No. 18-642

In the Supreme Court of the United States

MORRIS E. ZUKERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in initially remanding this case to the district court for an additional explanation of the sentence imposed.

2. Whether the court of appeals correctly affirmed petitioner's sentence as substantively reasonable under the "abuse of discretion" standard of review described in *Gall* v. *United States*, 552 U.S. 38 (2007).

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's sentence (Pet. App. 1a-18a) is reported at 897 F.3d 423. A prior opinion of the court of appeals remanding the case to the district court (Pet. App. 19a-23a) is not published in the Federal Reporter but is reprinted at 710 Fed. Appx. 499. The supplemental memorandum of the district court (Pet. App. 24a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2018. The petition for a writ of certiorari was filed on October 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of New York, petitioner

was convicted on one count of tax evasion, in violation of 26 U.S.C. 7201, and one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 1a, 24a. The district court sentenced petitioner to 70 months of imprisonment, to be followed by one year of supervised release, and ordered petitioner to pay approximately $37 million in restitution and a $10 million fine. *Id.* at 1a, 76a. The court of appeals initially remanded the case to the district court for a further explanation of the sentence, *id.* at 19a-23a, and thereafter affirmed, *id.* at 2a.

1. Petitioner is a graduate of Harvard College and Harvard Business School, and a former managing director at Morgan Stanley. Pet. App. 25a. After spending two decades at Morgan Stanley, petitioner founded his own investment firm, M.E. Zukerman & Co., which was known as "MEZCO." *Ibid.* Petitioner had significant success and accumulated a "net-worth * * * in the eight-figure range." *Id.* at 5a; see Presentence Investigation Report (PSR) ¶ 145; see also Gov't C.A. Br. 2 (noting petitioner's net worth of $37 million). He also evaded a comparable amount—approximately $45 million—in federal, state, and local taxes. PSR ¶ 65; Pet. App. 12a, 31a.

Over the course of two decades, petitioner "repeatedly and brazenly committed sophisticated tax fraud." Pet. App. 17a. In 2002, the Manhattan District Attorney's Office investigated petitioner for evading state sales taxes on millions of dollars of "Old Master" paintings that he had purchased. *Id.* at 25a. Petitioner had conspired with the sellers of the paintings to create false billing and delivery information—and, in some circumstances, even to deliver empty shipping crates to

out-of-state locations—in order to make it appear that the paintings had been shipped out of New York and were therefore exempt from the state sales tax. PSR ¶¶ 70-71. Petitioner avoided criminal charges for that conduct, instead resolving the matter by agreeing to cooperate with state prosecutors and to pay the $233,000 that he owed. PSR ¶¶ 71-72.

Petitioner, however, was undeterred by that "$233,000 slap-on-the-wrist." Pet. App. 37a. From 2008 to 2014, petitioner engaged in virtually identical criminal conduct, purchasing art and evading taxes on the purchases —all told, evading approximately $4.5 million in taxes on more than $52 million of art. PSR ¶¶ 53-56. Petitioner also engaged in various other frauds during the same time period, including lying to the IRS during two different audits (relating to his and his daughter's personal tax liabilities); diverting funds from corporate entities that he controlled to pay the salary of a domestic employee; evading personal income tax by disguising payments for real estate in Maine as contributions to a charitable land trust; concealing income from various corporations that he controlled; evading sales tax on a $645,000 pair of diamond earrings; and causing family members and household employees to file false tax returns. Pet. App. 3a, 26a-27a. Petitioner even lied to his insurance company to obtain rate reductions for the five cars that he garaged in Manhattan, making up a phony address in Westchester County, where rates were lower. *Id.* at 27a.

