No. _____

In the Supreme Court of the United States

MORRIS E. ZUKERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner pleaded guilty to tax offenses for which the Sentencing Guidelines recommended a sentence of 70 to 87 months' imprisonment and a fine of between $25,000 and $250,000. The district court imposed a sentence of 70 months' imprisonment, a longer prison term than the vast majority of tax offenders with the same offense characteristics receive. But then the district court did something truly extraordinary—it imposed a fine of *$10 million* as well. That is the largest fine imposed on any tax offender since the Sentencing Commission began compiling statistics and likely ever, and it is *40 times* the Guidelines maximum. Compared to the fines imposed on tax offenders with similar offense characteristics, the $10 million fine is off the charts.

On appeal, the Second Circuit held that the district court had failed to adequately explain its massive upward variance on the fine. But rather than vacating and remanding for resentencing as required by 18 U.S.C. § 3742, the Second Circuit simply ordered the district court to produce a supplemental explanation of its sentence, while holding the appeal in abeyance. Without hearing from the parties, the district court issued a 16-page, supplemental explanation for the fine that added new reasons that neither the Government nor the district court had even alluded to at sentencing and that, in important respects, were factually wrong. The Second Circuit nevertheless found this *post hoc* explanation sufficient to cure the original procedural error, and it affirmed petitioner's sentence under its longstanding, extremely deferential "shocks-the-conscience" test for appellate review of criminal sentences.

The questions presented are:

1. Whether a court of appeals that finds that a district court has failed adequately to explain a sentence can simply request further elaboration without vacating the sentence and ordering resentencing as required by 18 U.S.C. § 3742.

2. Whether, in the wake of *Gall v. United States*, 552 U.S. 38 (2007), a court of appeals may review a sentence for substantive unreasonableness under a "shocks-the-conscience" standard.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Morris Zukerman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit affirming petitioner's sentence (App. 1a-18a) is reported at 897 F.3d 423. The Second Circuit's earlier order remanding the case for a supplemental explanation of the sentence (App. 19a-23a) is reported at 710 F. App'x 499. The district court's supplemental memorandum (App. 24a-43a) is unreported.

JURISDICTION

The Second Circuit entered its judgment on July 27, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent sentencing statutes are reproduced at App. 89a-106a.

INTRODUCTION

This case tests the procedural and substantive requirements governing the imposition and appellate review of criminal sentences that are grossly out of whack with those received by other offenders. It involves the imposition of a $10 million criminal fine that is—by far—the largest ever imposed on a tax offender. The fine reflects a massive upward variance to *40 times* the maximum fine recommended by the Sentencing Guidelines, and *100 times* the fine recommended by the Probation Office. The Second Circuit's decision upholding that extraordinary $10

million fine conflicts with the federal sentencing statutes, decisions of this Court, and decisions from virtually every other court of appeals.

The first question presented concerns the proper remedy when a district court commits procedural error by failing to provide an adequate explanation of its sentence. The governing statutes explicitly provide that, in those circumstances, the court of appeals must remand the case to the district court for resentencing. 18 U.S.C. § 3742(f), (g). That is what every other circuit does when it finds a procedural violation—and what the Government itself requests when it appeals a sentence on procedural grounds. And this requirement is critical to ensuring that one of the basic components of criminal sentencing is met—a sentencing in open court, where the defendant has an opportunity to challenge the sentencing rationale *before* a sentence is imposed.

The Second Circuit, however, has adopted a practice—called a "*Jacobson* remand"—that flouts that statutory requirement. Under this practice, when the Second Circuit concludes, as it initially did here, that the district court has failed to adequately explain a sentence, it can disregard 18 U.S.C. § 3742 and choose not to vacate the sentence and remand for resentencing. Instead, while holding the appeal in abeyance, the Second Circuit simply invites the district court to supplement the record with a new written justification of the sentence. This unlawful procedure allowed the district court here to advance transparently new rationales for its outlier sentence, and to do so without giving Zukerman a hearing or any opportunity to contest those rationales.

The second question presented here concerns the appellate standard for reviewing the substantive

reasonableness of sentences. This Court's cases make clear that sentences must be reviewed for "reasonableness" under "the familiar abuse-of-discretion standard of review." *Gall v. United States*, 552 U.S. 38, 46 (2007). The Second Circuit alone, however, applies a "shocks-the-conscience" test to assess whether a sentence is excessive. The Second Circuit's shocks-the-conscience test is different from—and far more deferential than—review for reasonableness. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842-55 (1998). And only the application of this excessively deferential standard of review can explain the Second Circuit's affirmance of the extraordinary variance at issue here.

Both questions presented are exceptionally important to the law of criminal sentencing and fairness to defendants. The Second Circuit's "*Jacobson* remand" procedure for supplementing the supposed reasons for a sentence deprives defendants of the protection of being sentenced in open court and invites district courts to invent new justifications for overly severe sentences. And its excessively deferential, shocks-the-conscience test for substantive unreasonableness turns the appellate review of sentences into a rubber stamp. On each of these issues, the Second Circuit's approach conflicts with settled sentencing law and the practice of other federal courts of appeals.

Defendants in the Second Circuit are entitled to the same procedural and substantive checks against unjustifiably extreme sentences as defendants in the rest of the country. The petition should be granted.

STATEMENT OF THE CASE

Zukerman is a 74-year-old self-made businessman and the founder of a successful investment management firm, M.E. Zukerman & Co. ("MEZCO"). App. 25a. This case principally arises from federal tax returns filed by MEZCO, Zukerman, and a family trust between 2007 and 2013. Zukerman has admitted that he violated the tax laws, and he is serving a 70-month sentence that will keep him in prison until he is nearly 80 years old. This petition concerns the unprecedented $10 million fine that the district court imposed on top of that prison sentence.

A. The Offense Conduct And Guilty Plea

1. In 2007, a MEZCO subsidiary, M.E. Zukerman Specialty Oil Company ("SOC"), sold a 50% stake in a partnership named Penreco for $110 million. Presentence Investigation Report (PSR) 27-28. At the time, Zukerman believed that losses suffered by other entities he controlled could offset capital gains from the Penreco sale—but he neglected to execute the necessary corporate restructuring in time to achieve this result. *Id.*

When Zukerman realized the full tax implications of his failure to undertake the restructuring, he panicked and attempted to obtain the desired tax benefits by falsely claiming that MEZCO had sold SOC in 2007. *Id.* at 28. As a result, he failed to report to the IRS $12 million of income that SOC had received in 2007 and the $110 million received from the sale of Penreco. *Id.* Zukerman then misled another accountant and the IRS in an attempt to corroborate the story of the SOC sale. *Id.* at 28-29. Zukerman's failure to report the Penreco transaction

resulted in the underpayment of over $31 million in federal taxes. *Id.* at 10.

