No. 11-1203

IN THE

Supreme Court of the United States

SHOLOM RUBASHKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND CRIMINAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici curiae address the following issue only:

Whether a sentence is unreasonable when a district court fails to consider or even explain its basis for rejecting a defendant's non-frivolous argument for a below-Guideline sentence, resulting in a 27-year sentence for a first-time, non-violent offender—a sentence significantly greater than that for similarly situated offenders.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

Page(s)

MISCELLANEOUS

Page(s)

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has regularly appeared before this Court to address issues of great importance related to the U.S. Sentencing Commission and the Federal Sentencing Guidelines, especially to oppose the knee-jerk application of the Guidelines in cases that would result in the imposition of excessively harsh prison sentences. *See, e.g., Gall v. United States*, 552 U.S. 38 (2007); *United States v. Rita*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

The remaining *amici* are all legal scholars who teach, conduct research, and regularly publish in the fields of criminal law and sentencing in the United States. They have a professional interest in ensuring that federal sentencing statutes are interpreted and applied in a manner that coherently advances their purposes and is consistent with longstanding jurisprudential principles and with contemporary function in the criminal law. *Amici*

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondent with notice of intent to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of Court.

include Albert Alschuler, Julius Kreeger Professor Emeritus of Law and Criminology, Northwestern University Law School; Hon. Nancy Gertner, Professor of Practice, Harvard Law School; Marc L. Miller, Vice Dean & Ralph W. Bilby Professor of Law, University of Arizona's James E. Rogers College of Law; Ronald Rotunda, Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law; Christopher Slobogin, Milton Underwood Professor of Law, Vanderbilt University Law School; and, Stephen F. Smith, Professor of Law, University of Notre Dame Law School.

Amici submit this brief not only to highlight substantial flaws in the district court's sentencing of the defendant Sholom Rubashkin to a functional life sentence, but also to stress the urgent need for this Court to provide crucial guidance to lower federal courts on proper sentencing decision making and reasonableness review in the wake of *United States v. Booker*.

REASONS FOR GRANTING THE PETITION

Congress has instructed district courts to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of the Sentencing Reform Act (SRA), 18 U.S.C. § 3553(a), and the factors set out in § 3553(a) are now to "guide appellate courts . . . in determining whether a sentence is unreasonable" on appeal. *Booker*, 543 U.S. at 261-63. This Court has explained that appellate review should help "iron out sentencing differences" in district courts' application of the "numerous [statutory] factors that guide

sentencing," *id*. at 261-64, and that reasonableness review requires appellate courts to ensure that district courts are mindful of their statutory sentencing obligation to impose terms that comply with the substantive provisions of § 3553(a). *See Gall*, 552 U.S. at 38; *Rita*, 551 U.S. at 338. In *Rita*, this Court held that circuit courts could adopt a rebuttable "presumption of reasonableness" for a within-Guideline sentence, but stressed that district courts may ***not*** apply "a legal presumption that the Guidelines sentence should apply." 551 U.S. at 351. And in *Gall* this Court clarified that the same standard of appellate scrutiny applies "whether the sentence imposed is inside or outside the Guidelines range." 552 U.S. at 51.

Problematically, in the half-decade since this Court's rulings in *Rita*, *Gall*, and *Kimbrough v. United States*, 552 U.S. 85 (2007), the circuit courts have developed inconsistent and sometimes constitutionally suspect approaches to reasonableness review. Some circuits now regularly reverse sentences as procedurally unreasonable; others almost never do. Some circuits now regularly engage with the statutory factors of § 3553(a) when reviewing for substantive reasonableness; others almost never do. Accordingly, reasonableness review is not helping to "iron out sentencing differences" nationwide, but rather is exacerbating these differences. Tellingly, in recent official testimony, the U.S. Department of Justice has lamented the circuits' disparate approaches to reasonableness review, and the U.S. Sentencing Commission has urged Congress to amend the SRA to resolve circuit splits over the application of reasonableness review. And many federal judges and commentators have

asserted that appellate review of sentences—and all of modern federal sentencing under advisory Guidelines—would benefit significantly from this Court's further guidance on the contours of reasonableness review.

