Nos. 06-5618 and 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner,*

v.

UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

VICTOR A. RITA, *Petitioner,*

v.

UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, promoting a limited and accountable government, separation of powers, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment approximately 20 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines. WLF has also taken the Commission and its advisory committees to task and to court for failing to operate in an open and transparent manner in the formulation of Commission policy. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

In particular, WLF has been critical of the Guidelines and their application because they mandate excessively harsh prison sentences, particularly with respect to minor regulatory infractions. In addition, WLF filed a brief in *United States v. Booker*, 543 U.S. 220 (2005) and

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[1] Pursuant to S. Ct. R. 37.6, *amici* hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than *amici* and their counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.

in other Sentencing Guideline cases in lower courts, arguing that the Guidelines are unconstitutional, flawed, and generate unreasonably harsh sentences and aggravate disparity. *See, e.g., Thurston v. United States*, 358 F.3d 51 (1st Cir. 2004).

In addition, WLF's Legal Studies Division publishes relevant articles on criminal law and sentencing issues. *See, e.g.*, Brian M. Heberlig, *Avoiding Disparities Between Sentences Of Co-Defendants Is A Legitimate Sentencing Goal* (WLF Legal Opinion Letter, Apr. 7, 2006).

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as *amicus curiae* along with WLF in numerous cases, including *Booker* and *Thurston*.

INTRODUCTION AND SUMMARY OF ARGUMENT

"My object all sublime,
I shall achieve in time --
To let the punishment fit the crime --
The punishment fit the crime;"

Gilbert & Sullivan - The Mikado

Letting the "punishment fit the crime" has long been a sentencing policy goal in civilized societies. But this is only half of the equation, for the punishment must also fit the offender. Congress mandated that sentencing judges, when considering what punishment to impose in a particular case, carefully consider the nature and circumstances of the offense *and* the characteristics of each individual offender,

as well as all the other sentencing factors specified in 18 U.S.C. § 3553(a).

The overarching goal of sentencing is to select and impose a just punishment that achieves the principles of deterrence, retribution, and rehabilitation. Congress mandated, however, that the sentence ultimately imposed be one that "is sufficient, but not greater than necessary" to achieve the purposes of punishment. *Id.* This so-called "parsimony principle" forbids a civilized society from inflicting gratuitous punishments on its citizens.

The Sentencing Reform Act of 1984 altered sentencing policy in two major ways. First, it abolished the parole system and established a determinate sentencing scheme. No longer would a convicted prisoner be eligible for parole, usually after serving one-third of the sentence originally imposed by the court. Second, the Act created the Sentencing Commission, which devised a set of rigid Guidelines that sentencing courts were required to follow in determining a sentence. 18 U.S.C. § 3553(b). Sentences imposed under the Guidelines often resulted in excessive punishments that fit neither the crime nor the offender, thereby doing great violence to the parsimony principle.

In order to comply with the harsh dictates of a Guideline sentence, courts would sometimes be forced to "stack" the sentences for multiple charges, making them consecutive instead of concurrent, in order to meet the Guideline result. In other cases, the Guideline sentence was so severe that it exceeded the statutory maximum sentence permitted, thereby requiring the court to lop off the end of the Guideline sentence to fit the statute's maximum term. This Procrustean approach to sentencing fundamentally altered the principle of letting the punishment fit the crime;

instead, the Guidelines effectively forced the crime to fit the punishment, aided and abetted by overzealous prosecutors engaged in questionable plea bargaining practices.

Just as Theseus eventually killed Procrustes, this Court struck down the mandatory feature of the Guidelines as unconstitutional under the Sixth Amendment in *United States v. Booker*, 543 U.S. 220 (2005). Henceforth, the Guidelines would be only one of several factors to be considered by a sentencing court in deciding what sentence to impose, keeping in mind Congress's overarching command to follow the parsimony principle. However, several courts of appeals have since attempted to resurrect the Guidelines by giving them a presumption of reasonableness that would effectively make them mandatory, and thus, inconsistent with *Booker* and the parsimony principle. The primary questions before the Court in this pair of cases are whether sentencing courts should regard a Guideline sentence as "presumptively reasonable," and if so, whether substantial variance from that sentence needs to be justified by extraordinary circumstances. *Amici* submit that the answers to both those questions are emphatically no.