Petitioner's most significant fraud, however, began in early 2008, when MEZCO received over $100 million from selling its 50% interest in an oil company called

Penreco. PSR ¶¶ 10, 82.[1] Months later, when MEZCO's accountant informed petitioner that the sale would result in significant capital-gains income, petitioner told the accountant not to report any taxable income from the sale. PSR ¶ 20. He falsely claimed to the accountant that MEZCO had actually sold its interest in Penreco a year earlier to the Zukerman Family Trust—meaning that any capital-gains tax liability would fall not on MEZCO but on the Family Trust, an entity for which the accountant was not responsible. *Ibid.* When the accountant requested documentation, petitioner sent him a fake promissory note, dated January 2007, purporting to reflect a $48 million sale of Penreco from MEZCO to the Family Trust. PSR ¶ 21. The $48 million figure was based on an internal MEZCO document suggesting that the tax basis in Penreco was approximately $48 million, meaning that the fake sale would result in almost no taxable income. *Ibid.* But after the accountant later informed petitioner that MEZCO's tax basis in Penreco was in fact only $24 million (meaning that there would be capital gains), petitioner "revised" the purported sale price downward and sent the accountant a new fake note, also dated January 2007, reflecting a $25 million fake sale and a capital gain of around $500,000. PSR ¶¶ 22-24. Petitioner did not report any income from the fictitious sale of Penreco on the Family Trust's tax returns. PSR ¶ 25.

The upshot of all this was that petitioner willfully failed to report or pay taxes on MEZCO's receipt of

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[1] MEZCO owned its 50% share of Penreco through two intermediate subsidiaries, M.E. Zukerman Specialty Oil Acquisition Corporation and M.E. Zukerman Specialty Oil Corporation. PSR ¶¶ 10, 16. This brief collectively refers to MEZCO and those subsidiaries as "MEZCO" for the sake of simplicity.

$130 million of income between 2007 and 2008, leading to the evasion of more than $31 million in corporate income taxes. PSR ¶¶ 25-26. And when the IRS audited aspects of the Penreco transaction in 2012, petitioner lied to his tax accountant and to the attorneys handling the audit, which led those tax professionals to repeat petitioner's lies to the IRS. Pet. App. 2a, 26a; see *In re Grand Jury Subpoenas Dated March 2, 2015*, 628 Fed. Appx. 13, 14-15 (2d Cir. 2015) (rejecting claims of attorney-client privilege relating to false statements made by petitioner to his attorneys). In sum, as the district court found, petitioner's various frauds "spanned fifteen years and involved submitting more than 50 falsified tax forms[,] * * * cheating federal, state, and local governments out of more than $45 million." Pet. App. 31a.

2. A federal grand jury indicted petitioner on one count of tax evasion, in violation of 26 U.S.C. 7201; one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a); and one count of wire fraud, in violation of 18 U.S.C. 1341. Pet. App. 3a, 27a.

Petitioner pleaded guilty to the tax-evasion and tax-obstruction charges, pursuant to a written plea agreement in which petitioner stipulated that the properly calculated Sentencing Guidelines range of imprisonment was 70-87 months; that the maximum statutory fine was at least $90 million (based on a doubling of the $45 million in losses suffered by petitioner's victims, under 18 U.S.C. 3571(d)); and that the Sentencing Guidelines fine range was $25,000 to $250,000. PSR ¶¶ 159, 167, 169; see PSR 50 (defendant's objections) (stating that the maximum fine was $90 million per count).

At sentencing, petitioner requested that the district court impose a below-Guidelines prison sentence and that it impose no fine at all—or, at most, a "modest" fine within the stipulated Guidelines range of $25,000 to $250,000. C.A. App. 118, 165. He based that proposal on a study he had commissioned in connection with his sentencing that indicated that most criminal tax defendants did not receive fines as part of their sentences. *Ibid.* The government, meanwhile, argued for a within-Guidelines prison sentence based on the nature and duration of petitioner's criminal conduct, the aggregate harm caused by that conduct, petitioner's previous involvement in sales tax fraud, and the need for deterrence. See Pet. App. 50a-52a. The government also requested a "substantial" upward variance from the Guidelines fine range, pointing out that petitioner's sentencing data failed to reveal how many of the offenders had in fact possessed the financial means to pay a fine. C.A. App. 320-321.