Reasonableness review has been distinctly dysfunctional in those circuits that have adopted a so-called "presumption of reasonableness" for reviewing within-Guideline sentences. Curiously, there has yet to be a single appellate ruling that expounds upon—or, for that matter, even discusses—when and how this "presumption" can be rebutted or the legal consequences of any (phantom) rebuttal. Rather than function as the true "presumption" this Court outlined in *Rita*, the "presumption of reasonableness" has been used to convert the Guidelines into a sentencing safe-harbor, making all within-Guideline sentences effectively immune from substantive reasonableness review. (Indeed, despite the appeal of thousands of within-Guideline sentences since *Rita*, not one single within-Guideline sentence has been found substantively unreasonable in the "presumption" circuits.) That some circuits treat within-Guideline sentences as *per se* reasonable not only conflicts with this Court's clear holding in *Rita* and Congress's instructions in § 3553(a), but also raises serious constitutional concerns in light of this Court's Sixth Amendment jurisprudence in *Booker* and its progeny.

The district court's decision in this unusual and high-profile case to impose an extreme within-Guideline sentence, along with the Eighth Circuit's cursory affirmance, showcases the many problems

now resulting from disparate approaches to reasonableness review. In the Second, Third, Fourth, Sixth, and Seventh Circuits, which seriously enforce this Court's instructions in *Rita* that a district court should address "nonfrivolous reasons" for a sentence outside the Guidelines, Mr. Rubashkin's sentence likely would have been vacated as procedurally unreasonable because the district court failed to explain why it rejected his arguments for a below-Guideline sentence based on the statutory commands of §§ 3553(a)(1) and (a)(6). And in the Second and Ninth Circuits, which seriously enforce this Court's instructions in *Gall* that all sentences (whether within or above the Guidelines) should receive the same measure of appellate scrutiny, Mr. Rubashkin's sentence might well have been vacated as substantively unreasonable. These circuits have questioned rote application of those Guidelines that sometimes recommend excessive prison terms for nonviolent first offenders.

But due to the Eighth Circuit's routine of always affirming within-Guideline sentences, the district court approached the sentencing of Mr. Rubashkin as if only the Guidelines mattered; in turn, the Eighth Circuit affirmed an extreme prison sentence for a nonviolent first offender using the rubber-stamp approach to reasonableness review it has adopted only for within-Guideline sentences. This case thus highlights how some (but not all) district courts are still disregarding the statutory instructions of § 3553(a) that *Booker* made central to federal sentencing, and how some (but not all) circuit courts are disregarding this Court's instructions for reasonableness review set forth in *Rita*, *Gall,* and

Kimbrough. Absent this Court's intervention, the rulings below will stand as a high-profile reminder that district and circuit courts can feel free to treat *Booker* and its progeny as merely a lengthy "tale told by [the Justices], full of sound and fury, signifying nothing." William Shakespeare, *Macbeth*, Act V, Scene 5.

I. THE CIRCUITS HAVE DEVELOPED DISPARATE APPROACHES TO REASONABLENESS REVIEW, THEREBY UNDERMINING THE BEENFITS OF APPELLATE REVIEW OF SENTENCES

Appellate review has been a central component of the modern federal sentencing system since the passage of the SRA, and Congress has long indicated that it considers such review to be integral to the SRA's goals "to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing." S. Rep. No. 98-225, p. 150 (1983). Recognizing the continued importance of appellate review to achieve the goals of modern sentencing reform, this Court, in *United States v. Booker*, preserved a key role for Courts of Appeals in the review of sentences for reasonableness. *See* 543 U.S. at 261-64. To reinforce and ensure continued attentiveness to the statutory sentencing factors Congress established in 18 U.S.C. § 3553(a), *Booker* explained that those factors are now to "guide appellate courts . . . in determining whether a sentence is unreasonable." *Id.*

