assess the extent of the variance from the Guidelines by considering all the relevant measures—percentage, absolute time, and any difference in the nature of the punishment (*e.g.*, probation in lieu of imprisonment).[7]

5. Appellate review without a proportionality principle threatens to endorse the virtually unbounded district court discretion characteristic of the pre-SRA regime

Neither petitioner nor his amici offer any alternative form of appellate review that accords with the role envisioned by *Booker*. Petitioner, for his part, offers little explanation of how courts of appeals should review out-of-Guidelines sentences for unreasonableness. To the extent that petitioner says anything about how unreasonableness review should work, his comments suggest that it should not include any substantive component at all. Petitioner describes as a "false premise" the idea that "this Court intended 'reasonableness' review to limit the range of choice available to judges considering section 3553(a)." Pet. Br. 9. And he asserts that courts of appeals are

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[7] See, *e.g.*, *United States* v. *Repking*, 467 F.3d 1091, 1095 (7th Cir. 2006) (noting inappropriateness of exclusive focus on percentage); *Valtierra-Rojas*, 468 F.3d at 1240 (noting that "there are no strict guideposts that invoke certain levels of scrutiny" and considering "*both* percentage *and* absolute time").

prohibited from disagreeing with the "the weight sentencing judges gave to, or withheld from, particular factors." *Id.* at 33. See also *id.* at 11 (arguing that his sentence was reasonable because the district court "considered the relevant facts directed by section 3553(a) and imposed a sentence that, in its view, was 'sufficient but not greater than necessary' to satisfy the statutory purposes of sentencing."). That is not appellate review but its abdication. The courts of appeals cannot effectively carry out this Court's directive to "determin[e] whether [the] sentence 'is unreasonable, having regard for . . . the [Section 3553(a)] factors * * * and . . . the reasons for the imposition of the particular sentence, as stated by the district court," *Booker*, 543 U.S. at 261, without evaluating the weight that district courts have given the various Section 3553(a) factors. And appellate review cannot "iron out sentencing differences," *id.* at 263, if it imposes no limit on the range of sentences that district courts may impose in a particular case.

Petitioner's amicus FAMM acknowledges (albeit grudgingly) that unreasonableness review "is not without a substantive component." FAMM Br. 27. But the substantive review proposed by FAMM will not be any more effective in reducing unwarranted sentencing disparity than petitioner's alternative of no substantive review at all. FAMM contends that a sentence should be upheld unless it is "arbitrary and capricious and manifestly irrational" or it "runs afoul of the principle of parsimony," which, according to FAMM, requires the district court to impose "the least burdensome punishment" that satisfies the purposes of punishment set out in Section 3553(a)(2). *Id.* at 27-28. If FAMM's proposal provided any content for appellate review, it would provide only a one-way ratchet downward, and thus it could not guard against disparities that result from excessively lenient sentences. But FAMM's approach does not provide any meaningful content for review. In the first place, it relies on a misreading of the intent and force

of the so-called parsimony provision. See *Rita* Br. 27-28. In any event, review for arbitrariness, capriciousness, and irrationality cannot assure that sentences are reasonably proportionate and not a source of unwarranted disparity unless the reviewing courts have a quantitative benchmark by which to compare sentences. And, as described above, neither the purposes of punishment directly nor those purposes filtered through the parsimony principle provide such a benchmark. FAMM's proposal, like petitioner's, will thus result in the same kind of unchecked sentencing discretion that existed in the pre-Guidelines sentencing regime and that caused the "shameful disparity in criminal sentences" that Congress sought to eliminate when it enacted the SRA. S. Rep. 225, at 65.

Indeed, *Booker*'s remedy of advisory Guidelines with appellate review critically rested on the conclusion that these features will "continue to move sentencing in Congress' preferred direction" of greater uniformity. 543 U.S. at 264. Rejection of a proportionality principle for appellate review would seriously undermine that conclusion. Not only would it significantly diminish the ability of appellate courts to "iron out sentencing differences," *id.* at 263, but it would also contradict the remedial opinion's central premise.

D. Proportionality Review Is Consistent With The SRA As Modified By *Booker*

The proportionality principle best comports with the provisions of the SRA left intact by *Booker* and promotes Congress's underlying purpose. Indeed, the remaining portions of the SRA are, if anything, supportive of the adoption of proportionality review.