After hearing argument and acknowledging its obligation to consider all of the factors under 18 U.S.C. 3553(a), the district court imposed a bottom-of-the-Guidelines-range term of imprisonment of 70 months and an above-Guidelines fine of $10 million. Pet. App. 76a. The court based its sentence not only on the amount of taxes that petitioner had evaded but also on the fact that his "frauds were deliberate and calculated" "over the course of many years," demonstrating the "extraordinary lengths" petitioner was willing to go to "in order to cheat." *Id.* at 74a. The court observed that restitution payments had "come from [petitioner's] companies and not from his own pocket," meaning that petitioner "remains an astonishingly wealthy man." *Id.* at 75a. The court also noted the importance of general

deterrence in a case like this one. *Ibid.* As it explained, "others just like [petitioner] are watching to determine whether they, too, will try to avoid paying their fair share." *Ibid.*

Following the district court's imposition of its sentence, petitioner did not object to the procedural reasonableness of the fine or any other aspect of the sentence. Pet. App. 77a. The court thereafter issued a written statement of reasons, which documented that it had granted an upward variance in the fine amount because of the nature and circumstances of the offense and the history and characteristics of the defendant. *Id.* at 84a-85a. The statement explained that the variance was premised on petitioner's "financial ability to pay a significant fine," the fact that "[m]uch of the restitution has been paid by [petitioner's] corporate entities," the scope and complexity of the fraud, and the need "to provide sufficient deterrence." *Id.* at 87a.

3. The court of appeals initially remanded for clarification of the record, Pet. App. 19a-23a, and later affirmed, *id.* at 1a-18a.

a. The court of appeals initially made an assessment that, notwithstanding the district court's statements at sentencing and in its written statement of reasons, "the record nevertheless remains unclear as to why and how [the district court] settled on $10 million as the fine amount." Pet. App. 22a. Although the court of appeals acknowledged that "[t]he district court endeavored to explain its reasoning," the court of appeals indicated that it could not discern "the relative weight assigned to the various factors cited in [the district court's] oral and written explanations; to what extent, if any, the district court considered the disparity between the sentence imposed on [petitioner] and those imposed in other tax

prosecutions; and the basis for the determination that a $10 million fine (in conjunction with other aspects of [petitioner's] sentence) was 'sufficient, but not greater than necessary, to comply with the purposes' of criminal sentencing as required by § 3553(a)." *Ibid.*

Relying on *United States* v. *Jacobson*, 15 F.3d 19 (2d Cir. 1994), which explains that an appellate court may remand "'partial jurisdiction to the district court to supplement the record on a discrete factual or legal issue,'" the court of appeals directed 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." Pet. App. 22a-23a (citation omitted). The court indicated that, following the district court's elaboration, "either party may restore the matter to the active docket of [the court of appeals]." *Id.* at 23a.

b. The district court issued a supplemental memorandum further describing why "the imposition of a fine well above the Guidelines range was warranted." Pet. App. 42a; see *id.* at 24a-43a.

The district court explained that several considerations under 18 U.S.C. 3553(a) and 18 U.S.C. 3572(a) justified an above-Guidelines fine. Pet. App. 29a-42a. First, the court highlighted the complex nature and 15-year duration of petitioner's criminal conduct, which involved "more than 50 falsified tax forms for at least ten different individuals." *Id.* at 31a. Second, the court emphasized petitioner's "history of uncharged criminal conduct," as well as his refusal "to come clean * * * despite the number of investigations and audits that provided him the opportunities to do so." *Id.* at 32a-33a. Third, the court explained that it "put the most weight" on the general and specific deterrence factors under Section 3553(a). *Id.* at 34a. Among other things, it