Since *Booker*, however, the federal appellate courts have struggled to determine just how reasonableness review should operate, both formally

and functionally. In a set of 2007 rulings, this Court explained that reasonableness review was akin to an abuse-of-discretion standard embodying procedural and substantive protections that require circuit courts to ensure that district courts (1) approach the sentencing *process* with a proper understanding of their statutory obligations, and (2) produce sentencing *outcomes* that comply with the substantive provisions of § 3553(a). *See Gall*, 552 U.S. at 38; *Kimbrough*, 552 U.S. at 85; *Rita*, 551 U.S. at 338. Unfortunately, despite the additional guidance on the structure and substance of appellate review provided by these cases, circuit splits have emerged over the past half-decade as the Courts of Appeals have proven unable on their own to develop consistent and constitutionally sound approaches to reasonableness review.

A. The Circuits' Disparate Approaches to Procedural Reasonableness

Some circuits now regularly reverse sentences as procedurally unreasonable if a district court fails to address directly on the record a party's arguments for a non-Guideline sentence. *See* Office of Defender Resources, *Appellate Decisions After* Gall, Feb. 8, 2012, at http://www.fd.org/pdf_lib/app_ct_decisions_list.pdf [hereinafter, *Appellate Decisions After* Gall] (listing dozens of cases from the Second, Third, Fourth, Sixth, and Seventh Circuits that have been vacated as procedurally unreasonable for inadequate explanation). Emphasizing this Court's admonition that a sentencing judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing," *Gall*, 552 U.S. at 50, these circuits

recognize that sentencing fairness and rationality now depend not only on efforts by district judges to "filter the Guidelines' general advice through § 3553(a)'s list of factors," *Rita*, 551 U.S. at 358, but also upon a consistent judicial commitment to articulate reasoned and explicit rationales for sentencing decisions on the record and to respond directly to all serious statutory arguments raised by the parties. *See, e.g.*, *United States v. Pennington*, 667 F.3d 953, 956-58 (7th Cir. 2012) (vacating within-Guideline sentence because district court failed to thoroughly discuss defendant's § 3553(a) claims and thus "imposition of sentence without any further explanation suggests that the judge may have impermissibly placed a thumb on the scale favoring a guideline sentence"); *United States v. Friedman*, 658 F.3d 342, 362-63 (3d Cir. 2011) (vacating within-Guideline sentence because district court's cursory discussion of white-collar defendant's claim of unwarranted disparity did not reflect "meaningful consideration of the relevant statutory factors and the exercise of independent judgment"); *United States v. Lynn*, 592 F.3d 572, 584-85 (4th Cir. 2010) (vacating within-Guideline sentence because district court's discussion "failed to address [defendant]'s specific § 3553 arguments or explain why the sentence imposed on him was warranted in light of them"). *See also* Michael M. O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 Marq. L. Rev. 751 (2009) (discussing systemic benefits when appellate courts "review[] the adequacy of the explanations given by trial court judges to justify their sentencing decisions" and noting that "[t]hrough rigorous explanation review, appellate courts can help to ensure both the

appearance and the reality of better reasoned, more respectful sentences").

But some circuits almost never find sentences to be procedurally unreasonable because they seemingly believe it is sufficient and satisfactory for a district judge simply to state (or even just hint) he has reviewed the parties' sentencing materials and is generally aware of his statutory sentencing obligations. *See Appellate Decisions After* Gall, *supra* (listing only two or fewer cases from the First, Eighth, and Tenth Circuits to have found sentences to be procedurally unreasonable for inadequate explanation). Disconcertingly, these circuits appear unduly eager to assume that a district judge has properly considered all the parties' arguments and has a reasoned basis for any sentencing determination. *See, e.g., United States v. Bonilla*, 524 F.3d 647, 657 (5th Cir. 2008) (affirming above-Guideline sentence based on district court's reference to "arguments made earlier" and "information in the report" despite fact that the "district court's reasons [for its chosen sentence were] not clearly listed"); *United States v. Ellisor*, 522 F.3d 1255, 1278 (11th Cir. 2008) (indicating it is sufficient if a sentencing court has made an "acknowledgment that it has considered a defendant's arguments and the § 3553(a) factors"); *United States v. Jones*, 509 F.3d 911, 916 (8th Cir. 2007) (explaining it is sufficient if a sentencing court merely "adverts to some of the considerations contained in § 3553(a) . . . even if the district court failed to state its reasons with sufficient particularity").