1. Proportionality review is consistent with Section 3553(a)

Proportionality review, using the Guidelines as a benchmark, is consistent with the text of Section 3553(a). Nothing

in Section 3553(a) precludes appellate courts from drawing on the Guidelines and notions of proportionality to structure the review of sentences. Although Section 3553(a) itself does not establish a hierarchy of factors, it enumerates the central principle of the SRA—disparity avoidance—as a consideration in sentencing, 18 U.S.C. 3553(a)(6). Appellate courts can reasonably adopt a principle of proportionality as the means of implementing that statutory consideration, since no other standard would serve that purpose. Moreover, Section 3553(a) requires consideration of the Guidelines, 18 U.S.C. 3553(a)(2), which is also consistent with the proportionality principle.

Petitioner contends (Br. 41-42) that Section 3553(a) simply lists seven factors and provides no priority for any of them; it follows, he asserts, that district courts enjoy almost plenary authority to decide how the statutory purposes apply to the facts of any particular case. But that suggestion overlooks that appellate review for reasonableness must mean more than simply a rough check that a district court has consulted the statutory factors. That approach would fail to move sentencing towards the uniformity that Congress desired—the very premise of upholding the severability remedy in *Booker*. 543 U.S. at 264.

2. Proportionality review is consistent with the parsimony provision

Amicus NYCDL contends (Br. 9) that "[r]equiring any special showing or some form of 'extraordinary circumstances' to justify a sentence below the advisory guidelines * * * conflicts with the parsimony provision that Section 3353(a) sets forth as a district court's guiding directive." But a proportionality principle reinforces the import of that provision. A sentence must be "sufficient" to achieve the purposes of punishment as well as not excessive. 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). The provision thus posits that some sentences will

fail to provide adequate punishment for particular offenders, while other sentences may be too great. Identifying the appropriate range of sentences that fit the purposes of punishment is inherently a task of proportioning the sentence to the crime and the offender. Moreover, like FAMM, NYCDL misconstrues the parsimony provision as a direction to be lenient, when, in fact, it directs that the sentence imposed be consistent with, *i.e.*, proportionate to, the general purposes of sentencing in Section 3353(a)(2). See *Rita* Br. 27-28.

3. Proportionality review is supported by 18 U.S.C. 3553(c)

Proportionality review is also consistent with, and indeed supported by, the requirement that judges provide reasons for their sentences under 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). Section 3553(c) requires district courts to state reasons supporting the sentences that they impose, and Section 3553(c)(2) requires a district court to provide more specific reasons for a sentence that is outside the Guidelines range. For a non-Guidelines sentence, the court must state "the specific reason for the imposition of a sentence different from" the Guidelines recommendation, and the reason must generally be "stated with specificity in the written order of judgment and commitment." 18 U.S.C. 3553(c)(2) (Supp. IV 2004). Notably, this Court did not excise that provision in *Booker*. See 543 U.S. at 260.

Section 3553(c)(2) is clearly directed towards facilitating appellate review. See S. Rep. 98-225, at 80 ("The statement of reasons will play an important role in the evaluation of the reasonableness of the sentence. In fact, if the sentencing judge fails to give specific reasons for a sentence outside the guidelines, the appellate court would be justified in returning the case to the sentencing judge for such a statement."). The requirement in Section 3553(c)(2) that the district court ex-

plain why the sentence is different from the advisory Guidelines sentence supports use of the Guidelines as the benchmark in judging the reasonableness of sentences that vary widely from the range. The Guidelines provide national standards that judges must "consult" and "take * * * into account when sentencing" (*Booker*, 543 U.S. at 264), and the requirement of reasons for non-Guidelines sentences logically supports an approach that treats substantial variances from the Guidelines as requiring correspondingly persuasive justifications. Section 3553(c)(2) thus provides practical and legal support for the proportionality principle.

D. Proportionality Review Is Consistent With The Sixth Amendment

1. The proportionality principle does not violate the Sixth Amendment because it does not require the sentencing judge to find a fact to sentence outside the advisory Guidelines range

Although proportionality review asks for an especially strong justification for a sentence that varies widely from the advisory Guidelines range, it does not impose any limitation on the facts on which the sentencing judge may rely for that justification. In particular, the principle does not preclude the judge from justifying an out-of-Guidelines sentence based on facts already considered by the Guidelines, including the facts reflected in the jury verdict. Because the proportionality principle does not require the judge to rely on facts other than those reflected in the jury verdict before imposing a sentence outside of the Guidelines range, the proportionality principle does not violate the Sixth Amendment.

a. As *Booker* reiterated, the Sixth Amendment is not implicated when a judge exercises discretion "in imposing a sentence within a statutory range." 543 U.S. at 233 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000), and *Wil-*

liams v. *New York*, 337 U.S. 241, 246 (1949)). "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Ibid.* The Sixth Amendment is violated, however, if a judge may lawfully sentence outside a specified sentencing range only if the judge finds a fact other than the "facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted).