noted that a steep fine was important for specific deterrence, as "the $233,000 slap-on-the-wrist [petitioner] received in 2002 proved useless in dissuading him from evading his taxes." *Id.* at 37a. Finally, the court reasoned that the $10 million fine would not result in unwarranted disparities; was necessary to make petitioner's victims whole;[2] and was "not overly burdensome" in light of petitioner's many millions of dollars in personal financial resources. *Id.* at 42a; see *id.* at 40a-42a. The court added that it gave "substantial weight" to the fact that petitioner's corporate entities, rather than petitioner personally, had paid over $37 million in restitution payments. *Id.* at 42a.

c. Pursuant to the court of appeals' previous remand order, petitioner moved to restore the appeal to the court's active docket, requested a briefing schedule, and simultaneously sought to stay the periodic fine payments pending appeal. See C.A. Doc. 121 (Feb. 12, 2018); C.A. Doc. 137 (May 11, 2018). In connection with those motions, petitioner advanced extensive merits arguments attacking the procedural and substantive reasonableness of his sentence. See C.A. Doc. 137, at 2-5. The court of appeals accordingly reinstated petitioner's appeal and ordered the government to respond to petitioner's merits arguments and his request for a stay. C.A. Doc. 144 (May 18, 2018). The court also permitted petitioner to file a reply. *Id.* at 2. In none of those fil-

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[2] On this point, the district court incorrectly stated that petitioner had paid "only $37.5 million out of the total $45 million tax loss." Pet. App. 41a. As the government explained to the court of appeals, at the time of sentencing, petitioner had paid most of the remaining tax restitution, although he still owed other amounts to his victims. C.A. Doc. 153, at 6 (June 1, 2018).

ings did petitioner challenge the court of appeals' remand order or the district court's authority to issue its supplemental memorandum.

d. The court of appeals affirmed. Pet. App. 1a-18a.

The court of appeals first addressed petitioner's challenge to the procedural reasonableness of the fine. Pet. App. 4a-6a. It noted that petitioner had "not raise[d] any procedural objections below" and thus reviewed those objections for plain error only. *Id.* at 4a. The court determined that the district court did not plainly err in using the 2015 version of the Sentencing Guidelines or in finding that petitioner had ample ability to pay the $10 million fine. *Id.* at 4a-6a.

The court of appeals then reviewed petitioner's sentence for substantive reasonableness, quoting from *Gall* v. *United States*, 552 U.S. 38 (2007), to identify the "deferential abuse-of-discretion standard" applicable to its review. Pet. App. 6a (citation omitted). The court explained that the standard allows a court of appeals to "patrol[] the boundaries of reasonableness" but to "do so modestly," vacating as substantively unreasonable "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." *Ibid.* (quoting *United States* v. *Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), cert. denied, 569 U.S. 1025 (2013)).

The court of appeals then explained why the district court's selection of an above-Guidelines fine was substantively reasonable. The court reasoned that "the district court expressed deserved opprobrium" for petitioner's extensive fraudulent scheme, noting that the district court's decision to vary from the Guidelines "'may attract the greatest respect when the sentencing

judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply.'" Pet. App. 7a (citation omitted). The court of appeals also observed that petitioner had not challenged the district court's weighing of his history and characteristics, including his extensive uncharged conduct. *Id.* at 8a. In addition, the court of appeals determined that the district court had considered both general and specific deterrence and had "properly determined that a more onerous fine was needed" in light of petitioner's "enormous resources." *Id.* at 10a.

The court of appeals rejected petitioner's arguments that his above-Guidelines fine created unwarranted sentencing disparities. Pet. App. 11a. The court found that, because petitioner relied on "aggregated sentencing data and vague summaries of other cases," he had not identified other criminal defendants "'with similar records who have been found guilty of similar conduct.'" *Ibid.* (quoting 18 U.S.C. 3553(a)(6)). The court thus could not conclude "that any disparity in sentence would be unwarranted" in light of the information presented to the district court. *Ibid.* (citation omitted).