B. The Circuits' Disparate Approaches to Substantive Reasonableness

The significant circuit splits concerning reasonableness review are even starker and more consequential with respect to sentencing review for substantive reasonableness. Most tangibly, only some circuits have adopted the so-called "presumption of reasonableness" for reviewing within-Guideline sentences. Other circuits have expressly refused to adopt this presumption even after this Court clarified in *Rita* that a true presumption is not inherently unconstitutional. (These non-presumption circuits may justifiably be concerned, based on developments in presumption circuits, that adoption of this presumption not only risks placing an unwarranted thumb on the appellate scale for only certain sentences, but also can harmfully suggest to district courts that a Guideline sentence is *always* to be preferred to a non-Guideline sentence.) More broadly, regardless of whether they adopt a "presumption of reasonableness," some circuits now regularly engage with the statutory factors of § 3553(a) when reviewing for substantive reasonableness; others almost never do. *See Appellate Decisions After* Gall, *supra* (listing numerous cases from a few circuits vacating sentences as substantively unreasonable, while listing only one or no similar cases from other circuits).

As a consequence of these varied and disparate approaches to reasonableness review, appellate review of sentences is not helping to "iron out" sentencing differences in district courts nationwide, but rather may be further exacerbating

and reifying these differences. Recognizing the problems resulting from these circuit splits, lower court judges and commentators have expressed concern that these jurisprudential divisions are becoming intractable, suggesting that this Court's intervention may be essential to achieve the broader goals of modern federal sentencing reforms. *See, e.g.*, D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 Duq. L. Rev. 641, 649-61 (2011) (Third Circuit Judge suggesting "more Supreme Court guidance is necessary" on reasonableness review given how "the courts of appeals have differed over how to apply the [reasonableness] standard to district court sentencing determinations" and "have split on several important legal questions"); Craig D. Rust, *When "Reasonableness" Is Not So Reasonable: The Need to Restore Clarity to the Appellate Review of Federal Sentencing Decisions After* Rita*,* Gall*, and* Kimbrough, 26 Touro L. Rev. 75, 90-102 (2010) (documenting "competing approaches to reasonableness review in the circuit courts" and asserting that "it is unlikely that these conflicts will be resolved" absent Supreme Court intervention); Carissa Byrne Hessick & F. Andrew Hessick, *Five Years of Appellate Review Problems After* Booker, 22 Fed. Sent'g Rep. 85, 85 (Dec. 2009) (expressing concern with "confusion and conflict in the circuits" over reasonableness review).

Perhaps even more noteworthy than academic laments are official expressions of concern about disparate approaches to reasonableness review now coming from the U.S. Sentencing Commission and the U.S. Department of Justice. At a hearing before

a House Judiciary Subcommittee in October 2011, the Chair of the U.S. Sentencing Commission urged Congress to make statutory amendments to the SRA to resolve circuit splits over the interpretation and application of this Court's rulings in *Rita*, *Gall*, and *Kimbrough*. *See* Prepared Testimony of Judge Patti B. Saris Before the House Judiciary Subcommittee on Crime Terrorism, and Homeland Security (Oct. 12, 2011), *available at* http://www.ussc.gov/Legislative_ and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf. In her written testimony, the Commission Chair adumbrated various factors serving to "limit the effectiveness of appeals in alleviating sentencing differences" and noted that many judges have "voiced concerns regarding the courts' inability to apply a consistent standard of reasonableness review." *Id.* at 12, 14.