Thus, a guidelines system presents a Sixth Amendment problem only when it mandates some range, lower than the maximum for an offense specified by statute, that the judge may not lawfully exceed without finding a fact in addition to the facts reflected in the jury verdict or admitted by the defendant. The SRA as it existed before *Booker* presented that Sixth Amendment problem. A sentencing judge could not even calculate the appropriate Guidelines range based on only the facts found by the jury, and because the Guidelines were mandatory, the judge could not deviate from the Guidelines range unless the judge found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b)(1) (Supp. IV 2004). Making that determination necessarily involved finding a fact beyond those reflected in the jury verdict. The SRA's mandatory Guidelines system was therefore not consistent with the Sixth Amendment. See *Booker*, 543 U.S. at 234-235.

In order to render the SRA constitutional, *Booker* made the Guidelines non-mandatory by excising Section 3553(b)(1)'s limitation on the district court's authority to sentence outside the Guidelines range. 543 U.S. at 259. The proportionality principle does not reinstate that limitation; nor does it impose any other limitation on the facts on which a sentencing judge may rely to sentence outside the Guidelines range. As long as

the judge provides a sufficiently persuasive justification, the judge may sentence all the way to the statutory maximum in the United States Code. And the judge may rely on any facts, including facts already reflected in the jury verdict, to justify that out-of-Guidelines sentence.

b. Of course, reasonableness review means that a sentence at the statutory maximum will not be available in every case. Indeed, a sentence at the statutory maximum may not be reasonable in a significant number of cases. But that is not problematic. When Congress enacts a broad sentencing range, it necessarily contemplates punishment alternatives for the full spectrum of violators under the provision. A sentencing judge is expected, in his discretion, to reserve the harshest punishment for the most culpable offenders, and the most lenient punishment for the least culpable. Imposition of the most severe sentence on all defendants would conflict with the provision for a range.

Even before the SRA, while appellate courts did not review sentences for abuse of discretion, see *Koon*, 518 U.S. at 96, they did reverse maximum sentences when the sentencing judge failed to exercise discretion in light of the circumstances of the individual offender, but instead imposed sentence based solely on the offense of conviction.[8] Those courts recognized

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[8] See, *e.g.*, *United States* v. *Wardlaw*, 576 F.2d 932, 938-939 (1st Cir. 1978) (district court may not sentence based on "mechanistic" view that a particular crime always deserves a particular punishment; while general deterrence is a permissible factor, the individual circumstances of the defendant must be taken into account (citation omitted)); *United States* v. *Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974) (per curiam) ("the court applied a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis," which "requires us to invalidate the sentence"); *United States* v. *Bowser*, 497 F.2d 1017, 1019 (4th Cir. 1974) (vacating sentencing where court imposed the maximum sentence for bank robbery of 25 years of imprisonment where circumstances suggested that there may not have been an "actual exercise of discretion"), cert. denied, 419

that, when Congress establishes a punishment range, it intends courts to take into account individualized circumstances rather than routinely to impose the maximum sentence.[9] Nothing in that principle raised any Sixth Amendment concern, and a proportionality principle that has the same consequence is therefore equally consistent with the Sixth Amendment. Such a consequence is, in fact, inherent in review for reasonableness.

2. The proportionality principle does not reinstate mandatory Guidelines

Petitioner (Br. 34-37, 46-47), echoed by various amici (Sentencing Project Br. 2, 5-6; WLF BR. 9; FAMM Br. 21-22), contends that the proportionality principle violates the Sixth