In addition, Zukerman's personal tax returns for tax years 2008 through 2013 included various falsities and omissions. He also failed to pay certain taxes on behalf of a family trust and caused family members to file false tax returns. *Id.* at 15-17, 18-19.

2. In May 2016, the Government indicted Zukerman for tax evasion, obstruction of the internal revenue laws, and wire fraud. App. 27a. Zukerman immediately accepted responsibility and sought to make amends for his conduct. He pled guilty to the first two charges in June 2016. *Id.*[1] The plea agreement stipulated that Zukerman's total offense level under the Sentencing Guidelines was 27, which included a two-point reduction for acceptance of responsibility. All told, Zukerman was subject to a Guidelines sentencing range of 70 to 87 months' imprisonment and a fine of $25,000 to $250,000. C.A.J.A.76-77.

As part of the plea agreement, Zukerman also agreed to pay $37 million in restitution, which (unlike the vast majority of tax offenders) he promptly paid in full. C.A.J.A.75-76. He also agreed not to contest the applicability of civil fraud penalties. C.A.J.A.75.

B. The Sentencing Proceedings

1. The Probation Office recommended a sentence of 48 months' imprisonment, $37 million in

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[1] The wire fraud charge accused Zukerman of evading New York use tax in connection with art purchases. C.A.J.A.63-72; PSR 20-22. The Government dropped that charge, but Zukerman agreed to pay New York roughly $4.5 million in restitution. *See* PSR 53.

restitution, and a $100,000 fine. PSR 52-53. The Probation Office explained that this below-Guidelines prison term and within-Guidelines fine were "warranted for this 72-year old individual who lacks any other prior criminal history and has committed himself to philanthropic acts over the years." *Id.* at 51.

Zukerman urged the district court to impose a prison term below the Guidelines range. C.A.J.A.167. He bolstered that request with almost 100 letters of support from friends, family, employees, and acquaintances, attesting to Zukerman's good deeds. *See generally* C.A.J.A.170-220. Zukerman also relied on Sentencing Commission data showing that over 70% of individuals sentenced under the tax-offense Guideline since 2007 for losses of greater than $1 million received below-Guidelines sentences—and that the average downward variance for tax defendants sharing Zukerman's offense level was 27.1 months. C.A.J.A.162-63, 235-37.

As to the fine, Zukerman argued that the district court should impose "at most a modest, within-Guidelines fine." C.A.J.A.165-67. He emphasized that he had already tendered $37.6 million to satisfy his restitution obligations and that he had agreed not to contest applicable civil penalties. C.A.J.A.166-67. Zukerman also noted that he had agreed to pay *all* of the taxes he owed, a commitment he fully satisfied by the time of sentencing. C.A.J.A.166; *see* C.A. ECF No. 153 at 6.

Zukerman also presented an analysis of the fines imposed in other tax cases, again drawing on Sentencing Commission data. According to that data, approximately two-thirds of all defendants sentenced under the tax evasion Guideline between 1999 and

2015 received no fine whatsoever. C.A.J.A.237. And for the fraction (about a third) who received a fine, 94.3% received a fine within or below the Guidelines range. *Id.* And of the 35 defendants with a tax loss of between $20 million and $100 million, only four received fines, the largest of which was $100,000. *Id.*

The Government focused primarily on arguing for a within-Guidelines term of imprisonment, which it said would be a penalty "significant enough to deter would-be tax cheats." C.A.J.A.305-06. The Government devoted just three pages of its 82-page sentencing memorandum to the fine. C.A.J.A.319-22. Although it asked for an upward variance, it did not specify the amount of the variance it thought appropriate. The only justification it offered for an upward variance generally was its view that Zukerman was *capable* of paying more. C.A.J.A.321-22. And although the Government identified 21 allegedly comparable defendants for purposes of assessing Zukerman's prison sentence, C.A.J.A.348-51, it failed to mention that those defendants paid an average fine of less than $2,500, Pet'r C.A. Br. 38.

2. The district court held the sentencing hearing in March 2017, at which it agreed with the parties that the Sentencing Guidelines recommended that Zukerman be sentenced to a prison term of between 70 to 87 months and a fine between $25,000 and $250,000. App. 48a-49a. The district court stated further that it "d[id] not find any grounds warranting a departure under the guidelines." *Id.* at 49a.

After hearing argument from the parties (which focused exclusively on the appropriate prison term), the district court set forth its sentencing analysis under 18 U.S.C. § 3553(a). App. 72a-73a. The court began by noting Zukerman's "devotion to family,

friends and employees," the "positive impact [he had made] on many lives," his many charitable contributions, and the fact that he had "accepted responsibility for his crime." *Id.* at 74a. But the court also stated that Zukerman had committed "weighty offenses" and ultimately evaded taxes "totaling millions of dollars" because of "unmitigated greed." *Id.*

The district court noted that it was aware of "the need to avoid unwar[rant]ed sentence disparities," but said nothing further on the subject. *Id.* Instead, it turned to the issue of Zukerman's wealth, stating that much of the restitution came from his companies, "not from his own pocket," and that he remained "an astonishingly wealthy man." *Id.* at 74a-75a.

The district court then discussed deterrence, finding that "a term of imprisonment at the higher end of the guidelines range" was unnecessary "to achieve the goal of specific deterrence." *Id.* at 75a. The court was confident Zukerman had "gotten th[e] message . . . loud and clear." *Id.* But it noted that "others just like Mr. Zukerman are watching to determine whether they, too, will try to avoid paying their fair share." *Id.*

The district court concluded that "for the reasons stated, a term of imprisonment within the guidelines range of 70 to 87 months is merited here, and a fine above the guidelines range is warranted." *Id.* This was the first time the court had said anything about a fine, apart from noting the Guidelines range ($25,000 to $250,000). *See id.* at 48a-49a.

Without further discussion, the district court then announced Zukerman's sentence: 70 months' imprisonment, restitution of $37 million, *and a fine of*

$10 million. Id. at 76a. Notably, the court did not specify the particular reasons for such a fine, discuss the fine-specific considerations identified in 18 U.S.C. § 3572(a), or explain why the Guidelines calculation did not properly take account of the relevant facts.

3. The district court did not issue the written Statement of Reasons form (SOR), required in every case involving a variance from the recommended Guidelines range, at the time of sentencing. *See* 18 U.S.C. § 3553(c)(2). Instead, it issued the SOR form approximately three weeks *after* Zukerman filed his notice of appeal, in response to *ex parte* requests by Government counsel. C.A.J.A.419-21.

On the form, the district court checked various boxes identifying the Section 3553(a) factors relevant to its variance, including "Mens Rea," "Extreme Conduct," "Dismissed/Uncharged Conduct," "[c]omplexity and scope of fraud," and "[a]bility to pay a more substantial fine." App. 84a-86a. In the space for the court to "[s]tate the basis for a variance," it wrote that:

> The defendant has the financial ability to pay a significant fine in addition to the restitution agreed to in the plea agreement. Much of the restitution has been paid by the defendant's corporate entities. Given the scope and complexity of the defendant's tax fraud, and to provide sufficient deterrence, an upward variance to the amount of the fine is warranted.