In urging Congress to make statutory amendments to the appellate review provisions of the SRA, the Commission not only suggested that circuit splits over reasonableness review have become intractable, but also revealed that the Commission itself believes it is effectively powerless to harmonize disparate circuit jurisprudence concerning appellate review of federal sentencing determinations. *Cf. Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (suggesting certiorari review may be especially important if and when a circuit split concerning sentencing rules cannot be resolved through the Sentencing Commission's use of its Guideline amendment authority).

Not long after the U.S. Sentencing Commission articulated its concerns to Congress

about the widely varying application of reasonableness review in the circuits, an Associate Deputy Attorney General testifying on behalf of the U.S. Department of Justice expressed similar concerns at a hearing before the Commission. *See* Statement of Matthew Axelrod at U.S. Sentencing Commission, Hearing on the Current State of Federal Sentencing (Feb. 16, 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Axelrod.pdf. Through this testimony, the Justice Department stressed concerns that "federal sentencing practice continues to fragment" resulting in "growing sentencing disparities," *id.* at 6-10, and it spotlighted "differences in the way circuit courts view the sentencing guidelines and their role in overseeing sentencing practice and policy . . . [with some] appellate courts [taking] a 'hands-off' approach to their review of district court sentencing decisions and the guidelines [while] others are scrutinizing the guidelines more closely." *Id.* at 8.

In short, a broad consensus now exists that, in the half-decade since this Court's rulings in *Rita*, *Gall*, and *Kimbrough*, the federal circuits have failed to develop consistent and sound approaches to reasonableness review. This Court should provide additional guidance on these matters to ensure reasonableness review serves its important role to "iron out sentencing differences" in district courts' application of the "numerous [statutory] factors that guide sentencing." *Booker*, 543 U.S. at 261-64. Not just appellate review of sentences, but all modern federal sentencing under advisory Guidelines, would benefit immensely from this Court's further discussion of reasonableness review (especially in a

case, such as this one, involving a severe within-Guideline sentence imposed upon a nonviolent first offender, *see* infra Part III).

II. THE DYSFUNCTIONAL APPROACH TO REASONABLENES REVIEW IS MOST ACUTE IN CIRCUITS THAT HAVE ADOPTED A "PRESUMPTION OF REASONABLENES" FOR WITHIN-GUIDELINE SENTENCES

Reasonableness review has been distinctly dysfunctional in those circuits that have adopted a so-called "presumption of reasonableness" for reviewing within-Guideline sentences. As a practical matter, the presumption circuits treat within-Guideline sentences as *per se* reasonable; this approach not only disregards this Court's instructions in *Rita* and Congress's instructions in § 3553(a), but also rekindles concerns about the kind of unconstitutional judicial fact-finding that spawned the *Booker* ruling.

This Court's careful account of a "presumption of reasonableness" in *Rita* should have prompted the Courts of Appeals to begin developing a thorough and thoughtful jurisprudence concerning whether this "presumption" is rebutted in certain settings based on the import of particular § 3553(a) sentencing factors in individual cases. *Cf. Pepper v. United States*, 131 S. Ct. 1229, 1242-47 (2011) (thoroughly explaining how "evidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors" and why contrary Guideline provision rests on "wholly unconvincing policy rationales not reflected in the sentencing

statutes Congress enacted"). A robust appellate jurisprudence about when the "presumption of reasonableness" can be rebutted on appeal and the consequences of such a rebuttal would help ensure, as *Rita* envisioned, that sentencing judges actively consult all the § 3553(a) factors when deciding to impose a within-Guidelines sentence and that circuit judges adequately assess the reasonableness of the resulting sentence. *Cf. Pepper*, 131 S. Ct. at 1254 (Breyer, J., concurring) (explaining that "in applying reasonableness standards, the appellate courts should take account of sentencing policy as embodied in the statutes and Guidelines, as well as of the comparative expertise of trial and appellate courts").