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U.S. 857 (1974); *United States* v. *Daniels*, 446 F.2d 967, 971 (6th Cir. 1971) (reversal permitted when district court "grossly abused his discretion by failing to evaluate the relevant information before him with due regard for the factors appropriate to sentencing"; "[a] trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of 'individualizing sentences' " (quoting *Williams* v. *New York*, 343 U.S. at 248)); *Woosley* v. *United States*, 478 F.2d 139, 143 (8th Cir. 1973) (review permitted if sentence was "shown to have been imposed on a mechanical basis," which conflicts with *Williams* v. *New York*, *supra*); *United States* v. *Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985) (imposition of maximum term without individualizing sentences was an abuse of discretion; "mechanized sentencing" based on "the category of the crime, rather than the culpability of each individual criminal," is improper); *United States* v. *Roper*, 681 F.2d 1354, 1361 (11th Cir. 1982)) (disapproving of "rigid and mechanical sentencing procedures by which the district court bypasses the defendant's individual circumstances and metes out a sentence based on the category of crime"); *United States* v. *McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970) (per curiam) (stated policy of sentencing anyone convicted by a jury of armed robbery to a life sentence "completely undermines the basis on which trial judges have been accorded wide latitude in exercising discretion in determining sentences * * *. [A] rigid policy based solely on the crime with which the defendant is charged is not an exercise of discretion.")

[9] *Barker*, 771 F.2d at 1367; *Daniels*, 446 F.2d at 971-972.

Amendment because it effectively reinstates a mandatory Guidelines system. That contention is incorrect.

As an initial matter, petitioner's argument is based on the mistaken premise that the proportionality principle "requir[es] extraordinary circumstances to sentence below the Guidelines." Pet. Br. 35; see *id.* at 34 (asserting that principle "[r]equir[es] 'extraordinary justification' as a threshold for non-Guidelines sentences" and "extraordinary justifications for downward 'variances'"). Contrary to that premise, no court of appeals has held that a district court must provide an "extraordinary justification" before it may sentence outside the Guidelines range. Indeed, the courts of appeals have rejected that proposition. See, *e.g.*, *United States* v. *Rivera*, 448 F.3d 82, 85 (1st Cir. 2006) (a "party need not make an 'extraordinary' showing in order to persuade the district court that a sentence below the [Guidelines range] is warranted").

Consequently, petitioner and his amici are incorrect in contending that the proportionality principle requires district courts "to select a Guidelines-range sentence in the vast majority of cases." Sentencing Project Br. 2. Nothing in the proportionality principle presumes that a non-Guidelines sentence is unreasonable. Instead, the proportionality principle has its primary force when a court of appeals reviews a sentence significantly outside the range. Because the principle addresses only the extent of variance that can be justified, it does not require district courts to impose a within-Guidelines sentence in any, let alone the vast majority of, cases. See, *e.g.*, *Valtierra-Rojas*, 468 F.3d at 1238-1239 (10th Cir.) (citing cases from the Fourth, Sixth, Seventh, and Eighth Circuits—all of which have adopted the proportionality principle—holding that there is no presumption that a sentence outside the Guidelines range is unreasonable).

Petitioner incorrectly asserts that the proportionality principle "does little more than echo the standards for downward

departures" (Br. 34) and that "the prior departure standards may have allowed greater discretion" (Br. 35). The proportionality principle bears no resemblance to the circumscribed departure system under the mandatory Guidelines. Most fundamentally, as discussed above, the proportionality principle does not restrict out-of-Guidelines sentences to situations where the district court finds a fact or circumstance not adequately taken into account by the Guidelines. Moreover, unlike the departure provisions of the Guidelines, see Sentencing Guidelines §§ 5H1.1-7, 11-12, 5K2.0(d), 12-13, 19-20, the proportionality principle does not prohibit or discourage sentencing outside the Guidelines range based on particular facts. On the contrary, the proportionality principle places no limit on the universe of facts that can justify an out-of-Guidelines sentence.

3. The proportionality principle does not otherwise unconstitutionally constrain district court sentencing discretion

Amicus NYCDL incorrectly contends that the proportionality principle raises constitutional issues because it "strongly discourage[s] district courts from exercising the sentencing discretion that this Court deemed constitutionally essential in *Booker*." NYCDL Br. 4. The contention lacks support.