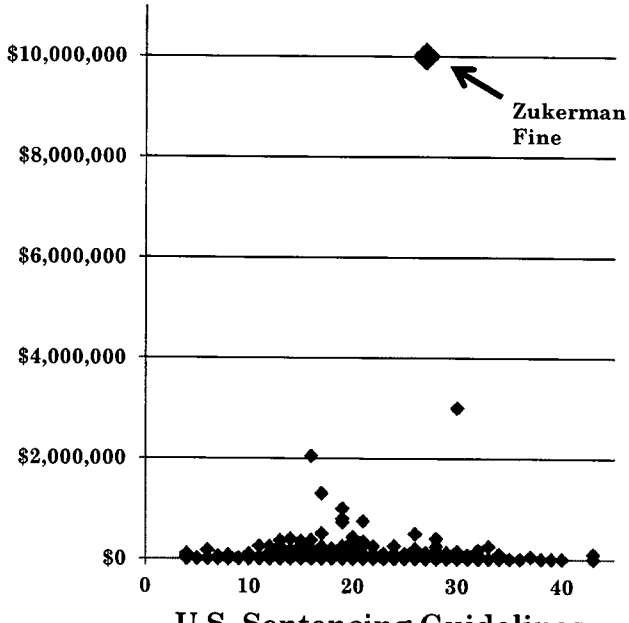
Id. at 87a.

C. The $10 Million Fine In Context

1. Since 1999, the Sentencing Commission has kept detailed data regarding every federal sentence

imposed throughout the country. Those data reveal that Zukerman's $10 million fine is an extraordinary outlier in numerous respects. To start, Zukerman's fine is the single largest—by far—imposed on any of the roughly 8,700 defendants sentenced under the tax evasion Guideline between 1999 and 2016.

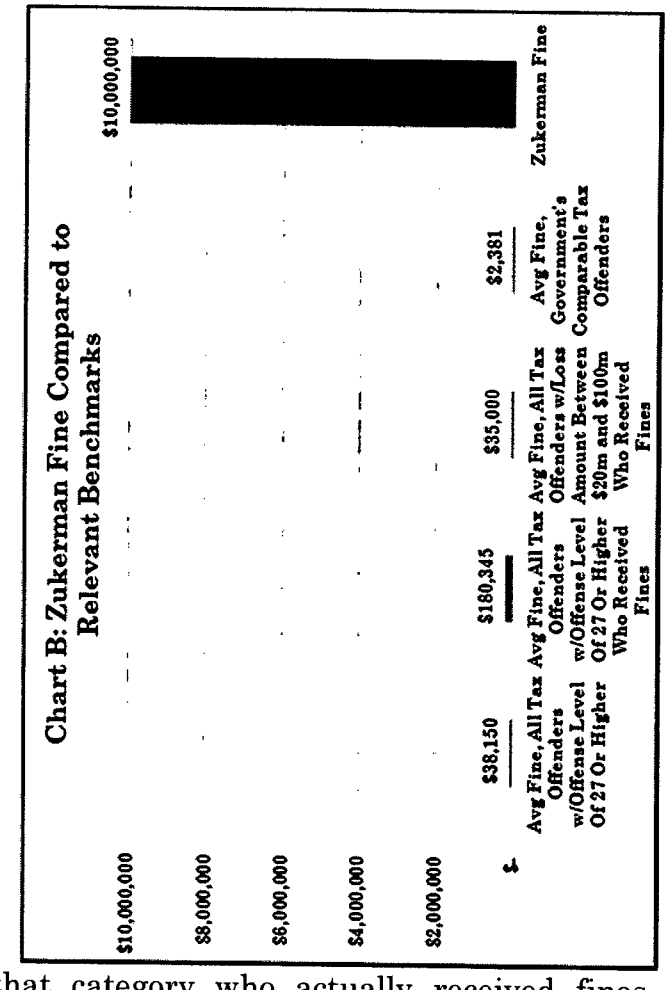
Chart A: Fines Imposed on All U.S.S.G. § 2T1.1 Tax Defendants (8,706 Total), 1999-2016



Zukerman's fine is more than three times greater than the closest rival ($3 million). In fact, only four other defendants in this entire period were fined $1 million or more. The stunning magnitude of Zukerman's fine in comparison to all others is represented in Chart A, which plots every tax

offender's fine relative to his offense level. *See* Pet'r C.A. Br. 31-32.

Zukerman's fine was also extreme relative to those who committed comparable crimes (or worse), as illustrated below in Chart B. *See id.* at 34. Between 1999 and 2016, the average fine imposed on tax offenders who shared Zukerman's offense level of 27 was $38,150. With respect to the subset of offenders



in that category who actually received fines, the average fine was $180,345. The Government's own,

handpicked list of comparable defendants that it compiled for purposes of sentencing (*see supra* at 7) received an average fine of only $2,381.

As Chart B shows, Zukerman's fine is also extreme compared to the fines imposed on defendants convicted of crimes causing a tax loss of between $20 million and $100 million. Once again, Zukerman's fine is a stark outlier, even among this group of more culpable defendants. Of the roughly three dozen defendants in this category, only four received any fine at all—and of these, the average fine was $35,000 and the largest was $100,000. Pet'r C.A. Br. 34. Zukerman's $10 million fine is thus more than *285 times* the average fine actually imposed on such defendants.

In short, no matter how it is viewed, Zukerman's $10 million fine is grossly out of step with the fines imposed on all other tax offenders.

D. The Appeal And "*Jacobson* Remand"

Zukerman appealed, contending that this extraordinary fine rendered his sentence procedurally and substantively unreasonable. As to procedural unreasonableness, Zukerman argued that the district court had failed to explain why it had imposed such an enormous variance. As to substantive reasonableness, Zukerman argued that the $10 million fine was an extreme outlier that created unwarranted sentencing disparities and was unjustified by the sentencing factors set forth in 18 U.S.C. § 3553(a). Zukerman asserted that each of these grounds independently required the Second Circuit to vacate the judgment and remand for resentencing. Pet'r C.A. Br. 51.