The court of appeals further determined that the district court had appropriately considered petitioner's financial resources in imposing a $10 million fine. Pet. App. 13a-15a. The court of appeals explained that 18 U.S.C. 3572(a) mandates such consideration and that "[a] fine can only be an effective deterrent if it is painful to pay, and whether a given dollar amount hurts to cough up depends upon the wealth of the person paying it." Pet. App. 14a; see *id.* at 13a-14a; Sentencing Guidelines § 5E1.2(d)(2)-(3) (2015). The court additionally concluded that the district court had appropriately given

weight to the fact that "corporate payment of restitution reduced the degree to which restitution personally punished" petitioner. Pet. App. 16a. The court of appeals did not, however, "definitively rule" on the propriety of "considering the gap between [petitioner's] restitution and the estimated tax loss," because that part of the district court's analysis relied on portions of the PSR to which petitioner had not objected. *Id.* at 13a.

Beyond its specific approval of the considerations on which the district court relied, the court of appeals also cautioned that "[f]ocusing on each facet of the district court's reasoning individually, rather than their totality, is to miss the forest for the trees." Pet. App. 17a. It explained that the district court had reasonably decided that petitioner, "a very wealthy man who has repeatedly and brazenly committed sophisticated tax fraud * * * ought to pay a fine hefty enough to take any financial benefit out of his crimes and to give pause to others who might be tempted to commit similar crimes." *Ibid.* The court of appeals thus concluded that petitioner's "sentence was reasonable." *Id.* at 18a (quoting *Gall*, 552 U.S. at 56).

ARGUMENT

The court of appeals correctly determined that petitioner's sentence was substantively reasonable and not an abuse of the district court's discretion. The decision of the court of appeals does not conflict with any decision of this Court or of another court of appeals, and petitioner did not raise below either of the two questions presented—the propriety of the court of appeals' remand procedure or its specific formulation of the abuse-of-discretion standard. Neither question warrants this Court's review.

1. Petitioner first contends (Pet. 19-28) that the court of appeals erred when it remanded his case to the district court for clarification of that court's sentencing decision rather than for a full resentencing proceeding. That contention lacks merit, and the question does not warrant this Court's review.

a. As an initial matter, petitioner did not raise this issue below. After the court of appeals' remand order, he did not seek to make any additional written submission to the district court, nor did he request a new sentencing hearing. And in his several appellate filings challenging the district court's supplemental sentencing memorandum, petitioner never contested the propriety of the remand. That alone is a sufficient reason for this Court to deny the petition. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" precluding a grant of certiorari when "'the question presented was not pressed or passed upon below'") (citation omitted); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

b. Even if the argument had been advanced below, it would not warrant further review in this Court. Petitioner contends (Pet. 19-21) that the court of appeals was required under 18 U.S.C. 3742(g) to remand his case for full resentencing, rather than to permit clarification of the record. That contention is mistaken.

Under 18 U.S.C. 3742(f)(1), "[i]f the court of appeals determines that * * * the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." The following subsection then provides 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." 18 U.S.C. 3742(g). Any resentencing under subsection (g), therefore, is triggered only when a case has been remanded, as relevant here, "pursuant to subsection (f)(1)." 18 U.S.C. 3742(g). And a remand "pursuant to subsection (f)(1)" occurs only after, as relevant here, a "court of appeals determines that * * * the sentence was imposed in violation of law." 18 U.S.C. 3742(f)(1). But petitioner has not demonstrated that subsection (f)(1) applies here—*i.e.*, that the court of appeals determined that his initial sentence "was imposed in violation of law." *Ibid.*