The percentage of out-of-Guidelines sentences has increased significantly since *Booker* in virtually all circuits, including all but one that have adopted the proportionality principle. In the four fiscal years before this Court's decision in *Blakely*, available statistics indicate that district courts imposed out-of-Guidelines sentences on grounds other than government-sponsored departure in 9.4% of the cases.[10] See

[10] Those statistics may well overstate the rate of non-government sponsored departures. Government sponsorship may not be perfectly reflected in the figures, particularly for circuits that handled a large volume of immigration

App., *infra*, 32a. Between February 1, 2005 (a few weeks after *Booker* was decided), and September 30, 2006 (the latest date for which preliminary data have been released), district courts imposed such out-of-Guidelines sentences in 13.9% of the cases. *Ibid.* That represents a 48.4% increase in the rate of out-of-Guidelines sentences. Moreover, non-Guidelines sentences have, on average, increased at a greater rate in the circuits that have adopted the proportionality principle than in the circuits that have not adopted the principle. *Ibid.* The rate of increase is 67.2% in proportionality circuits and only 29.6% in circuits that have not adopted the principle. *Ibid.* Thus, there is no basis to conclude that the proportionality principle discourages out-of-Guidelines sentences.

Petitioner (Br. 29) and NYCDL (Br. 3-8) also contend that the proportionality principle leads courts of appeals to invalidate most below-Guidelines sentences and to affirm most above-Guidelines sentences. That claim has no logical basis because the proportionality principle applies equally to sentences whether they are above or below the Guidelines range. See, *e.g.*, *Dean*, 414 F.3d at 729 ("[T]he farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer to enable the court of appeals to assess the reasonableness of the sentence imposed.").[11]

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cases (*e.g.*, the Fifth and the Ninth). It is also clear that, in virtually all circuits, departure rates dropped significantly in the years immediately before *Booker*—when the PROTECT Act was in effect—and rose significantly after *Booker*.

[11] Although petitioner asserts (Br. 29) that the Eighth Circuit does not apply the proportionality principle in deciding appeals of above-Guidelines sentences, that is incorrect. See, *e.g.*, *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006).

The difference in the rates of affirmance for below- and above-Guidelines sentences stems from other factors that suggest no cause for concern. Upward variances are far rarer than downward ones. See United States Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* D-4 (2006); App., *infra*, 32a. And the government appeals a small percentage of sentences on the ground of unreasonableness, while criminal defendants appeal a high percentage (likely including nearly all upward variances). Both the FPCD and the NYCDL report more than 17 times as many defendant appeals as government appeals, see FPCD Br. App. A8; NYCDL Br. App. 2a-3a, 5a-6a, despite the fact that, since *Booker*, district courts have imposed below-Guidelines sentences more than seven times as often as above-Guidelines sentences, see App., *infra*, 32a. Indeed, FPCD figures show that defendants are nearly twice as likely to appeal even when the district court imposes a sentence *below* the Guidelines range. FPCD Br. App. 8a (counting 148 defendant appeals and 83 government appeals from below-Guidelines sentences). See also *United States* v. *McDonald*, 461 F.3d 948, 956 n.7 (8th Cir. 2006). Given the government's greater selectivity in appealing, it is unsurprising that appellate courts have reversed below-range sentences more frequently.

Finally, amicus NACDL contends that the proportionality standard violates the Sixth Amendment because, "[i]n the typical case—*i.e.*, one where extraordinary mitigating circumstances are not present," the standard requires "a sentence greater than that authorized by the jury's findings." NACDL Br. 4. That argument depends on the mistaken premise that the maximum sentence "authorized by the jury's findings" is the top of the Guidelines range as calculated based on those findings. See *id.* at 8 (suggesting that the maximum sentence authorized by the jury's findings is "the top of the range determined solely on the basis of facts found by the jury or admitted

by the defendant"). That premise would be correct only if a sentencing judge were prohibited from sentencing above that range unless the judge found a fact beyond the facts reflected in the jury verdict. See *Blakely*, 542 U.S. at 303 (defining statutory maximum for *Apprendi* purposes). But *Booker* eliminated that prohibition, and the proportionality principle does not reimpose it. Consequently, the maximum sentence "authorized by the jury's findings" is not the top of the Guidelines range as calculated based on the facts found by the jury but the statutory maximum provided in the United States Code. Indeed, that conclusion follows from the advisory nature of the Guidelines after *Booker*, which makes reference to the Guidelines range as calculated based on the jury's findings unnecessary and artificial.

II. PETITIONER'S SENTENCE WAS UNREASONABLE

Petitioner's advisory Guidelines range was 37 to 46 months of imprisonment. J.A. 53-63, 69; Sealed J.A. 15. The district court imposed a sentence of 15 months. J.A. 72, 78; Sealed J.A. 17. The sentence was therefore 22 months, and nearly 60%, below the bottom of the Guidelines range. That was a substantial variance, and thus, under the proportionality principle, it required a substantial justification. The justification provided by the district court does not satisfy that requirement. The 15-month sentence was therefore unreasonable.