The reason why the Guidelines often generate excessive sentences is primarily due to design defects in their promulgation, as even the Commission itself has acknowledged. All of the sentencing factors of § 3553(a) were not fully taken into account, particularly those regarding offender characteristics, nor could they be. Under the Guidelines, no longer could judges fully consider a defendant's personal situation, family responsibilities, education, health status, military service, charitable and community service activities, and the like, as they did prior to the promulgation of the Guidelines. The "one-size-fits-

all" approach of the Guidelines, which purportedly were designed to reduce unwarranted sentencing disparity, often caused more of it.

More significantly, the Guidelines are fundamentally flawed because they regularly dictate prison terms that are several times longer than terms actually served in the pre-Guideline era for the same offense. Because parole has been abolished, no longer will offenders be able to be released after serving one-third of their time. Thus, the Guidelines fly in the face of Congress's directive that they were to generally reflect the average sentence *actually served* in the pre-Guideline era. More importantly, the Guidelines directly violate Congress's directive, 28 U.S.C. § 994(j) -- that probation be the norm for non-violent first offenders -- by greatly reducing the availability of probation and other non-prison punishments for those categories of defendants. The Commission never adequately explained this radical departure from the pre-Guideline sentencing practice.

Therefore, in order to properly compare the length of pre- and post-Guideline sentences, any sentence imposed under the Guidelines should be multiplied by a factor of three in order to get a good sense of what that sentence would have been in a pre-Guideline era, thereby enabling one to gauge whether the Guideline generated sentence is a fair and reasonable one. For example, Petitioner Rita, a first-offender, father, and distinguished military veteran of two wars suffering from serious medical problems, was given a Guideline sentence of 33 months for the non-violent offense of making two false statements before a grand jury with regard to his purchase of a "parts kit" for a vintage World War II replica rifle. Since he will be required to serve almost all of that time, his 33-month sentence is

comparable to a 99-month pre-Guideline sentence, or a little over eight years. That is so because Mr. Rita would most assuredly have been paroled after serving one-third of that time (assuming he would not have received probation). It is hard to imagine that *any* judge in the pre-Guideline era would have sentenced Mr. Rita to prison for eight years. Mr. Rita's sentence is simply unreasonable by any standard.

Similarly, Petitioner Claiborne, also a first-offender, plead guilty to a very minor drug offense, and was given a below-Guidelines sentence of 15 months, which translates into a pre-Guideline sentence of 45 months, or almost 4 years. Yet the court of appeals declared this sentence too lenient, in light of the 37-month sentence called for by the Guidelines -- a sentence which translates into a pre-Guideline prison term of 111 months, or a little over 9 years. The district court's choice of a below-Guidelines sentence for Claiborne was clearly reasonable, and its reasons for imposing the sentence were valid ones that comported with the parsimony principle.

Accordingly, because of these systemic design flaws in the Guidelines and the results they have produced, they are hardly worthy of a presumption of reasonableness; if anything, the opposite is true. At most, they should be regarded as just one of several factors in § 3553(a) that a judge, using his or her informed discretion and judicial expertise, should consider, without giving the Guidelines any special or presumptive weight. Concomitantly, there should be no necessity of demonstrating extraordinary circumstances to justify imposing a lower sentence than the one called for by the Guidelines.

Finally, *amici* submit that sentencing courts should explain their reasons for imposing a sentence in order to

make it clear that they properly considered the sentencing factors in § 3553(a), thereby enabling a reviewing court to determine whether the sentence is reasonable both procedurally and substantively.

ARGUMENT

I. THE GUIDELINES DO NOT WARRANT A PRESUMPTION OF REASONABLENESS BECAUSE THEY ARE DESIGNED TO SYSTEMATICALLY GENERATE UNREASONABLE SENTENCES THAT VIOLATE THE PURPOSES OF SENTENCING.

Congress mandated in 18 U.S.C. § 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment] set forth in paragraph (2) of this subsection," *viz.*, "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate [general] deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant [specific deterrence]; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." (emphasis added). The directive that the sentence be "sufficient, but not greater than necessary" to comply with these sentencing purposes is the parsimony principle, an important hallmark of a civilized society that does not inflict arbitrary, wanton, or gratuitous punishment on its citizens.