Unfortunately, the presumption circuits have not embraced a true "presumption of reasonableness" as this Court outlined in *Rita*; instead, circuit courts have utilized the "presumption of reasonableness" as a means to convert the Guidelines into a sentencing safe-harbor for district courts so that *any* within-Guideline sentence is essentially immune from substantive review. Presumption circuits, in reality, are *per se* circuits; despite defendant appeals of many *thousands* of within-Guideline sentences in the five years since *Rita*,[2] no within-Guideline sentence has

[2] The latest data from the U.S. Sentencing Commission reports that, in Fiscal Year 2011, more than 3,800 defendants raised reasonableness issues on appeal. *See* U. S. Sentencing Commission, 2011 *Sourcebook of Federal Sentencing Statistics* Table 57 (2012). Though the Commission's public data does not specifically indicate in which circuit each of these FY2011 claims were raised or which cases involved appeal of a within-Guideline sentence, other Commission data suggest that a

ever been found substantively unreasonable in those circuits that have adopted the so-called "presumption of reasonableness." Perhaps more disconcerting than the absence of even a single substantive reversal in presumption circuits is the broader lack of engagement with the § 3553(a) factors that are now supposed to "guide appellate courts . . . in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261-63. Despite circuit courts' assertions that they are applying only the "presumption" approved in *Rita*, there has yet to be a single appellate ruling in the last half-decade that seriously explores or even expressly discusses when and how the presumption can be rebutted by an appellant and what might be the legal consequences of any such (phantom) rebuttal.

That some circuits regard any and all within-Guideline sentences *per se* reasonable not only conflicts with *Rita*, it also raises serious constitutional concerns in light of this Court's Sixth Amendment jurisprudence in *Booker* and its progeny. Both Justice Scalia's concurring opinion and Justice Souter's dissenting opinion in *Rita* exposed the potential for constitutional difficulties if the "presumption of reasonableness" were to be misapplied by the Courts of Appeals. *See Rita*, 551 U.S. at 368-81 (Scalia, J., concurring); *Rita*, 551 U.S. at 388-91 (Souter, J., dissenting). Indeed, Justice Souter's dissent in *Rita* was based on his fear that "a

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large percentage of the thousands of reasonableness claims raised each year are appeals of within-Guideline sentences in the presumption circuits. *See id.* at Tables N & 55 (reporting that a majority of sentences are within-Guideline sentences and that a majority of appeals are in presumption circuits).

presumption of Guidelines reasonableness" could prompt sentencing judges to treat the Guidelines "as persuasive or presumptively appropriate," and then "the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right [thereby] . . . undermining *Apprendi* itself." *Rita*, 551 U.S. at 388-91 (Souter, J., dissenting). When deciding *Rita* in 2007, it was understandable and perhaps wise for this Court to assume that circuits would not come to apply the "presumption of reasonableness" in a manner that would ultimately vindicate Justice Souter's stated fears. But, five years later, it is evident that many circuits that have adopted the "presumption of reasonableness" have only perpetrated Guideline-centric doctrines and practices that ultimately still encourage just the sort of rote, mechanistic reliance on the Guidelines and judicial fact-finding that this Court deemed unconstitutional in *Booker*.

In addition to being constitutionally suspect, the circuit courts' inflexible application of the presumption of reasonableness conflicts with the nuanced sentencing instructions of 18 U.S.C. § 3553(a). As this Court recently stressed in *Pepper*, the Guidelines are just one factor in § 3553(a)'s detailed list of "seven sentencing factors that courts must consider in imposing sentence," and it is inappropriate for courts to "elevate [certain] § 3553(a) factors above all others" given the "sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)." *Pepper*, 131 S. Ct. at 1241-49. Moreover, when implementing and

revising the Guidelines, the U.S. Sentencing Commission has never claimed that *all* its Guidelines effectively and consistently serve *all* the statutory purposes in *all* cases: the Commission has expressly stated that certain Guidelines—such as the disproportionate crack-to-powder cocaine sentencing ratios and the severe career-offender enhancement—can sometimes function in ways that undermine the sentencing goals set forth by Congress in § 3553(a)(2). *See, e.g.*, U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 131-34 (2004). The practice of some circuits to crudely apply a blanket presumption of reasonableness for all within-Guideline sentences ignores the fact that the Sentencing Commission has itself indicated that some Guidelines do not produce sentences in accord with the mandates of 18 U.S.C. § 3553(a) in some cases.