A. The Circumstances On Which The District Court Relied Cannot Justify Such A Substantial Variance From The Guidelines Range

As justification for its sentence, the district court identified five considerations: (1) the fact that petitioner's criminal history "is zero," J.A. 71; accord J.A. 72; Sealed J.A. 17; (2) "the quantity of drugs involved," J.A. 72; accord Sealed J.A. 17; (3) the fact that petitioner "qualif[ies] for the safety valve," J.A. 72; (4) "the likelihood of [petitioner's] committing further simi-

lar crimes in the future," *ibid.*; and (5) a comparison of petitioner's "situation" to "that of other individuals that I have seen in this court who have committed similar crimes," *ibid.*; accord Sealed J.A. 17.

1. The first three considerations on which the district court relied are common features of drug cases that present no especially weighty grounds for a variance. Indeed, the Guidelines range was considerably reduced for those very factors.[12] The fact that the Guidelines range reflected those factors did not bar the district court from relying on them in determining whether the factors in Section 3553(a) justified a below-Guidelines sentence. As a number of courts have recognized, however, it does mean that the circumstances can support a very substantial variance from the Guidelines range only if they substantially distinguish petitioner from the hundreds of other defendants who share the same general characteristics.[13]

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[12] Petitioner's lack of a criminal record placed him in the lowest criminal history category (category I), Sentencing Guidelines Ch. 5, Pt. A (Sentencing Table), and was one of the criteria that made him eligible for the "safety valve," *id.* § 5C1.2(a)(1). The quantity of drugs for which petitioner was held responsible (between 5 and 20 grams of cocaine base) determined his base offense level (level 26). *Id.* § 2D1.1(a)(3) and (c)(7). And petitioner's eligibility for the "safety valve" reduced his offense level by two levels, *id.* § 2D1.1(b)(9), and authorized the district court to impose a sentence below the five-year statutory minimum, 18 U.S.C. 3553(f).

[13] See, *e.g.*, *Bishop*, 469 F.3d at 907 ("an extreme variance must be justified by § 3553(a) factors that are particular and individualized, not those that may be common to many defendants"); *Rattoballi*, 452 F.3d at 133-134 ("[O]n appellate review, we will view as inherently suspect a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants. Disparate sentences prompted the passage of the Sentencing Reform Act and remain its principal concern."); *United States* v. *Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) ("When a factor is already included in the calculation of the guidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the range must articulate specifically the reasons that

The district court's explanation did not identify reasons why this case involved distinctive features that justified the variance. Indeed, insofar as petitioner's advisory Guidelines range was based on his lack of a criminal record and his responsibility for a little more than five grams of crack, the advisory Guidelines range likely *understated* petitioner's culpability. To establish eligibility for a sentence below the statutory minimum of five years, petitioner had to "truthfully provide[] to the Government all information and evidence [he] has concerning the offense or offenses that were part of the same course of conduct." 18 U.S.C. 3553(f)(5). Petitioner made the following admission, through counsel, before sentencing:

> [Petitioner] sold crack in the area of 37th and Itaska in the City of St. Louis for approximately two and a half months between either the end of February, 2003, or early March, 2003, until his May 14, 2003 arrest. He was there from about 9:00 p.m. to midnight or 1:00 a.m., almost every day. Often he was unable to sell anything because there were a large number of individuals selling in that area. * * * He obtained his crack from a man named Shawn * * * . Claiborne would call Shawn, who would deliver the crack to him. He could obtain five or six rocks from Shawn for $50.00. He would try to sell each rock for $20.00.

J.A. 50.

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this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation."); *United States* v. *Myers*, 439 F.3d 415, 418 (8th Cir. 2006) ("[The defendant's] lack of a criminal history, while reflected in the advisory sentencing guidelines, was properly considered as part of 'the history and characteristics of the defendant.' * * * Inasmuch as a guidelines sentence reflects a defendant's criminal history, [however,] a wide divergence from the guidelines sentence based solely on this single criterion would conflict with the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.") (quoting 18 U.S.C. 3553(a)(1) and citing 18 U.S.C. 3553(a)(6)).