Shortly after oral argument, the Second Circuit issued an order recognizing that the district court had failed to "'adequately explain the chosen sentence to allow for meaningful appellate review.'" App. 21a (quoting *Gall*, 552 U.S. at 50). As the court noted, an appellate court can only accept "a sentencing judge's justifications 'if adequately explained.'" *Id.* at 22a (citation omitted). And although the district court here had "endeavored to explain its reasoning orally at the sentencing hearing and in its written statement of reasons," it remained "unclear as to why and how it settled on $10 million as the fine amount." *Id.*

The Second Circuit identified several deficiencies, noting that the district court had failed to explain at sentencing:

> [1] the relative weight assigned to the various factors cited in its oral and written explanations; [2] to what extent, if any, [it] considered the disparity between the sentence imposed on Zukerman and those imposed in other tax prosecutions; and [3] the basis for its determination that a $10 million fine (in conjunction with other aspects of Zukerman's sentence) was 'sufficient, but not greater than necessary, to comply with the purposes' of criminal sentencing as required by [18 U.S.C.] § 3553(a).

Id.

Although the Second Circuit thus concluded that Zukerman's sentence was procedurally inadequate under *Gall*, it refused to vacate the sentence and remand for resentencing, as required by 18 U.S.C.

§ 3742 and requested by Zukerman. Instead, the court took a step that neither party had requested. It stated that "this issue is best resolved by means of what is known in this Circuit as a *Jacobson* remand, in which we remand 'partial jurisdiction to the district court to supplement the record on a discrete factual or legal issue while retaining jurisdiction over the original appeal.'" App. 22a (citation omitted) (citing, *inter alia*, *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994)).

Thus, instead of vacating the sentence and remanding for a resentencing, the Second Circuit simply "direct[ed] the district court to elaborate on its rationale for imposing a fine greater than those typically imposed in tax prosecutions, and for the amount selected." *Id.* at 22a-23a. Meantime, while it waited for the district court's supplemental explanation, the court held Zukerman's appeal in abeyance.

E. The District Court's Supplemental Memorandum

Several months later, and without further briefing or a hearing, the district court issued a 16-page "Supplemental Memorandum" intended to "explain the Court's basis for imposing the $10 million fine." App. 25a. Although the memorandum purported to convey what the district court had been thinking at the time of sentencing, it included a host of justifications that neither the Government nor the court had ever mentioned at sentencing, and it sought to answer arguments and points raised after sentencing.

Among other things, the Supplemental Memorandum identified two considerations that had

supposedly factored into the district court's choice of a $10 million fine. First, the court noted that while the PSR estimated the total federal and state tax loss at $45 million, Zukerman's criminal restitution obligation under the plea agreement had been for only $37.5 million, leaving what the court described as $7.5 million of "unaccounted losses." *Id.* at 41a. Second, the court "weighed the possible interest that would have accrued" on Zukerman's unpaid taxes, which the court estimated as at least $5 million. *Id.* at 41a & n.2.

Notably, the Government had not raised, and the district court had not mentioned, either of these points at sentencing. And for good reason: By the time of sentencing, Zukerman had fully satisfied *all* of his outstanding tax obligations, including *not only* the $37.5 million in restitution, but *also* all other taxes owed for the relevant years. C.A. ECF No. 137 at 2-3. The tax losses associated with Zukerman's offenses were therefore *not* "unaccounted" for in any sense. Moreover, the Government itself had told the district court—before sentencing—that the IRS would *separately* collect the accrued interest on Zukerman's taxes in a separate civil proceeding. *Id.* at 3.

The Supplemental Memorandum also added other new reasons to support Zukerman's $10 million fine. For example, the district court now said that various items of uncharged conduct "weighed heavily in favor of a high fine," even though it had not adverted to uncharged conduct at all at sentencing. App. 32a. The memorandum also stated that the court had "put the most weight on the general and specific deterrence factors," *id.* at 34a—even though the court had indicated at sentencing that the 70-month prison

sentence was sufficient to achieve deterrence, *id.* at 75a.

The Supplemental Memorandum did not claim that the court had given any consideration to the Sentencing Commission data that Zukerman had provided in his sentencing memorandum. *See id.* at 37a-40a. But it did assert that—at the time of sentencing—the district court had considered and found distinguishable the case of Robert Pfaff, an offender responsible for a tax loss of more than *$100 million*, who paid *no* restitution, and who received a fine of $3 million, less than a *third* the size of Zukerman's $10 million fine. *Id.* at 38a-39a; *see United States v. Pfaff*, 407 F. App'x 506 (2d Cir. 2010) (affirming conviction).

This discussion of Pfaff was a red flag, because although Zukerman had discussed Pfaff in his *appellate* briefs, neither party had mentioned him in their district court sentencing memoranda, nor had the court itself either before or at sentencing. Also telling was that, in connection with this discussion, the Supplemental Memorandum cited a website that *had not even existed* at the time of Zukerman's sentencing. App. 38a (citing MCM Data Consulting website created in preparation of Zukerman's appeal).

The Supplemental Memorandum also asserted that the court had considered and relied on a number of fraud (rather than tax) cases involving substantial fines—none of which had ever before been cited by the parties or the court. *Id.* at 39a-40a. The Supplemental Memorandum misstated the holding of one of these newly unveiled cases, claiming it affirmed a fine "33 times the Guidelines maximum," when in fact it involved a *within*-Guidelines fine. *Compare id.* at 40a (citing *United States v. Gushlak*,

495 F. App'x 132 (2d Cir. 2012)), *with Gushlak*, 495 F. App'x at 136.

Zukerman would have corrected these and other errors if he had been given notice and an opportunity to defend against these new explanations. But he was cut out of the process under the "*Jacobson* remand."

F. The Follow-On Decision

Zukerman promptly requested supplemental briefing in the Second Circuit in light of the district court's new memorandum. Zukerman's request highlighted some of the most significant problems with the district court's new analysis. C.A. ECF No. 137. In particular, Zukerman noted that the court was factually wrong about the supposed $7.5 million in "unaccounted losses" and unpaid interest. Zukerman noted that these key "facts" comprised the district court's only real justification for the magnitude of the $10 million fine. In response, the Government did not defend the district court's idea that there were $7.5 million of "unaccounted losses" and, instead, conceded that by the time of sentencing Zukerman had "largely satisf[ied]" his tax obligations. C.A. ECF No. 153 at 6. Nevertheless, the Government argued that the district court had now adequately justified the fine.

In July 2018, after denying Zukerman's request for supplemental briefing, the Second Circuit issued an opinion affirming Zukerman's sentence. App. 1a-2a. The court first rejected Zukerman's claims of procedural error, including his argument that the district court had inadequately explained the sentence, which the court now simply deemed "moot in light of our *Jacobson* remand." *Id.* at 6a n.1.