Congress also commanded that in determining the appropriate sentence, the judge must consider six other sentencing factors, including the appropriate Sentencing

Guideline, 18 U.S.C. § 3553(a)(4), and any pertinent policy statement issued by the Sentencing Commission, § 3553(a)(5).[2] *All* the factors listed must be considered by the Court; no special weight is required to be given to the Guidelines or any Commission policy statement. The end result must be a sentence carefully chosen that is sufficient, but not greater than necessary, to serve the purposes of sentencing specified in § 3553(a)(2).

One of the rationales for the Sentencing Reform Act of 1984 was the perception that judges' broad sentencing discretion resulted in a fragmented sentencing system that produced unwarranted disparity in sentences and a lack of fairness. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-190 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220-3373.[3]

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[2] The other four factors specified in 18 U.S.C. § 3553(a) that must be considered by the sentencing court are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (3) the kinds of sentences available;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.

[3] In fact, sentencing disparities that existed in the federal system before the passage of the Guidelines apparently were minor or statistically insignificant and not based on impermissible factors such as race and ethnicity. *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 105-42 (1998). "It bears emphasizing . . . that an examination of . . . early studies and other data from the pre-Guidelines period belies the notion that sentencing in the federal courts was 'shameful,' 'lawless,' or 'arbitrary.'" *Id.* at 111.

The Sentencing Reform Act abolished parole and established a determinate sentencing scheme whereby the sentence that was imposed was essentially the sentence served. Wholly independent of that reform, Congress also established the Sentencing Commission to promulgate Sentencing Guidelines that would effectively dictate the sentence, within a narrow range, to be imposed on a defendant convicted of a federal offense. 18 U.S.C. § 3553(b). In so doing, application of the Sentencing Guidelines under § 3553(b) in a particular case would trump any sentencing decision reached solely after considering the seven factors in § 3553(a), even if the resultant Guideline sentences were unduly harsh (as they often were), and in clear violation of the parsimony principle.

All of that changed when this Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines violated a defendant's Sixth Amendment rights, and as a remedy, excised 18 U.S.C. § 3553(b). In so doing, the Court deleted the mandatory feature of the Guidelines, thereby making them "effectively advisory." *Id.* at 245. Henceforth, the Guidelines are to be simply one of seven factors a sentencing court must consider in fashioning a just sentence.

Contrary to the courts of appeals in these instant cases, *amici* submit that a Guideline sentence should not be given any "presumption of reasonableness" or any other special weight, because doing so would make the Guidelines effectively mandatory rather than advisory, contrary to *Booker*. Moreover, they should not be regarded as presumptively reasonable because the Guidelines themselves have structural design flaws that regularly produce harsh sentences in clear violation of the parsimony principle that the sentence "be sufficient, but not greater than necessary"

to serve the purposes of sentencing. Accordingly, there should be no need to show extraordinary circumstances when a judge imposes a below-Guideline sentence. All that is required is a statement of reasons explaining the sentence in light of the § 3553(a) factors.

A. The Guidelines Are Designed To Produce Excessively Harsh Sentences Compared to Sentences Imposed in the Pre-Guideline Era.

The fundamental defect with the Guidelines is that they were drafted without hewing to Congressional commands. Congress intended that "for the most part the average time served [under the Guidelines] should be similar to that served today in like cases." S. Rep. No. 225, *supra*, at 116. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988) (Guidelines were primarily to be based on "typical, or average, actual past practice"). In addition, Congress directed the Commission to develop the Guidelines to "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).[4] Thanks to the flawed Guidelines, our nation's

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[4] The history of this provision suggests that prison was to be used for the principal purpose of incapacitation (specific deterrence) or retribution where the defendant would be a danger to the community if free to remain at large. 130 Cong. Rec. S542-43 (daily ed. Jan. 31, 1984) (remarks of Senator Nunn). Attorney General Alberto Gonzales apparently shares this view, having opined during his confirmation hearings that incarceration is best suited "for people who commit

prisons are overpopulated by inmates serving sentences that far exceed the typical or average sentence imposed and served in the pre-Guideline era, including sentences by first offenders who have been convicted of non-violent and minor offenses.