Petitioner's May 14, 2003, arrest, at the end of that approximately two-and-a-half-month period, was for the sale of crack to an undercover detective in the same area. J.A. 14, 50, 88-89; Sealed J.A. 4. Petitioner was initially charged with a state drug offense and referred to a drug-court program, in connection with a deferred prosecution. Sealed J.A. 6. On November 2, 2003, while subject to the diversion program, petitioner was arrested again, in possession of more than 5 grams of crack. J.A. 14-15, 50-51, 89; Sealed J.A. 4-5. In federal court, petitioner was charged with, and pleaded guilty to, only the May 14 and November 2 crimes, and he was held responsible at sentencing only for the crack that was seized from him on those two dates. J.A. 1-2, 7-9, 14-15; Sealed J.A. 3, 5.

The undisputed evidence thus demonstrates that petitioner sold crack continually for more than two months before his May 14 arrest and possessed a large quantity of crack less than six months after that arrest (and subsequent referral to the drug-court program). That evidence reflects that petitioner can be considered a "first-time offender" only in a formal sense (because he has no prior convictions) and that he is, as a practical matter, a repeat offender. The evidence also reflects that petitioner sold a far larger quantity of crack than that for which he was held responsible. As a consequence, insofar as there are any differences between petitioner and typical crack defendants with the same offense level and criminal-history score, the differences do not warrant a less severe sentence for petitioner; if anything, they warrant a more severe sentence. The district court's reliance on the drug quantity and criminal history score in varying downward very substantially from the Guidelines range was therefore plainly unjustified.[14]

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[14] The court of appeals believed it a "fair inference" that petitioner distributed additional quantities of crack between the dates of his two arrests. J.A. 91. That inference may well be warranted. Even if it is not, however, or even

For the same reasons, the fourth consideration on which the district court relied—"the likelihood of [petitioner's] committing further similar crimes in the future," J.A. 72—cannot justify a substantial variance from the advisory Guidelines range, as the court of appeals correctly held (J.A. 91). The district court believed that petitioner was sufficiently unlikely to return to selling crack that a 15-month prison term—an extremely lenient sentence for a crack offense—would constitute adequate deterrence. But that belief cannot be reconciled with the undisputed fact that petitioner sold crack continually for more than two months until he was caught and placed in a diversion program, and then, less than six months later, "committed a second serious drug offense" while still subject to the program, J.A. 91. Plainly, petitioner's continued drug dealing even after being arrested and offered leniency in state court revealed that the need for a deterrent sentence was increased, not decreased.

2. The district court's fifth stated ground for the variance was that, "when I compare [petitioner's] situation to that of other individuals that I have seen in this court who have committed similar crimes * * * and the sentences they receive, I don't believe that 37 months is commensurate in any way with that." J.A. 72. But the court did not identify any of those "other individuals"; it did not describe the "similar crimes" they had committed; and it did not state what "sentences they [had] receive[d]." It is thus impossible for a reviewing court to make a reasoned assessment of whether similar sentences were justifiably imposed on similarly situated defendants.

More fundamentally, a national sentencing system does not contemplate that each district judge will create a personal set

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if the court of appeals was not the appropriate court to draw it (Pet. Br. 42-43), the circumstances described above are sufficient by themselves to justify the conclusion that the advisory Guidelines range does not overstate, and likely understates, petitioner's culpability.

of guidelines and then seek to avoid disparities within the comparatively small set of cases that end up on that judge's docket. "Congress' primary goal in enacting § 3553(a)(6) was to promote national uniformity in sentencing," not uniformity in a particular case or within a particular court. *United States* v. *Parker*, 462 F.3d 273, 277 (3d Cir.) (emphasis added), cert. denied, 127 S. Ct. 462 (2006); see pp. 25-26, *supra*. The large majority of defendants throughout the country who are similarly situated to petitioner will likely receive a sentence within or near the advisory Guidelines range of 37 to 46 months. Petitioner's variance thus had the effect of increasing, not reducing, disparity in the sentencing of similarly situated defendants across the country, based largely on the sentencing perceptions of the individual judge.

B. No Other Circumstances In The Record Could Justify Such A Substantial Variance

1. In defending the 15-month sentence as reasonable, petitioner relies (Br. 16, 22) on the district court's statement that a sentence within the Guidelines range "would be tantamount to throwing [him] away." J.A. 72. But that statement merely reflects the court's conclusion that a Guidelines sentence would be too long; it does not provide any additional explanation of what facts and circumstances justify that conclusion. Indeed, in using the language on which petitioner relies, the court made clear that it was relying on the first four of the five considerations discussed above—*i.e.*, petitioner's lack of criminal history, the quantity of drugs, petitioner's eligibility for the "safety valve," and the likelihood of recidivism. See *ibid.* ("when I consider" those factors, "I come to the conclusion that a 37-month sentence would be tantamount to throwing you away").