The Second Circuit then turned to the substantive reasonableness of the sentence. The court explained that under circuit precedent, it could set aside "only those sentences that are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice." *Id.* at 6a (quoting *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012)). Applying its shocks-the-conscience standard, the Second Circuit had little difficulty in upholding the $10 million fine. *Id.* at 6a-18a.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly admonished that the appellate courts retain a critical role in reviewing the procedural and substantive reasonableness of sentences. The Second Circuit has disregarded that role in two fundamental respects. First, it has invented a peculiar remand procedure that denies defendants their right under 18 U.S.C. § 3742 to a resentencing when an appellate court concludes that a district court has failed adequately to explain a sentence, and effectively invites district courts to invent new reasons to justify the original sentence. And second, the court employs a "shocks-the-conscience" test that eliminates any meaningful review of the substantive reasonableness of the sentence. In both of these important respects, the Second Circuit's sentencing law stands in clear conflict with virtually every other circuit. And the real-world impact of the Second Circuit's anomalous sentencing practice is starkly illustrated by the freakishly large fine that the court upheld in this case. This Court's review is needed.

I. THE "*JACOBSON* REMAND" QUESTION WARRANTS THIS COURT'S REVIEW

The first question concerns whether, when an appellate court concludes that a district court has not adequately justified a sentence, the court must vacate the sentence and remand for a resentencing; or whether a court may, as the Second Circuit does, keep the sentence intact and simply give the district court an opportunity to supplement its explanation.

The Second Circuit's approach, which it calls a "*Jacobson* remand," violates 18 U.S.C. § 3742, conflicts with the practice of every other circuit, and is grossly prejudicial to defendants.

A. The Second Circuit's "*Jacobson* Remand" Procedure Violates The Sentencing Statutes And Settled Practice

The Second Circuit's original conclusion (App. 22a) that the district court had failed to adequately explain Zukerman's massively above-Guidelines fine should have triggered vacatur and resentencing under the federal sentencing statutes. By instead letting the district court simply craft a written, *post hoc* justification for the same sentence, the Second Circuit violated those statutes in two critical respects.

1. Appellate review of criminal sentences is principally governed by 18 U.S.C. § 3742. Subsection (f)(1) states, in no uncertain terms, that "[i]f the court of appeals determines that . . . the sentence was imposed in violation of law . . . , the court *shall remand* the case for further sentencing proceedings." 18 U.S.C. § 3742(f)(1) (emphasis added). Subsection (g) then states that "[a] district court to which a case is remanded pursuant to subsection (f)(1) . . . *shall*

resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals . . . ." *Id.* § 3742(g) (emphasis added).

The statutory language is therefore clear, unambiguous, and emphatic: When an appellate court finds that a sentence was "imposed in violation of law," it "shall remand" to the district court, which in turn "shall resentence" the defendant. *See United States v. Figueroa-Labrada*, 780 F.3d 1294, 1299 (10th Cir. 2015) ("The plain language of § 3742(g) controls the district court's actions on remand . . . .").

Needless to say, "[a] procedurally unreasonable sentence . . . counts as one imposed 'in violation of law.'" *United States v. Jackson*, 901 F.3d 706, 708 (6th Cir. 2018) (citation omitted). That includes a sentence that is procedurally unreasonable due to an inadequate explanation. *Id.*; *see also, e.g.*, *United States v. Akhigbe*, 642 F.3d 1078, 1084 (D.C. Cir. 2011); *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006); *see generally Gall v. United States*, 552 U.S. 38, 51 (2007). Therefore, when a court of appeals concludes that a district court has failed to adequately explain its sentence, the statutory scheme mandates resentencing. The Second Circuit's practice of merely ordering the district court to supplement its explanation, without resentencing the defendant, violates this statutory mandate.

2. When a sentence is imposed in violation of law, Section 3742 not only mandates resentencing, it mandates resentencing "in accordance with section 3553." 18 U.S.C. § 3742(g). Section 3553, in turn, commands a district court to provide "the reasons for its imposition of the particular sentence" and, critically, to do so "*at the time of sentencing*" and "*in*

open court." *Id.* § 3553(c) (emphasis added). As Chief Judge Wood recently observed, "[t]his language is not ambiguous: it requires the district judge to state her reasons for the sentence and to announce her final sentencing decision 'in the [sentencing] hearing itself.'" *United States v. Reed*, 859 F.3d 468, 474 (7th Cir. 2017) (concurring in part and dissenting in part) (alteration in original) (citation omitted); *see also United States v. Garcia-Robles*, 640 F.3d 159, 166-67 (6th Cir. 2011) (Section 3553(c)'s open-court requirement applies to resentencings).

The open-court requirement ensures that the defendant is not cut out of the process in any resentencing. And requiring "the sentencing court [to] 'eyeball' the defendant [in open court] at the instant it exercises its most important judicial responsibility . . . is far from a formality." *United States v. Faulks*, 201 F.3d 208, 209 (3d Cir. 2000). It protects a defendant in several ways. To start, a district court's assessment of what is an appropriate sentence may change "when faced with a live human being in open court." *Id.* at 213. The open-court requirement also gives a defendant the "opportunity to challenge the sentencing rationale before the sentence becomes fixed in the judgment of conviction." *United States v. Reyes*, 116 F.3d 67, 72 (2d Cir. 1997), *abrogated on other grounds by United States v. Hargrett*, 156 F.3d 447 (2d Cir. 1998); *see also United States v. Martin*, 520 F.3d 87, 97 (1st Cir. 2008) (noting that Section 3553(c) "entitle[s]" a defendant "to an on-the-spot opportunity to respond to the sentencing court's rationale").

Requiring sentencing judges to state their reasons in open court also promotes confidence in the judicial process: "Confidence in a judge's use of reason

underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Rita v. United States*, 551 U.S. 338, 356 (2007).

In light of these important purposes, courts have recognized that "post hoc reasons [for a sentence] provided at a later proceeding cannot be used to satisfy the § 3553(c) requirement." *United States v. Miqbel*, 444 F.3d 1173, 1179-80 (9th Cir. 2006). As Chief Judge Wood put the point, "the in-court sentencing hearing is the main event, and it cannot be 'patched up' later with . . . a *post hoc* justification for the court's ultimate choice of a sentence." *Reed*, 859 F.3d at 475 (concurring in part and dissenting in part). The Second Circuit invited—and then condoned—precisely such a *post hoc* "patching up" here. In doing so, the court not only blatantly violated Section 3553(c), but as explained below, seriously prejudiced Zukerman. *See infra* at 23-28.

B. The Second Circuit's "*Jacobson* Remand" Procedure Conflicts With Numerous Decisions From Other Circuits

Not surprisingly, the Second Circuit's practice of remanding unlawful sentences without requiring (or even permitting) resentencing conflicts with decisions from other courts of appeals. In other circuits, it is well settled that when a district court has inadequately explained the basis for its sentence, the proper course is to vacate the sentence and remand for resentencing. *See, e.g.*, *United States v. Smith*, 860 F.3d 508, 520 (7th Cir. 2017); *United States v. Ortiz-Rodriguez*, 789 F.3d 15, 20 (1st Cir. 2015); *United States v. Rangel-Guzman*, 752 F.3d 1222, 1227 (9th

Cir. 2014); *United States v. Carter*, 564 F.3d 325, 330 & n.3 (4th Cir. 2009); *United States v. Livesay*, 525 F.3d 1081, 1094 (11th Cir. 2008); *United States v. Levinson*, 543 F.3d 190, 202 (3d Cir. 2008).