The source material allegedly utilized by the Commission in determining past sentencing practices was a 1,279 page report summarizing some 40,000 sentences imposed from January 1, 1984 to February 28, 1985. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986). In reviewing the sentences imposed for various categories of offenses, one is struck by how frequently probation was imposed in the pre-Guideline era, including the imposition of community service and fines, all of which properly reflect the goals of parsimony in meeting the purposes of punishment, as well as considering the "kind of sentences available" as required by § 3553(a)(3).[5] On the other hand, a probation sentence under the Guidelines is rarely an available punishment, even for first offenders. This occurs because the Commission structured the Guidelines in such a way that Base Offense Level scores

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violent crimes and are career criminals." Transcript of Senate Judiciary Committee hearings on the nomination of Alberto R. Gonzales to be Attorney General, as transcribed by Federal News Service, *accessed at* http://sentencing.typepad.com/sentencing_law_and_policy/files/gonzales_hearing_excerpts_part_1.doc

[5] For example, convictions for the non-violent crime of mail or wire fraud resulted in probation sentences in 57.5 percent of the cases. *Id.* at 3-250, Table 3-58. Many of these probation sentences included fines, community service, and restitution. For those convicted for making a false statement within the jurisdiction of a federal agency who had no prior convictions, 76 percent were given probation. *Id.* at 3-222, Table 3-75.

can be easily increased by adding Specific Offense Characteristics that take probation off the table as a sentencing option.[6]

More significantly, under the pre-Guideline parole system, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed, with inmates receiving their initial parole hearing within 120 days after incarceration. 18 U.S.C. § 4205(a) (repealed 1984). Indeed, for those inmates who were considered "very good" candidates for parole, and whose criminal offense level was a Category 3 or less, the customary total time to be served in prison before being paroled would be 10 months or less. *See* Paroling Policy Guidelines for Decisionmaking, 28 C.F.R. 2.20 (Parole Guideline chart attached hereto as App. 1a).[7] In short, even if Petitioner

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[6] According to a survey conducted by the Federal Judicial Center, 65.8 percent of the judges contacted indicated that the Guidelines do not appropriately identify offenders who should be eligible for alternatives to incarceration; 60.2 percent of Chief Probation Officers similarly agree. *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 101 (1997). In addition, 84.7 percent of the judges surveyed agreed that Congress should expand the so-called "safety valve" provision (18 U.S.C. § 3553(f) and USSG §5C1.2) so that *more* defendants would be eligible for sentence reductions under its provisions. *Id.* at 69. These views by experienced sentencing experts is further evidence of the structural design flaws of the Guidelines.

[7] For those crimes not listed in specific categories in the parole guidelines, the general rule is that for crimes where the maximum sentence is less than 2 years, the offense level is Category One; for statutes providing sentences from 2 to 3 years, the level is Category Two; and for sentences of 4 to 5 years, the level is Category Three. 28 C.F.R. 2.20, Chapter 12 Miscellaneous Offenses.

Rita had been sentenced to prison instead of probation in the pre-Guideline era, he likely would have been released after serving a minimal time of a few months since his offense would be no greater than a Category Three, and more likely a Category One.

Accordingly, sentences imposed under the Guidelines are roughly equivalent to pre-Guideline sentences that are *three times greater*. As previously noted, Petitioner Rita is a first-offender and distinguished military veteran who suffers from serious medical problems. He was sentenced to 33 months in prison for the non-violent offense of making two false statements before a grand jury with regard to his purchase of a "parts kit" for a vintage World War II rifle. Since he will be required to serve almost all of that time (minus nominal good time credits), his 33-month sentence is comparable to a 99-month pre-Guideline sentence, or a little over eight *years*. That is so because Mr. Rita would most assuredly have been paroled after serving one-third of that time. Surely, no judge would have sentenced Rita to prison for eight years in the pre-Guideline era. Rita's 33-month prison sentence is simply unreasonable by any standard. Similarly, Petitioner Claiborne's Guideline range was a prison sentence of 37 to 46 months. That sentence translates into a pre-Guideline prison term of 111 months to 138 months, or approximately 9 to 11 1/2 *years*. The district court imposed a much more reasonable below-Guideline sentence of 15 months, but even that translates into a very stiff 45-month pre-Guideline sentence. The court of appeals, giving the Guidelines presumptive weight, thought the lengthly sentence was too lenient.

Harsh sentences are thus common under the Guideline system and are unfairly imposed on those who

commit even minor regulatory offenses, particularly in the environmental area. In *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), for example, 97-month prison sentences were meted out to first offenders Robert Blandford and Abner Schoenwetter, hard-working seafood importers, and first offender Steven McNab, a Honduran seafood exporter, for the "crime" of violating the Lacey Act by importing frozen lobster tails from Honduras in clear plastic bags instead of cardboard boxes. This shipping practice violated an obscure Honduran regulation that the Honduran government argued was invalid and could not be enforced in its own country.