More specifically, the court of appeals never determined that the district court's initial sentence was "procedurally unreasonable due to an inadequate explanation," as petitioner assumes (Pet. 20). The district court originally provided in open court several reasons for its sentence. See Pet. App. 72a-76a. And it followed up with a written statement of reasons emphasizing many of the same points. See *id.* at 84a-87a. On appeal, the court of appeals did not conclude that the district court's explanation was procedurally unreasonable under *Gall* v. *United States*, 552 U.S. 38 (2007). Indeed, it recognized that "[t]he district court endeavored to explain its reasoning orally at the sentencing hearing and in its written statement of reasons." Pet. App. 22a. But the court of appeals nevertheless found that the district court's reasoning "remains unclear as to why and how it settled on $10 million as the fine amount." *Ibid.* Accordingly, it "direct[ed] the district court to elaborate on its rationale." *Ibid.* Because the court of appeals

requested further elaboration of an opaque-but-explained decision, rather than concluding that the district court had procedurally erred in failing to explain its decision, the court of appeals never "determine[d] that * * * the sentence was imposed in violation of law." 18 U.S.C. 3742(f)(1). Any requirement for a sentencing hearing in 18 U.S.C. 3742(g) thus was never triggered.

Nor is there any merit to petitioner's more general complaint (Pet. 21-22, 24) that the remand procedure employed by the court of appeals denied him the opportunity to appear before the district court and raise arguments on remand. Nothing in the court of appeals' remand order precluded petitioner from requesting either an in-person hearing or the opportunity to submit supplemental briefs. See, *e.g.*, *United States* v. *Valdez*, No. 04-cr-603 (W.D. Tex.) Doc. 285 (Sept. 7, 2006); Doc. 286 (Sept. 13, 2006); Doc. 290 (Oct. 24, 2006) (respectively, (1) a court of appeals order remanding the case for clarification of Guidelines calculations, (2) the defendant's memorandum requesting a hearing, and (3) the district court's order setting a hearing). Even in the context of the court of appeals' limited remand, petitioner could have sought to participate in order to prevent any factual errors. And in the event that the district court became persuaded that its original sentence was unsupportable, the court could have made that determination clear to the court of appeals. Petitioner therefore fails to demonstrate that the court of appeals' limited remand in fact "cut [him] out of the process." Pet. 21.

c. Petitioner contends (Pet. 22-23) that the court of appeals' partial remand conflicts with decisions of other courts of appeals. But none of the decisions that petitioner cites (*ibid.*) criticizes, calls into question, or even

mentions the remand procedure used by the court of appeals here. Indeed, the primary authority on which petitioner relies (Pet. 21, 22, 25, 27)—Chief Judge Wood's partial dissenting opinion in *United States* v. *Reed*, 859 F.3d 468 (7th Cir. 2017)—acknowledged that a district court may sometimes need to clarify or "amplify[] reasons already given at the sentencing hearing," as occurred here. *Id.* at 474; see *id.* at 474-475 (criticizing the majority for upholding a sentence based on an issue that the district court failed to address at all during sentencing and mentioned only in its written statement of reasons).

More generally, petitioner identifies no authority for the proposition that a court of appeals may never remand without vacating. To the contrary, courts of appeals regularly remand cases to obtain clarification or supplementation of the record from the district court. See, *e.g.*, *United States* v. *Lucena-Rivera*, 750 F.3d 43, 53, 56 (1st Cir. 2014) (remanding to district court to either reaffirm previously imposed sentence and file "additional written findings," or vacate sentence and conduct resentencing proceeding); *United States* v. *Martinez-Saavedra*, 707 Fed. Appx. 220, 223 (5th Cir. 2017) (remanding for "further clarification" of reasons for sentence because "record [wa]s unclear as to what factors the district court relied on" when denying sentencing motion); *United States* v. *Redmond*, 667 F.3d 863, 876 (7th Cir. 2012) (remanding to allow district court to clarify whether it "might be inclined to impose a different sentence if it knew the full extent of its discretion"); *United States* v. *Andrade-Castillo*, 585 Fed. Appx. 346, 347 (9th Cir. 2014) (remanding for district court to "clarify the basis for its sentence and determine in the first instance whether resentencing is required");