Indeed, the Government itself has contended that vacatur and remand for resentencing is the proper remedy when it challenges sentences as inadequately explained. *See, e.g.*, U.S. Supp. Br. on Reh'g 9, *United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (*en banc*) (No. 06-2059), 2008 WL 5452840 ("[T]he district court failed to provide an adequate explanation for the chosen sentence, and this Court should therefore remand for resentencing."). And that is the remedy that Zukerman expressly sought here. *See* Pet'r C.A. Br. 51, 58.

By invoking the "*Jacobson* remand" procedure, the Second Circuit's decision in this case directly contravenes this overwhelming weight of authority. Simply by virtue of being in the Second Circuit, Zukerman was subjected to a different and far less favorable sentencing-review process. Anywhere else, Zukerman would have had the opportunity to challenge his sentence and the justifications proffered by the district court, and the district court would have had to provide him a fair hearing. But not in the Second Circuit. This arbitrary disuniformity in federal sentencing practice demands the Court's review.

C. This Case Starkly Illustrates The Flaws And Unfairness Of The Second Circuit's Unlawful "*Jacobson* Remand" Practice

The Second Circuit's "*Jacobson* remand" procedure is not only blatantly unlawful, but grossly prejudicial for defendants. Procedure matters. When

a sentence is vacated for lack of an adequate explanation and the matter is remanded for sentencing, a district court may consider the appropriate sentence afresh. But when a district court is instructed to issue a supplemental explanation of an existing sentence via a "*Jacobson* remand," it is locked into justifying its initial sentence and it will invariably be tempted to conjure up new reasons for that sentence never previously raised or tested. In such circumstances, the defendant will be sentenced without the full or fair hearing contemplated by the federal sentencing statutes. This case glaringly illustrates the problems with the Second Circuit's flawed approach.

1. By not remanding for resentencing, the Second Circuit prevented the district court from reconsidering its original sentence and, instead, effectively forced the court to double down on that sentence. It is common for district courts to impose more moderate sentences after an extreme original sentence is vacated for lack of adequate explanation. *See, e.g.*, *Jackson*, 901 F.3d at 708 (sentence reduced from 346 months to 244 months); *United States v. Levinson*, 350 F. App'x 756, 757 (3d Cir. 2009) (sentence increased from probation to 12 months).

That might well have occurred here too, if the Second Circuit had ordered resentencing as required by statute. Indeed, the record strongly suggests that when the district court originally sentenced Zukerman, it did not realize that it was imposing the largest criminal tax fine in history, by far. Faced with that fact at resentencing, and forced to "eyeball" Zukerman in open court (*Faulks*, 201 F.3d at 209), the district court might have imposed a smaller penalty.

2. Under the Second Circuit's remand, the district court had no option but to defend the $10 million fine. In doing so, the record makes clear that the court invented entirely new justifications to retroactively bolster its sentence. *Cf. Reed*, 859 F.3d at 475 (Wood, C.J., concurring in part and dissenting in part) (warning that when reasons "are not provided before the decision is made we cannot say with confidence whether the judge thought of them prior to or following his sentencing decision").

The section of the Supplemental Memorandum addressing sentencing disparities makes this readily apparent. For example, the district court asserted that, at sentencing, it had considered and distinguished the case of Robert Pfaff. App. 38a-39a. But neither the parties nor the district court had ever mentioned Pfaff before or during sentencing; Zukerman first addressed Pfaff in his subsequent *appellate* brief. Moreover, to support an assertion about Pfaff in the Supplemental Memorandum, the district court cited a website that was created on Zukerman's behalf several months *after his sentencing*. *See id.* at 38a.

In its Supplemental Memorandum, the district court also purported to have considered a trio of fraud (not tax) cases that no one had ever cited or mentioned at sentencing. *See id.* at 39a-40a. The Government had never suggested comparing Zukerman to *fraud* offenders until its appellate briefs, when it was searching far and wide to find a *post hoc* justification for the $10 million fine. Resp. C.A. Br. 40-41.

Perhaps the most egregious example of how Zukerman was prejudiced was the district court's reliance on the supposed "$7.5 million in unaccounted

losses" and at least $5 million more in interest. *See* App. 41a. The Supplemental Memorandum says that these losses answer the key question of why the district court felt "$10 million was sufficient, but no greater than necessary to comply with § 3553(a)." *Id.* Yet somehow the district court failed to mention them either at sentencing *or* in its Statement of Reasons form. It is highly unlikely, to say the least, that this (erroneous) rationale actually influenced the court's initial decision to impose a $10 million fine.

This matters, greatly, because a sentence is supposed to be the product of the district court's assessment of relevant factors at the time the sentence is imposed, and not simply a *post hoc* exercise of attempting to backfill a previously selected result.

3. Even if the Supplemental Memorandum *did* accurately represent what the district court thought at sentencing, Zukerman was still prejudiced by the unlawful procedure. Because the district court did not state its reasons "at the time of sentencing" or "in open court," Zukerman had no opportunity to contest those reasons—many of which were badly flawed.

Most importantly, Zukerman would have contested the district court's reliance on the supposed "unaccounted losses" and interest. On this critical issue, the district court simply got the facts wrong. It is true that the restitution obligation imposed as part of Zukerman's federal criminal judgment was less than the Probation Office's *estimate* of the total *federal*, *state*, and *local* tax loss, but that does not mean Zukerman in fact retained millions in improper gains. He did not. Even the Government conceded below that, "by the time of sentencing, Zukerman had caused the payment of several million dollars of losses

above and beyond the 'base restitution amount' of $37 million stipulated to in the plea agreement, thus largely satisfying the unpaid tax component of what he owes to his victims." C.A. ECF No. 153 at 6 (emphasis omitted); *see also* C.A. ECF No. 137 at 2-3 (explaining that Zukerman had filed amended returns and paid all back taxes owed).

The Government also recognized that Zukerman has not escaped paying interest on his back taxes. The most the Government could fault Zukerman for was not trying to calculate and *prepay* that interest. *See* C.A. ECF No. 153 at 6. If the district court had openly relied on these supposed losses at the original sentencing hearing—or in a proper resentencing hearing—Zukerman would have corrected the district court's error before sentence was imposed. C.A. ECF No. 137 at 3 (explaining that Zukerman had paid millions of dollars in interest and that Government had informed district court that it would assess any remaining interest owed *after* sentencing).

Zukerman also would have contested the district court's heavy reliance on uncharged and dismissed conduct in its *post hoc* explanation. The district court did not mention such conduct *at all* at the original sentencing, but the Supplemental Memorandum incredibly asserts that it played a substantial role in the court's analysis. *See* App. 32a; *see generally Reed*, 859 F.3d at 475 (Wood, C.J., concurring in part and dissenting in part) ("[A]dditional evidence or argument on the defendant's part might have influenced the judge's weighing of the mitigating and aggravating factors.").