Those sentences translate into a mind-boggling pre-Guideline sentence of 297 months, or almost 25 years![8] In order to stretch the crime to make it fit the 97-month Guideline punishment (which was at the low end of the range), the sentencing court had to carve out a 37-month portion of a 60-month sentence from one of the charges, and stack it on top of a maximum 60-month sentence of another charge, and made them run consecutively, with the other counts running concurrently. *See* Blandford Pet. at 7; Pet. App. at 173a, No. 03-627, *cert. denied,* 540 U.S. 1177 (2004). Procrustes would have been happy.

These kinds of harsh sentences clearly violate the parsimony principle and every other sentencing factor in 18 U.S.C. § 3553(a), including the need "to promote respect for the law" as provided in § 3553(a)(2)(A). Neither the defendant nor society can have any "respect for the law" when the Guidelines mechanistically produce unduly harsh punishments. Indeed, the opposite is true; rigid Guideline

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[8] *See* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004).

sentences have been met with scorn and contempt by judges and the public alike.[9]

To be sure, Congress authorized the Sentencing Commission in 28 U.S.C. § 994(m) to depart from past sentencing practice if sentences were too lenient for serious crime, but Commission Policy is that "when departures [from pre-Guideline sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 50 (1988) (emphasis added). It appears that the Commission did not follow 28 U.S.C. § 994(m) which mandates that the Commission "ascertain the average sentences imposed" and the "length of such terms *actually served*" before jettisoning pre-Guideline sentencing norms. The record, however, is sparse as to the Commission's articulated reasons for departing from past sentencing practice. This is particularly true for sentences meted out for environmental infractions where the pre-Guideline practice was probation, remediation, community service,

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[9] Federal judges have repeatedly complained that the Guidelines' "wholly mechanical sentence computation" reduces the judiciary to "automaton[s]," "rubber-stamp bureaucrat[s]," or "accountant[s]." Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002 at 28 n.87 (collecting cases and other sources); *see also United States v. Green,* 346 F. Supp. 2d 259, 281 (D. Mass. 2004) ("To call our present federal sentencing structure a 'guidelines' system suggests that the district judge still plays a central role. She does not. Other than determining the controlling sentencing factors . . . , the district judge's role is purely mechanistic, applying arithmetically the sentencing factors . . . .").

and fines.[10] It appears that the Commission simply did not do all of its homework as required by Congress before sharply departing from past sentencing practice.[11]

When a statute clearly commands an agency to undertake certain studies before promulgating regulations, and the agency's own policy requires it to articulate reasons for departing from the data in establishing the regulation, the courts are required to set aside the regulations when the agency has done neither. For example, in *Environmental Defense Fund, Inc. v. EPA*, 898 F.2d 183 (D.C. Cir. 1990), the court was called upon to determine whether the EPA had properly followed Congressional directives in setting certain emission levels [compare to Guideline levels] and determining whether they were stringent enough [compare to the parsimony principle]. When it found the record to be barren, the court struck down the rule, stating, "We cannot sustain [agency] action merely on the basis of interpretive theories that the agency *might have adopted* and findings that (perhaps) it *might have made*." *Id.* at 189 (emphasis added). *See also Chamber of Commerce v. Securities and Exchange Comm'n*, 412 F.3d 133 (D.C. Cir. 2005) (agency rule invalidated for not taking costs into

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[10] Where incarceration was imposed for minor environmental offenses in the pre-Guideline era, the length of the sentences were usually for a few weeks or months, coupled with fines and remediation, which adequately served the principles of punishment and deterrence. *See generally* U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver *Summary of Criminal Prosecutions Resulting From Environmental Investigations* (May 31, 1991) (summarizing disposition of all environmental criminal cases from fiscal years 1983 to 1991).

