No. 18-____

IN THE

Supreme Court of the United States

MATTHEW D. SAMPLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may reduce a prison sentence, or impose a probationary term in lieu of imprisonment, to enable a defendant to earn income to pay restitution to his victims.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew D. Sample respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 901 F.3d 1196 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-12a. The judgment of the district court is unpublished but reprinted at Pet. App. 13a-26a, and the transcript of the district court's oral sentencing ruling is reprinted at Pet. App. 27a-62a.

JURISDICTION

The court of appeals issued its decision on August 27, 2018, Pet. App. 1a, and denied rehearing on September 14, 2018, *id.* at 63a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent provisions of the U.S. Code are reprinted at Pet. App. 64a-66a.

INTRODUCTION

Recognizing the profound costs of crime to the American people, Congress over and over again has enacted laws to ensure that crime victims receive full restitution. The Mandatory Victims Restitution Act, for example, requires district courts to order complete restitution in all cases with identifiable victims. 18 U.S.C. § 3664(f)(1)(A); *see also id.* § 3771(a)(6) (grant-

ing crime victims "[t]he right to full and timely restitution as provided in law"). An amendment to the Sentencing Reform Act also directs district courts, when crafting a sentence for a criminal defendant, to attend to "the need to provide restitution to any victims of the offense." *Id.* § 3553(a)(7).

Pursuant to such laws, district courts every year order immense amounts of restitution. Yet nearly all of this restitution goes unpaid, primarily because defendants are unable to pay it.

This case presents a fundamental question concerning the ability of district courts to help fulfill Congress's mandate that restitution be paid to all victims of crime. The question is whether a district court may impose a reduced term of imprisonment or probationary sentence to allow a defendant to earn money to make restitution payments to his victims. That question is both frequently recurring and profoundly important. And the courts of appeals are deeply divided over the answer.

Three circuits hold that district courts may consider a defendant's earning capacity and impose a sentence of minimal imprisonment or probation to enable the defendant to pay restitution to his victims. Consistent with the law in those circuits, the district court here sentenced petitioner to probation rather than prison, so that he could maintain his employment and earn income to pay back the victims of his crimes. Although that sentence would have been affirmed in the Sixth, Eighth, and Ninth Circuits, the Tenth Circuit reversed. Joining the Fourth and Eleventh Circuits, the Tenth Circuit held that district

courts must sentence every defendant "without considering [his] earning capacity," even when that capacity makes it possible for him, if not imprisoned, to pay restitution. Pet. App. 12a.

This Court should grant certiorari to resolve the conflict and provide much needed clarity and uniformity for criminal defendants, victims of crimes, and courts alike.

STATEMENT OF THE CASE

1. Over about a decade, petitioner worked successfully in the securities industry. CA10 App. 244, 789-90. But around the time of the 2008 financial crisis, the hedge fund petitioner co-managed suffered a catastrophic loss—forcing petitioner to close the fund, and rendering him unable to financially provide for his family. *See id.* at 790. At about the same time, petitioner encountered turmoil in his personal life. *Id.* at 790-91. Suffering from shame and confusion about his business failure and his personal issues, petitioner made a series of terrible decisions.

In particular, petitioner began using investors' funds for his own personal expenses. Pet. App. 2a. He also gave investors false updates on their purported investments. *Id.* All told, petitioner diverted a total of $1,086,453.62 from eight investors for his personal use. *Id.* at 2a-3a, 36a.

Following the filing of a criminal information on multiple charges, petitioner pleaded guilty to one count of mail fraud under 18 U.S.C. § 1341 and two counts of wire fraud under 18 U.S.C. § 1343. Pet. App. 1a-2a. He also accepted responsibility for his wrongdoing, attended therapy, became alcohol and

drug free, and got engaged. *Id.* at 35a, 54a; CA10 App. 280-85, 801-05.

2. While petitioner's case was pending in the district court and proceeding towards sentencing, petitioner secured a position as a sales representative at SettlementOne Valuation. The United States Sentencing Guidelines recommended a prison sentence in the range of 78-97 months for petitioner's crimes. Pet. App. 53a. Yet representatives of SettlementOne submitted letters to and testified before the district court, explaining that, if petitioner was not imprisoned, they would continue to employ him—thereby enabling him to earn a six-figure salary with increases over time to pay restitution to the victims of his crimes. CA10 App. 277, 305-06, 762. By the time of sentencing, petitioner had already paid about $70,000 in restitution to the victims. *Id.* at 898.

The victims themselves also submitted letters to the district court. "Every single one of them want[ed] their money back." Pet. App. 30a. Many of the victims, moreover, specifically requested that petitioner be placed not in prison, but on probation, so that he could earn money to repay them.[1]

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[1] *See, e.g.*, CA10 App. 46-47 ("request[ing] [that] the court consider a non-incarceration sentence" for petitioner so he could "make . . . restitution"); *id.* at 136 ("I would prefer that [petitioner] be required to pay us back to the best of his ability rather than add another burden to society in an already taxed prison system."); *id.* at 195 (proposing sentence that would enable petitioner "to work at continuing to make [restitution] payments, but [prevent him from] hav[ing] a free life" outside of his job).

After reviewing all of these submissions and various other evidence, the district court ordered petitioner to pay $1,086,453.62 in restitution. It also sentenced him to five years of probation with special conditions, including that he is required to maintain gainful employment. Pet. App. 2a, 4a-5a, 55a-58a. The court explained that although "other cases would be different," "this is a case where probation would give [petitioner] the opportunity to keep working at [his] current job and get these victims some measure of justice." *Id.* at 45a; *see also id.* at 33a ("I want you to keep your job, because I want you to have a good job to pay these victims back."); *id.* at 37a (similar). The district court also stressed Congress's express command in 18 U.S.C. § 3553(a)(7) that it consider "the need to provide restitution to any victims of the offense." *Id.* at 53a-55a, 59a-60a. The court stated that restitution was "a major motivator in [the court's] decision," and confirmed that it was ordering probation so that petitioner could retain his job and pay restitution to his victims. *Id.* at 59a.