Finally, Zukerman would have also contested the district court's flawed analysis of sentencing disparities. The Supplemental Memorandum

contains a host of errors on this topic: It inexplicably limited its comparative analysis to "this Circuit," App. 38a, even though the Sentencing Reform Act and Guidelines are concerned with *nationwide* disparities, *see, e.g.*, *United States v. Franklin*, 785 F.3d 1365, 1371 (10th Cir. 2015). It perversely treated Zukerman as more culpable than other defendants because he *lacked* coconspirators. App. 38a; *contra Ocasio v. United States*, 136 S. Ct. 1423, 1441 (2016) ("[A] 'combination' or 'group association for criminal purposes' is more dangerous than separate individuals acting alone." (citation and some alterations omitted)). It flatly misread *United States v. Gushlak*, 495 F. App'x 132 (2d Cir. 2012), as affirming a far-*above*-Guidelines fine, when in fact it affirmed a *within*-Guidelines fine. App. 40a. And it relied on woefully inapposite fraud cases. *Id.* at 39a-40a.

If the district court had stated these erroneous reasons openly at resentencing, Zukerman would have at least had a chance of pointing out these errors and correcting them, as part of the face-to-face sentencing, in "open court," that Section 3553(c) requires. Instead, the Second Circuit deprived Zukerman of the fair resentencing process to which he was entitled by law once the Second Circuit initially recognized that his extraordinary sentence was procedurally unreasonable. This Court should grant certiorari to review the legality of the Second Circuit's anomalous "*Jacobson* remand" procedure in these circumstances.

II. THE STANDARD-OF-REVIEW QUESTION WARRANTS THIS COURT'S REVIEW

This case presents a second question that independently warrants this Court's attention: whether an appellate court may review the substantive reasonableness of sentences under the hands-off, "shocks-the-conscience" test. The Second Circuit's adoption of that test conflicts with the decisions of this Court as well as those of other courts of appeals. And once again, this case illustrates the severe consequences for defendants of the Second Circuit's outlier position.

A. The Second Circuit's Shocks-The-Conscience Standard Is Incompatible With This Court's Precedents

In reviewing the substantive reasonableness of Zukerman's sentence, the Second Circuit followed its precedent holding that a sentence may be set aside only if it was "so shockingly high . . . that allowing [it] to stand would damage the administration of justice." App. 6a (citation omitted). This standard comes from *United States v. Rigas*, where the Second Circuit concluded that the substantive reasonableness of sentences should be judged by a "shocks-the-conscience" test analogous to the test used to assess whether intentional torts by state actors violate substantive due process. 583 F.3d 108, 122-24 (2d Cir. 2009) (pointing to *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and asserting that the "substantive unreasonableness" and "shocks-the-conscience" standards "seek to capture the same idea").

The Second Circuit's shocks-the-conscience test is sharply at odds with this Court's precedents. This

Court has made clear that appellate courts reviewing the substance of a criminal sentence must apply "the familiar abuse-of-discretion standard of review." *Gall*, 552 U.S. at 46. This Court has further explained that in this context, a reviewing court must consider the factors set forth in 18 U.S.C. § 3553(a) and ensure the sentence imposed by the district court is "reasonable." *Id.* at 46, 51. Any substantively "unreasonable" sentence must be set aside as an abuse of discretion. *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 537 (2013); *Setser v. United States*, 566 U.S. 231, 244 (2012); *Rita*, 551 U.S. at 341.

This Court also has already recognized that whether an action is unreasonable is obviously a different question from whether it shocks the conscience. Indeed, this Court confirmed that common-sense distinction in the very case—*County of Sacramento v. Lewis*—that the Second Circuit erroneously relied on in *Rigas*. In *County of Sacramento*, the Court addressed whether a police officer's reckless conduct during a high-speed chase, which resulted in the death of the suspect being pursued, violated substantive due process. The Court said no. Only conduct that shocks the conscience, the Court explained, would violate due process. 523 U.S. at 846-47.

Notably, *County of Sacramento* expressly *rejected* a "reasonableness" test and explained that the shocks-the-conscience standard is far *harder* to satisfy. *Id.* at 842-55 (noting that even though the officer's conduct might have been unreasonable, "it does not shock the conscience"). The Second Circuit's belief that substantive reasonableness "capture[s] the same idea" as the "shocks-the-conscience" standard (*Rigas*, 583 F.3d at 122-23) is thus totally unjustified.

Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), confirms that the Second Circuit's shocks-the-conscience test is out of step with this Court's precedent. There, the Fifth Circuit had held that reversal under a plain-error standard was warranted only by errors "that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *Id.* at 1905 (citation omitted). This Court rejected the Fifth Circuit's shocks-the-conscience formulation as too demanding, noting that it improperly suggested that reversal would be justified only where a district court had a culpable state of mind or had engaged in "grossly serious misconduct." *Id.* at 1906-07. This Court should reject the Second Circuit's shocks-the-conscience review of criminal sentences for the same reason.

B. The Second Circuit's Shocks-The-Conscience Standard Conflicts With The Standard Used By Other Circuits

The shocks-the-conscience test applied to Zukerman's sentence is firmly entrenched in the Second Circuit. *See, e.g.*, *United States v. Spoor*, 904 F.3d 141, 156 (2d Cir. 2018) ("[W]e will reverse the district court's decision only if the sentence imposed amounts to a manifest injustice or shocks the conscience." (citation and alteration omitted)). The Government expressly invoked the test when urging the Second Circuit to uphold Zukerman's extreme sentence on appeal, and has likewise done so in many other cases in the Second Circuit. C.A. Oral Argument at 22:26-:32; *see also, e.g.*, U.S. Br. 29, *United States v. Jaramillo*, No. 17-3133 (2d Cir. July

20, 2018), ECF No. 46 ("In these circumstances, such [an upwardly variant] sentence is not . . . one that 'shocks the conscience.'" (citation omitted)).

The Second Circuit's adoption of that standard conflicts with the practice of every other circuit, none of which applies the shocks-the-conscience standard. Instead, the other circuits simply ask whether the sentence is unreasonable using the ordinary abuse-of-discretion standard prescribed by this Court. *See, e.g.*, *United States v. Irey*, 612 F.3d 1160, 1191 (11th Cir. 2010) (*en banc*) ("The fetters on a district court's sentencing discretion are the requirement of reasonableness and the existence of appellate review to enforce that requirement."); *United States v. Gardellini*, 545 F.3d 1089, 1093 (D.C. Cir. 2008) (Kavanaugh, J.) ("In light of the facts and circumstances of the offense and offender, is the sentence so unreasonably high or unreasonably low as to constitute an abuse of discretion by the district court?"). This lack of uniformity among the courts of appeals warrants this Court's review.