[11] *See also* Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers.

account as required by statute or considering alternatives). As this Court has stressed, courts must be sure that an agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

Here, the Guidelines are vulnerable from both a procedural and substantive challenge such as any other agency's rules. *See* Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3 (1991); *id.* at 89 ("sentencing courts should remain receptive to offenders' objections to the procedures employed by the Commission in promulgating guidelines"). In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, USSG §2J1.6, and remanded the case to the district court for resentencing as if the Guideline did not exist. The court did so because the Guideline in question was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the court concluded that the standard of review of agnecy regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

Amici submit that no *Chevron* deference is due the Commission's Guidelines; at most, they deserve only *Skidmore*-type deference. *Skidmore v. Swift & Co.*, 323

U.S. 134, 140 (1944) (agency ruling, "while not controlling upon the courts by reasons of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of the such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). In short, the Guidelines are only to be considered as one of several sentencing factors, without any presumption of reasonableness, or any requirement that extraordinary circumstances must be shown to justify a sentence that departs downward from them.

B. The Guidelines Are Flawed Because They Mandate Statutory Maximum Punishments In Violation of the Parsimony Principle.

Another major defect in the Guidelines is that in a number of cases, they require the sentencing judge to impose the statutory maximum sentence, despite all the other § 3553(a) factors counselling otherwise. This result clearly violates the parsimony provision, because the Guidelines call for a prison sentence greater than what Congress itself has declared should be the statutory maximum for the worst offender. Indeed, the Commission even contemplated that this bizarre result would occur by promulgating a specific application Guideline that would lop off any excess of the Guideline sentence that is greater than the statutory maximum. USSG §5G1.1(a).[12]

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[12] "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." USSG

A good case study of this troubling phenomenon is *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004). Mr. Thurston was charged with one count of conspiracy under 18 U.S.C. § 371 with respect to his company's medicare billing practice for laboratory blood testing. His co-defendant, who the district court found was the prime architect of the challenged practice, was offered a plea bargain that he accepted. He was allowed to plead nolo contendere, did not furnish any assistance to the government, and received three years of probation.

The government offered a similar plea deal to Thurston. Thurston rejected the offer because he believed he was innocent and committed no wrongdoing, and exercised his constitutional right to stand trial. Two defense expert witnesses testified at trial that the challenged blood testing practice as a lawful industry practice. *Id.* at 60. There was no allegation or finding that Mr. Thurston financially benefited personally from the company's billing practice, unlike the allegations of fraud and personal enrichment made in Enron-type cases. Nevertheless, a jury found him guilty of one count of conspiracy as charged. The maximum sentence allowed by law is five years or 60 months. 18 U.S.C. § 371.

Although the government readily accepted a probationary sentence as suitable punishment for the more culpable co-defendant, and thus tacitly acknowledged that it served the principles of punishment as provided by § 3553(a), the Guideline sentence for Thurston was computed as 78 to 97 months. But because the statutory maximum punishment was 60 months, the excess had to be trimmed to fit the statutory maximum. The district court departed

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§5G1.1(a).

from the Guidelines, and imposed a reasonable split six-month term -- three-months to be served in prison and three months to be served by home detention -- followed by 21 more months of supervised release. The court did so in order to avoid a gross disparity with the probation sentence given to the more culpable co-defendant, and because of Thurston's civic and charitable works. This reasonable sentence "outraged the prosecutors" and the government appealed. 358 F.3d at 55.

The First Circuit reversed, finding that the then mandatory Guidelines "bind us and they bind the district court," and therefore, downward departures for unwarranted disparities "in sentences among co-defendants was impermissible." *Id.* at 78. Mr. Thurston would have to return to prison and serve the maximum five years (which is effectively a pre-Guideline sentence of 15 years). Thurston sought review in this Court, which summarily vacated the judgment and remanded following its *Booker* decision. 543 U.S. 1097 (2005).

On remand, a different sentencing judge[13] held a searching two-day hearing. At the conclusion, the court decided to impose the original 6-month split sentence, carefully explaining his reasons. Significantly, the court concluded that the sentence it imposed on Thurston was "sufficient and no more than necessary to serve the statutory purposes" of § 3553(a). *See* Thurston Pet. App. at 188a, No. 06-378 (*cert. pending*). This sentence apparently outraged the prosecutors yet again and the government appealed Thurston's sentence for a second time.

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[13] The original judge recused himself from the case on remand, apparently due to his disgust for the harsh and inflexible Guidelines.