Petitioner contends that the comments "reflect the district court's judgment that just punishment and the need to protect

the public from future crimes meant, in [petitioner's] case, a sentence that punished without severing his family connections." Br. 16. On this view, the district court "did not wish to throw away [petitioner's] chance to be a father, to reintegrate with his family, and to resume his family responsibilities." *Ibid.* That contention is mistaken, because the district court never identified petitioner's family ties and responsibilities as a basis for the variance. See J.A. 71-72; Sealed J.A. 17. Insofar as the court mentioned petitioner's family, it was in the context of "lecturing" him (J.A. 71) that "[s]elling drugs is * * * not the way to support your family," that "[y]ou're not going to be able to support your family from prison," and that "you [might not] fully realize the effect of what you've done has on your family." J.A. 70. In any event, an effect on family ties is a common consequence of imprisonment. Nothing in the record indicates that petitioner's family ties and circumstances differ from those of a large percentage of defendants.

Petitioner also suggests that the variance was justified by his history of employment, including at the time of sentencing. Br. 14. What is true of petitioner's family ties and responsibilities, however, is equally true of his employment record: the district court did not identify it as a ground for the variance (indeed, the court did not mention it at all), see J.A. 69-74; Sealed J.A. 17; and it is in any event a circumstance that is common to a large proportion of defendants.

Finally, petitioner notes that the district court "recognized [his] youth" when it imposed sentence. Br. 16. The court did not say, however, that petitioner's youth was a basis for a variance. See J.A. 71-72; Sealed J.A. 17. Indeed, far from having identified it as a mitigating factor, the court's comments about petitioner's youth were made in the context of expressing concern that petitioner would commit additional crimes in the future. See J.A. 70 ("I am very concerned that, because you're so young, you don't fully realize the effect of what you've done

has on your family and what it is going to have on you and your future."). That concern was certainly justified, because there is a strong correlation between youth and recidivism. See, *e.g.*, United States Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12, 28 (2004).

2. One of petitioner's amici suggests that a substantial variance was warranted because "Criminal History Category I overstates the criminal tendencies and likelihood of recidivism for a true first-time offender like [petitioner]." NYCDL Br. 10. But because petitioner sold crack continually for more than two months before his first arrest and committed another crack offense less than six months afterwards, petitioner is not a "true" first-time offender. And although he may be a "first-time offender" in the sense that he has no prior convictions, the fact that he committed the second crime a few months after his arrest on the first crime, while participating in the drug court's diversion program, places him in the category of first offenders who are most likely to be recidivists. See United States Sentencing Comm'n, *Recidivism and the "First Offender"* 14-16 (2004).

A number of petitioner's amici also suggest that the variance was warranted because of the disparity in Guidelines sentences for crack cocaine and powder cocaine. NYCDL Br. 10-11; Sentencing Project Br. 7-18. As one set of amici acknowledges, however, "the district court did not base the sentence it imposed on this disparity." Sentencing Project Br. 8. Consequently, the issue was not addressed by the court of appeals, and the question whether a court may base its sentencing decision on a general disagreement with Congress's decision to impose harsher punishment for crimes involving crack than for those involving powder is not presented in this case. In any event, as the courts of appeals have uniformly concluded, such a categorical disagreement with the congres-

sionally prescribed crack-powder ratio is not a permissible basis for a variance.[15]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[15] See *Spears*, 469 F.3d at 1170-1178; *United States* v. *Castillo*, 460 F.3d 337, 355-361 (2d Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 685-688 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006); *United States* v. *Williams*, 456 F.3d 1353, 1364-1369 (11th Cir. 2006), petition for cert. pending, No. 06-7352 (filed Oct. 19, 2006); *United States* v. *Eura*, 440 F.3d 625, 632-634 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006); *United States* v. *Pho*, 433 F.3d 53, 61-65 (1st Cir. 2006); cf. *United States* v. *Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) ("[A]though the issue is not before us, we do not suggest (or even hint) that the [District] Court [may] categorically reject the 100:1 ratio and substitute its own, as this is *verboten*.").