C. The Shocks-The-Conscience Test Was Outcome Determinative Here

This case demonstrates that the Second Circuit's excessively deferential, shocks-the-conscience standard matters in practice. In light of Zukerman's 70-month prison sentence, his payment of $37.5 million in restitution, and his agreement not to contest civil penalties, the imposition of a $10 million fine was substantively unreasonable. In upholding the fine, the Second Circuit demonstrated that its erroneous standard guts both (1) this Court's requirement that substantial deviations from the Guidelines be appropriately justified and (2) the

important statutory goal of avoiding unwarranted sentencing disparities.

1. Although the Guidelines are no longer binding, they continue to play a "central role in sentencing." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). When a district court varies from the Guidelines, it must "ensure that [its] justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. Naturally, "a major departure should be supported by a more significant justification than a minor one." *Id.*

As discussed, the extent of the upward variance on the $10 million fine at issue here was astronomical. *See supra* at 9-12. Yet, in upholding that outlier fine, the Second Circuit never meaningfully reviewed whether the factors identified by the district court could justify "the *degree* of the variance," *Gall*, 552 U.S. at 50 (emphasis added)—*i.e.*, the decision not just to go beyond $250,000, but to go *all the way to $10 million*. Put otherwise, the court of appeals never asked whether it was reasonable to conclude that nothing less than $10 million would be "sufficient, but not greater than necessary" to satisfy the purposes of sentencing. 18 U.S.C. § 3553(a). It was not. *See* Pet'r C.A. Br. 42-49; Pet'r C.A. Reply Br. 13-24.

The only reason the district court gave that comes close to explaining why it thought it necessary to exceed the Guidelines by $9.75 million was its mistaken belief—expressed for the first time in the Supplemental Memorandum—that there were $7.5 million of "unaccounted losses," plus unpaid interest. App. 41a. That is, the district court apparently believed that, even after paying restitution, Zukerman had gotten away with more than $7.5 million in profits from his crimes. But as explained

above, the court's supposition was factually wrong. *See supra* at 14-15, 26-27.

Applying its extraordinarily deferential standard, the Second Circuit gave this "unaccounted losses" justification no meaningful scrutiny. It first described the issue as "a relatively minor aspect of the district court's analysis," App. 13a, without trying to explain what else could account for the magnitude of the variance. It then said that, in any event, the fact that "these considerations . . . were referenced in Zukerman's Pre-Sentence Report" was good enough. *Id.* But the PSR's inclusion of a total tax-loss estimate was not a determination that, absent an enormous fine, Zukerman would get away with millions in ill-gotten gains. Nor did the PSR reflect Zukerman's subsequent payment of both the full restitution *and* all other outstanding taxes owed. *See* C.A. ECF No. 153 at 6.

Only the Second Circuit's toothless, shocks-the-conscience test could have allowed the court to ignore the failures in the district court's analysis. And especially when considered alongside the other errors in the district court's supplemental analysis, the district court's explanation is clearly inadequate. *See supra* at 26-28. There was no justification here "sufficiently compelling to support the degree of the variance," *Gall*, 552 U.S. at 50, and the Second Circuit should have overturned Zukerman's sentence under the proper standard of review.

2. The Second Circuit's shocks-the-conscience standard also obviated any meaningful analysis of the wild disparity between Zukerman's $10 million fine and those imposed on other tax offenders.

Promoting fair and uniform sentences is at the heart of the Sentencing Reform Act, and is why the Guidelines remain of crucial significance. *See Hughes v. United States*, 138 S. Ct. 1765, 1775-77 (2018); *Molina-Martinez*, 136 S. Ct. at 1342. Congress has required sentencing courts to consider at sentencing "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).

On appeal, Zukerman used the comprehensive data collected by the Sentencing Commission to show that his sentence was an egregious outlier. As explained in more detail above, the data show that $10 million is by far the largest fine imposed on any tax offender in at least two decades, and likely ever. *See supra* at 10. And it is also vastly greater than the average fines paid by defendants with comparable (or *higher*) offense levels and loss amounts. *Id.*

Zukerman paired this data on fines with data regarding incarceration, which showed that his astronomical fine could not be explained as a counterweight to a lenient prison term. The data showed that a large majority of tax offenders receive substantially *below*-Guidelines prison terms. C.A.J.A.235-36. Indeed, among defendants with Zukerman's offense level sentenced between 2007 and 2015, over 85% received below-Guidelines prison terms, which averaged 27 months below the recommended minimum. C.A.J.A.237. Thus, although Zukerman's prison term was at the low end of the Guidelines recommendation, his sentence was in fact unusually harsh even *before* the district court added the largest fine in history.

The Second Circuit summarily rejected Zukerman's striking and unrebutted sentencing disparity data as "unconvincing." App. 11a. None of this mattered, according to the Second Circuit, because Zukerman had not proven that these other defendants "'were so similarly situated to himself that any disparity in sentence would be unwarranted.'" *Id.* (quoting *United States v. Broxmeyer*, 699 F.3d 265, 296-97 (2d Cir. 2012)).

But unlike the defendant in *Broxmeyer*, Zukerman did not just cherry-pick an assortment of superficially favorable comparators. He presented an analysis of *every single* tax offender sentenced since 1999. And he showed that he was fined more harshly, by far, than *any* of them—including those specifically identified as comparable *by the Government itself*. *See supra* at 11-12 (noting that Government's handpicked defendants received an average fine of $2,381).

If the comprehensive sentencing data showing the unwarranted disparity that was presented by Zukerman in this case was not good enough for the Second Circuit, nothing will ever be. Criminal defendants lack any reliable means of accessing detailed, case-specific facts to definitively prove that they are "similarly situated" to any given defendant such that "any disparity in sentence" would necessarily be unwarranted. App. 11a (citation omitted). It is plainly unreasonable to deem a defendant's argument "unconvincing" when it establishes a gross disparity on the Sentencing Commission's comprehensive data and the Government's own list of comparable defendants. Yet that is apparently what the Second Circuit's

excessively deferential, shocks-the-conscience test requires.[2]

Accordingly, the Second Circuit's shocks-the-conscience test also warrants this Court's review.

* * * * *

District courts have broad leeway to mete out sentences. But appellate courts must play a meaningful role in reviewing sentences and eliminating gross and unwarranted disparities. The appellate court in this case fundamentally abdicated that role, and did so based on circuit precedent that will infect other cases. This Court's intervention is needed to ensure that defendants in the Second Circuit receive the same procedural and substantive protections enjoyed by defendants in the rest of the country.

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[2] By contrast, *United States v. Sample*, 901 F.3d 1196, 1201 (10th Cir. 2018), illustrates that Commission data can be used to establish the substantive unreasonableness of an extreme variance under the correct standard of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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