The First Circuit reviewed Thurston's sentence this time for reasonableness under the post-*Booker* voluntary guidelines and reversed Thurston's sentence again. The court of appeals held that the sentence was unreasonable, in part, because in the court's view, the Guidelines -- which called for a sentence that was much longer than the statutory maximum for a first offender --- is an "important consideration" for a sentencing court because it has the "imprimatur" of an allegedly "expert agency." 456 F.3d 211, 215 (1st Cir. 2006). The court of appeals reversed Mr. Thurston's sentence for a second time. It further held that any sentence imposed on remand that falls below a three-year prison term (an effective pre-Guideline sentence of *9 years*), would be unreasonably lenient and, presumably, would be reversed yet again. *Id.* at 220. Astonishingly, the court of appeals further opined that if it were the sentencing authority, it would impose a sentence "at or near" the statutory maximum term of five years.[14] *Id.* Mr. Thurston's second petition for certiorari from that judgment is pending before this Court.

Congress provided that the maximum prison sentence for Thurston's crime should be five years in prison. Yet the Guidelines dictated a 78 to 97 month sentence for Thurston, a first-offender. Applying an uncapped Guideline sentence in that case would result in a sentence that would

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[14] Not only do the Guidelines dictate a patently harsh and unreasonable sentence, they run directly counter to Congress's direction to the Commission that "a term of imprisonment at or near the maximum term authorized for categories of defendants" be reserved for the class of thrice-convicted felons who have been convicted of crimes of violence and/or certain drug offenses. 28 U.S.C. § 994(h). Mr. Thurston, a pillar in this community, is a first-offender who was not convicted of a crime of violence or drug offense.

be approximately 30 to 60 percent *longer* than what Congress intended should be meted out to the *worst* offender for the *worst* possible case for the underlying object of the conspiracy. In short, the statutory *maximum* sentence that *could* be imposed, became the mandatory *minimum* sentence that were called for by the Guidelines.

The imposition of statutory maximums as mandatory minimums also occurs in certain environmental cases, particularly for those which are classified as misdemeanors, and hence, have a statutory maximum term of one year. Again, non-violent first offenders found guilty of a minor regulatory infraction find themselves sentenced to the statutory maximum prison term of one year because the unreasonable Guidelines call for a sentence even greater than that. *See* B. Sharp & L. Shen, *The (Mis)Application of Sentencing Guidelines to Environmental Crimes*, BNA Toxics L. Rpt'r 189 (July 11, 1990). *See also United States v. Maul*, 2006 U.S. App. LEXIS 27979 (7th Cir. 2006) (defendant charged with a Class A misdemeanor for merely "struggl[ing] with two federal officers" as they were arresting him pleaded guilty and received the statutory maximum sentence of one year because Guidelines would require a 30-37 month sentence due to his criminal history score, and because a guideline sentence is "presumptively reasonable").

C. The Guidelines Are Flawed Because They Spawn, Rather Than Reduce, Sentencing Disparities.

One of the primary purposes of the Guidelines was to reduce perceived unwarranted disparity in sentencing. As one commentator noted:

> Of all the problems that inspired Congress to establish guidelines, none was as urgent as inconsistency in sentencing. 18 U.S.C. 3553(a)(6) lists "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of the primary sentencing considerations. The guidelines reflect this commitment in the opening policy statement. The goal of uniformity is no less pressing simply because two defendants happen to be joined in the same case. *In fact, similarly situated defendants accused of the same crime so clearly deserve similar punishments that they present test cases for the legitimacy of the guidelines.*[15]

Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 Fed. Sent. R. 116 (1993) *available at* 1993 WL 561438 (footnote omitted) (emphasis

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[15] As the Sentencing Commission itself recognized:

> *The guidelines seek fairness*, which is the establishment of sanctions proportionate to the severity of the crime and *the avoidance of unwarranted disparity, by setting similar penalties for similarly situated offenders*.
>
> * * * *
>
> Disparity in sentencing has long been a concern for Congress, the criminal justice community, and the public.

U.S. Sentencing Comm'n, 2002 ANNUAL REPORT 1 (emphasis added). Indeed, an empirical study of pre- and post-Guideline sentences conducted by the Department of Justice's Bureau of Justice Statistics suggests that disparities in sentencing of different racial or ethnic groups may have *increased* under the Guidelines. Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 124 (1998).

added).

If the reduction of sentencing disparities of defendants accused of the same crime present the "test case" to assess the legitimacy of the Guidelines, they clearly flunk that test. The previously discussed *Thurston* case is also Exhibit A in demonstrating the failure of the Guidelines to reduce disparity. As noted, both defendants were charged with the same offense for essentially the same conduct. If anything, Thurston's co-defendant was *more* culpable. But because Thurston exercised his constitutional right to trial, his Guideline sentence was the statutory maximum of five years, whereas his co-defendant received probation.