The presumption circuits' conceptually bankrupt approach to substantive reasonableness review is most misguided and harmful in those cases involving Guidelines widely recognized to be unduly severe such as in crack cocaine cases (before recent statutory reforms) and in cases involving nonviolent first offenders such as the one at bar. Stunningly, some circuits have continued to rely on the "presumption of reasonableness" to declare reasonable within-Guideline sentences based on the old crack cocaine guidelines even *after* Congress ordered the significant reduction of these Guidelines through the Fair Sentencing Act of 2010. *See, e.g.*, *United States v. Brewer,* 624 F.3d 900 (8th Cir. 2010); *United States v. Lewis*, 625 F.3d 1224 (10th

Cir. 2010); *United States v. Hudson*, 429 Fed. Appx. 870 (11th Cir. 2011). These rulings vividly illustrate that, as now applied by some circuit courts, the presumption of reasonableness essentially enables and even fosters the apparent desire of some district and circuit judges to completely ignore Congress's detailed statutory sentencing instructions in 18 U.S.C. § 3553(a) and to impermissibly "elevate [the Guidelines] above all other [§ 3553(a) factors]" despite the statutory text which makes it a "sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)." *Pepper*, 131 S. Ct. at 1241-49.

III. CONSTITUTIONAL CONCERNS AND THE GOALS OF THE SENTENCING REFORM ACT COMMEND REVIEW OF THE SENTENCE IMPOSED IN THIS CASE

In this unusual and high-profile case, the district court's decision to impose an extremely harsh within-Guideline sentence, as well as the Eighth Circuit's subsequent affirmance, bring into sharp focus the troubling potential for disparity resulting from some approaches to reasonableness review. Able to rely on the Eighth Circuit's post-*Rita* record of always affirming all within-Guideline sentences in all settings, the district court approached Mr. Rubashkin's sentencing as if *Booker* was essentially inconsequential. Likewise, the Eighth Circuit affirmed that sentence by referencing the "presumption of reasonableness" to justify its rubber-stamp approval of a functional life sentence

for a nonviolent first offender. This case thus stands as a high-profile example of how some district courts continue to disregard the statutory instructions of § 3553(a) that *Booker* made central to federal sentencing, and of how some circuit courts continue to disregard this Court's instructions for reasonableness review set forth in *Rita*, *Gall* and *Kimbrough*.

This case provides an excellent vehicle for considering enduring challenges for advisory Guideline sentencing law and practice after *Booker*, particularly because Mr. Rubashkin's Guideline range was dramatically elevated based on contested judicial fact-finding as to what portion of alleged economic losses could and should be justly attributed to him. Many courts and commentators have long recognized that even an accurate calculation of losses attributable to fraud may result in a Guideline sentencing range divorced from the purposes set forth in § 3553(a)(2). *See United States v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010); *United States v. Parris*, 573 F. Supp. 2d 744 (S.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006); s*ee also* Frank Bowman, *Sacrificial Felon*, American Lawyer, Jan. 2007, at 63 (noting that, in high-end cases, the Guidelines for "federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense"); Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 Yale L.J. Pocket Part 286 (2007) (stating that "Guidelines for fraud and other white-collar offences are too severe" and are greater than "necessary to satisfy the traditional sentencing goals of specific and general deterrence—or even

retribution"). These concerns are only compounded where, as here, the district court relies on contested and inflated loss amounts to increase severely the calculated Guideline range, and the Eighth Circuit summarily affirms an extreme prison term within the elevated Guideline range merely by referencing the "presumption of reasonableness."