United States v. *Dee*, 197 Fed. Appx. 590, 591 (9th Cir. 2006) (remanding to allow district court to "clarify the basis for its sentence"); see also *United States* v. *Paladino*, 401 F.3d 471, 483-484 (7th Cir. 2005) (describing post-*Booker* remand procedure employed in Seventh and Second Circuits of allowing district court to indicate whether it would have imposed a different sentence if it knew the Guidelines were advisory).

2. Petitioner next contends (Pet. 29-37) that the court of appeals disregarded *Gall*'s abuse-of-discretion standard of review for evaluating a sentence for substantive reasonableness, and instead applied a more demanding "shocks-the-conscience" test. That is incorrect, and this second question likewise does not warrant the Court's review.

a. As with his first argument, petitioner failed to raise this argument below. Instead, he embraced the common-sense reading of Second Circuit precedent that he now rejects.

Petitioner describes (Pet. 29) the Second Circuit's standard as "com[ing] from" *United States* v. *Rigas*, 583 F.3d 108 (2d Cir. 2009), cert. denied, 562 U.S. 947 (2010). In *Rigas*, the Second Circuit explained that a court of appeals' "role in sentencing appeals is to patrol the boundaries of reasonableness, while heeding the Supreme Court's renewed message that responsibility for sentencing is placed largely in the precincts of the district courts." *Id.* at 122 (citation and internal quotation marks omitted). The court noted that "[i]n other areas of the law, we employ various concepts that seek to capture the same idea represented in the phrase 'substantive reasonableness,'" including the "manifest-injustice" standard for motions for a new trial and the "shocks-the-conscience" standard for substantive due process.

Id. at 122-123. Those standards, the court explained, "share several common factors" and "provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Id.* at 123.

In his briefing in the court of appeals, petitioner cited *Rigas* for the relevant standard of review. See Pet. C.A. Br. 29. His brief observed in a footnote that, although the court of appeals "ha[d] previously noted some analytical similarities between the substantive unreasonableness standard applicable to sentencing and the shocks-the-conscience test that governs alleged violations of substantive due process," *id.* at 29 n.4 (citing *Rigas*, 583 F.3d at 122-123), "the two tests are substantively different and must not be conflated," *ibid.* Petitioner's court of appeals brief thus appears to have correctly understood *Rigas* as drawing a generalized *analogy* between the substantive-reasonableness and shocks-the-conscience standards. Petitioner did not contend, as he does in this Court (Pet. 29), that the Second Circuit has adopted a "hands-off, 'shocks-the-conscience' test" that "is sharply at odds with this Court's precedents." In the absence of any suggestion—let alone any explicit statement—in the decision below that petitioner's prior understanding of circuit precedent was incorrect, his revised view provides no basis for review in this Court. See *Williams*, 504 U.S. at 41.

b. In any event, petitioner's new interpretation of *Rigas* is unsound. The Second Circuit follows the abuse-of-discretion standard for substantive reasonableness required by *Gall*.

This Court has directed appellate courts to review the substantive reasonableness of sentences for abuse of discretion under the "totality of the circumstances." *Gall*, 552 U.S. at 51. It has emphasized that "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Ibid.* The Second Circuit applies the *Gall* standard when reviewing the substantive reasonableness of sentences. See, *e.g.*, *United States* v. *Cavera*, 550 F.3d 180, 189-190 (2008) (en banc) (recognizing that *Gall*'s abuse-of-discretion standard requires the court of appeals to "take into account the totality of the circumstances" and to "set aside a district court's substantive determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions") (citation, emphasis, and internal quotation marks omitted), cert. denied, 556 U.S. 1268 (2009); *United States* v. *Roy*, 730 Fed. Appx. 65, 66 (2018) (same); *United States* v. *Haskins*, 713 Fed. Appx. 23, 25 (2017) (same); *United States* v. *Rivernider*, 828 F.3d 91, 110-111 (2016) (same), cert. denied, 137 S. Ct. 456 (2016).