In *Thurston*, the government argued that departures from the guidelines on the basis of sentencing disparity are only justified based on *nationwide* disparities, rather than intra-case or co-defendant disparities. This argument is absurd on its face, for it tolerates gross disparities in the very same case for the very same conduct, and thus, contravenes one of the primary reasons for having the Guidelines in the first place.

In addition, *amici* note that many courts and commentators have expressed serious misgivings about the Guidelines' inflexibility in the pre-*Booker* era for dealing with unwarranted disparities in sentences. *See* James A. McLaughlin, *Reducing Unjustified Sentencing Disparity,* 107 Yale L.J. 2345, 2347 (1998).[16] Departing from the Guidelines in cases such as this not only would further Congress's intent of reducing disparities, but also would

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[16] See also Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale. L.J. 1681, 1723-24 (1992).

bring transparency into the sentencing process which will promote public confidence in the integrity of the judicial system.

> Permitting judges to depart on the basis of unjustified disparity among codefendants could have salutary consequences beyond improving the fairness of the sentences at hand. It could lead to a richer and more honest discussion of the underlying purposes of sentences and how they are -- or are not -- served by the current structure of the Guidelines.

Id. at 2350. Those salutary public policy goals can now be fully realized in the post-*Booker* era, provided that the Guidelines are not given a "presumption of reasonableness." *See, e.g., United States v. Lazenby*, 439 F.3d 934 (8th Cir. 2006) ("district court gave too little weight to the extreme disparity between the sentences imposed on two similarly situated conspirators. . . . [E]xtreme disparity in these two sentences not only fails to serve the legislative intent reflected in § 3553(a)(6), but it also suggests an arbitrary level of decision-making that fails to 'promote respect for the law,' § 3553(a)(2)(A).").

D. The Guidelines Are Flawed Because They Do Not Properly Provide for Probation And Violate Congress's Command To Reduce The Likelihood of Prison Overcrowding.

The Guidelines are also flawed and are unworthy of a presumption of reasonableness because the Sentencing Commission violated the Congressional directive that the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity

of the Federal prisons . . . ." 28 U.S.C. § 994(g). In fact, the Guidelines appear to have been formulated to *maximize* the likelihood that the prison population would exceed the capacity of federal prisons. Because the flawed Guidelines routinely generate unduly harsh prison sentences, federal prison population has far exceeded its capacity by over 40 percent. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7.

One of the sentencing factors that courts are required to consider is the "kind of sentences available," § 3553(a)(3). In addition to incarceration, for which the Guidelines are heavily skewed, there are a variety of sentencing options available to a sentencing judge, such as probation (supervised or unsupervised); home confinement (including electronic monitoring, visitor restrictions, and other conditions deemed appropriate)[17]; halfway houses, community service, restitution, forfeiture, and monetary fines, or a sentencing package involving a mixture of all these sanctions.

Unfortunately, many of these sentencing options are unavailable in many Guideline cases, even though a suspended sentence with probation comports with the parsimony provision. Violations of any of the numerous conditions of probation (*e.g.*, drug testing, employment, restitution, and community service) will trigger probation revocation proceedings, and if warranted, incarceration will follow. On the other hand, errors for imposing excessive prison terms in violation of the parsimony provision cannot

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[17] For a good description of the costs and benefits of home confinement, see Paul J. Hofer and Barbara S. Meierhoefer, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, Federal Judicial Center (1987).

be corrected because parole has been abolished.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be reversed.

Respectfully submitted,

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GUIDELINES FOR DECISIONMAKING

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense Characteristics: Severity of offense behavior	Offender characteristics: Parole prognosis (salient factor score 1998)			
	Very good (10 to 8)	**Good (7 to 6)**	**Fair (5 to 4)**	**Poor (3 to 0)**
	Guideline range (months)			
Category:				
1	[</=]=4	[</=]=8	8-12	12-16
2	[</=]=6	[</=]=10	12-16	16-22
3	[</=]=10	12-16	18-24	24-32
4	12-18	20-26	26-34	34-44
5	24-36	36-48	48-60	60-72
6	40-52	52-64	64-78	78-100
7	52-80	64-92	78-110	100-148
8	100+	120+	150+	180+

Source: 28 C.F.R. 2.20 Paroling policy guidelines (footnote omitted)