More broadly, the record below suggests that the district court largely ignored this Court's repeated admonition that a district court should not presume reasonable a sentence within the calculated Guidelines range. By giving no weight or even on-the-record consideration to the many mitigating facts and § 3553(a) factors justifying a below-Guideline sentence for Mr. Rubashkin, the district court disregarded this Court's clear instruction to treat the Guidelines as only "one factor among several courts must consider in determining an appropriate sentence" as part of "§ 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough*, 552 U.S. at 90. The district court's lengthy discussion of Guideline calculation disputes in its written opinion stands in sharp contrast to its total silence concerning the extensive § 3553(a) arguments developed by the defendant throughout the sentencing proceedings. The district court's opinion barely acknowledged *any* of the § 3553(a) factors Mr. Rubashkin stressed at sentencing; it even wholly ignored the Government's own indication during the sentencing hearing that a sentence *below* the calculated guideline range would be sufficient in this case. As noted before, in those circuits that seriously enforce this Court's

admonition in *Rita* that a district court should address "nonfrivolous reasons" for a sentence outside the Guidelines, Mr. Rubashkin's sentence would likely have been vacated as procedurally unreasonable because the district court failed to explain in any way why it rejected Mr. Rubashkin's arguments for a below-Guideline sentence based on the statutory commands of §§ 3553(a)(1) and (a)(6).

The cavalier treatment given to Mr. Rubashkin's § 3553(a) arguments is especially troubling given the broad consensus that Guidelines in this setting often suggest sentencing ranges that are much "greater than necessary" to serve the punishment purposes of 18 U.S.C. § 3553(a)(2). *See, e.g.*, Bowman, *supra*; Alan Ellis, John R. Steer & Mark H. Allenbaugh, *At a "Loss" for Justice*, Criminal Justice, Winter 2011, at 34 (reviewing myriad problems with fraud Guidelines and explaining that "[t]here simply is no way the sentences that result from them can be considered principled or even reasonable"). The within-Guideline (and functional life) sentence given to Mr. Rubashkin—a first offender and father of 10 who has led a pious life and whose conduct was part of efforts to keep afloat a business of great importance to his local and religious communities—is substantively much "greater than necessary" to comply with the purposes of sentencing set forth by Congress in § 3553(a)(2). Many former senior Justice Department officials—including six former Attorney Generals of the United States—wrote directly to the district court to express their view that such a sentence would be excessive in this case and that an extremely long prison term need not and should not be imposed on Mr. Rubashkin. Key considerations

Congress set out in § 3553(a)—ranging from the "nature and circumstances of the offense" to the "history and characteristics of the offender" to the "need to avoid unwarranted disparity"—justify a much shorter prison term for Mr. Rubashkin than was imposed by the district court. After barely giving lip service to the governing sentencing rules after *Booker*, the district court violated the statutory command in 18 U.S.C. § 3553(a) that Mr. Rubashkin's sentence be "not greater than necessary" in light of the purposes of sentencing Congress set forth in the Sentencing Reform Act. In addition to being the product of an unreasonable sentencing process, the sentence imposed below is substantively unreasonable.

The unreasonableness of the functional life sentence given to Mr. Rubashkin comes most clearly into focus when considering the significantly lower sentences that have been imposed for offenses whose "nature and circumstances" were much more aggravated than the offense here and that have been imposed upon offenders whose "history and characteristics" were much less sympathetic than Mr. Rubashkin's personal history. High-profile federal fraud defendants ranging from Marc Dreier and Bernie Ebbers to John and Tim Rigas and Jeffrey Skilling—all of whom deprived a large number of persons of life savings, caused losses many times larger than even the most inflated loss claims in this case, *and* funded lavish lifestyles through their fraudulent behaviors—*all received prison terms below the sentence imposed on Mr. Rubashkin*. *See generally* Ellis, Steer & Allenbaugh, *supra*, at Table 2 (listing more than a dozen cases in which defendants received federal prison sentences

much lower than Mr. Rubashkin despite being deemed responsible for losses comparable or much greater than the (inflated) losses attributed to Mr. Rubashkin's offense conduct). Because nothing in the § 3553(a) statutory sentencing factors suggests that Mr. Rubashkin's offense conduct and personal characteristics demand a longer sentence for him than for *any* of these other more aggravated offenders, it is nearly impossible to fathom how the district court concluded that Mr. Rubashkin's offense conduct and personal characteristics demanded the unduly harsh sentence he received in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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