The court of appeals expressly invoked *Gall*'s abuse-of-discretion standard here. See Pet. App. 6a (applying a "deferential abuse-of-discretion standard") (quoting *United States* v. *Thavaraja*, 740 F.3d 253, 258 (2d Cir. 2014) (quoting *Gall*, 552 U.S. at 41)); *id.* at 10a (giving "due deference to the district court's decision") (quoting *Gall*, 552 U.S. at 51); *id.* at 18a (concluding that the district court's "sentence was reasonable") (quoting *Gall*, 552 U.S. at 56). Although at one point in its opinion the court of appeals described substantively unreasonable

sentences as those "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," Pet. App. 6a (citation omitted), the court's opinion never used the specific "shocks-the-conscience" formulation on which petitioner focuses (Pet. 29). And as petitioner himself recognized below, the mere fact that the Second Circuit in *Rigas* mentioned the shocks-the-conscience standard for substantive due process does not mean that the court in that case equated the shocks-the-conscience standard with the scope of review mandated by *Gall*. See 583 F.3d at 123. To the extent that *Rigas* expressed a view that "manifest injustice, shocks the conscience, and substantive unreasonableness" standards in appellate review share "several common factors," *id.* at 122-123, it did not hold that they are identical. Instead, *Rigas* correctly recognized that the abuse-of-discretion standard mandated by *Gall* is specific to the sentencing context and requires the reviewing court to take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. See *id.* at 121-122.

c. Finally, this case would be a poor vehicle for considering any difference between the substantive reasonableness standard in *Gall* and the assertedly more demanding test applied in the Second Circuit because resolution of that question would not affect the outcome. The court of appeals correctly affirmed petitioner's sentence as substantively reasonable under the abuse-of-discretion standard of review described in *Gall*.

As an initial matter, the $10 million fine imposed was only a small fraction of the sentence authorized by Congress: The statutory maximum fine was at least $90 million, twice the $45 million loss that petitioner

caused. See 18 U.S.C. 3571(d); PSR 50. And the Sentencing Commission has made clear in the relevant fine Guideline that it expected "that for most defendants, the maximum of the guideline fine range * * * will be at least twice the amount of gain or loss resulting from the offense." Sentencing Guidelines § 5E1.2, comment. (n.4) (2015). When, as here, the Guidelines range for fines does not reflect a doubling of the loss to victims, the Commission suggested that "an upward departure from the fine guideline may be warranted." *Ibid.* Petitioner's $10 million fine is thus reasonable under both the statute and the Guidelines, particularly when considered alongside his term of imprisonment at the bottom of the Guidelines range. See Pet. App. 75a.

Moreover, as the court of appeals explained at length, the district court had ample basis for imposing an upward variance with respect to petitioner's fine. See Pet. App. 6a-17a. Those reasons included petitioner's long history of fraud, his failure to be deterred by a previous "'$233,000 slap-on-the-wrist,'" the necessity of setting a fine large enough that it would be "painful to pay," and the importance of general deterrence for economic crimes that are "'lucrative'" and "'difficult to detect and punish.'" *Id.* at 9a-10a, 14a (citations omitted). As the court of appeals summarized:

> The district court concluded that [petitioner], a very wealthy man who has repeatedly and brazenly committed sophisticated tax fraud—a rarely caught and more rarely punished offense that undercuts the functioning of state and federal governments—ought to pay a fine hefty enough to take any financial benefit out of his crimes and to give pause to others who might be tempted to commit similar crimes.

Id. at 17a. The court of appeals thus correctly recognized that the district court's $10 million fine "resulted from the reasoned exercise of discretion." *Ibid.* (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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