The district court acknowledged that Section 3553(a) required it to consider other factors besides restitution, including "promot[ing] respect for the law" and ensuring the sentence "reflect[s] the seriousness of the offense." Pet. App. 53a. But the court believed a prison sentence was not necessary to satisfy those factors. In reaching this conclusion, the district court noted that petitioner had accepted responsibility, *id.* at 35a; that this was petitioner's first felony conviction, *id.* at 54a; and that "society is not in danger of any further crimes from" petitioner, *id.* at 35a.

3. The Government appealed, and the Tenth Circuit vacated petitioner's sentence and remanded for resentencing.

The court of appeals conceded that "[t]he need to provide restitution to victims is one of the factors district courts must consider in fashioning a sentence." Pet. App. 9a. And the court of appeals did not dispute that petitioner's sentence would be substantively reasonable if it were permissible to consider a defendant's earning capacity for purposes of enabling him to pay restitution. But the Tenth Circuit held that that consideration must be kept entirely off the table.

In the court of appeals' view, considering a defendant's earning capacity—even in service of enhancing his ability "to repay his victims"—is tantamount to giving a "sentencing discount for wealth." Pet. App. 2a, 8a, 11a. And the Sentencing Reform Act requires sentences to be neutral as to the "socioeconomic status of offenders." 28 U.S.C. § 994(d). According to the Tenth Circuit, therefore, a defendant's employment status (or prospects) must always be off-limits; district courts must sentence each defendant "without considering [his] earning capacity." Pet. App. 12a.

With this dictate in mind, the court of appeals set aside petitioner's ability to work to pay restitution to the victims and evaluated the other mitigating factors the district court had discussed, including "(1) [petitioner's] lack of a serious criminal history; (2) his conduct on pretrial release; (3) his acceptance of responsibility; and (4) the likelihood that he would not reoffend." Pet. App. 11a. The court of appeals concluded that those factors "do not justify the extent of the district court's variance from the Guidelines

range." *Id.* at 11a-12a. The court of appeals thus deemed petitioner's sentence substantively unreasonable. *Id.* at 12a.

4. Petitioner filed a petition for rehearing, but the court of appeals denied the petition. Pet. App. 63a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are deeply divided over whether district courts may reduce a prison sentence, or instead impose a probationary term, so that a defendant can earn money to make restitution payments to his victims. Thus, defendants' sentences—not to mention the likelihood that crime victims will receive restitution—depend entirely on the geographic location in which defendants are charged and sentenced. Only this Court's review can resolve the conflict over this recurring and important question, and this case presents an ideal vehicle through which to do so.

The Tenth Circuit's decision, moreover, is incorrect. That court's refusal to allow district courts to consider a defendant's earning capacity in the situation here thwarts the express command in 18 U.S.C. § 3553(a)(7) that district courts consider the need to provide restitution to victims when sentencing a defendant. And the holding is not at all compelled by the statutory directive to eschew sentencing based on "socioeconomic status." 28 U.S.C. § 994(d). Poor and working-class people sometimes have substantial earning capacity, and rich people sometimes have no need for a job to pay full restitution.

A. The Courts Of Appeals Are Divided Over The Question Presented

1. The Tenth, Fourth, and Eleventh Circuits hold that district courts may not reduce a prison sentence, or instead impose a probationary term, to enable a defendant to earn income to pay restitution to his victims. As the Tenth Circuit put it in this case, courts must apply the factors listed in 18 U.S.C. § 3553(a) "without considering [the defendant's] earning capacity," even insofar as that factor would "allow[] him to make restitution payments to his victims" if not imprisoned. Pet. App. 11a-12a.

The Fourth Circuit likewise would have vacated the sentence here. In *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010), the district court sentenced the defendant to four years' probation on tax evasion charges so that he would be able to repay the taxes owed to the Government, and made clear that absent the defendant's potential ability to pay restitution, the court would have ordered a prison sentence. *Id.* at 499, 504. The Fourth Circuit vacated the sentence, reasoning that at least where, as here, the Guidelines recommend a prison sentence of two years or more, considering the defendant's "earning capacity" is "impermissible." *Id.* at 504-05. Such consideration makes "prison or probation depend[] on the defendant's economic status." *Id.* at 505; *see also United States v. Bolden*, 889 F.2d 1336, 1340 (4th Cir. 1989) ("[W]e do not think that the economic desirability of attempting to preserve [defendant's] job so as to enable him to make restitution warrants a downward adjustment from the guidelines.").

The Eleventh Circuit has similarly "rejected the argument that a term of imprisonment should be shortened simply to allow a defendant to begin making restitution payments earlier." *United States v. Jones*, 705 F. App'x 859, 862 (11th Cir. 2017) (citing *United States v. Crisp*, 454 F.3d 1285, 1291 (11th Cir. 2006)). In *Crisp*, the Eleventh Circuit held that a district court could not depart even from a 6-12 month Guidelines range to a sentence of probation and home confinement, where the district court explicitly reasoned that the sentence would support the defendant's "ability to earn a living so as to be able to make restitution payments." 454 F.3d at 1288-92. The Eleventh Circuit held that a court may not give "controlling weight" to "the goal of restitution to the detriment of all of the other sentencing factors." *Id.* at 1289, 1292.

2. The Eighth and Ninth Circuits—plus the Sixth Circuit in a thoroughly reasoned but unpublished opinion—have held the opposite.

In *United States v. Cole*, 765 F.3d 884 (8th Cir. 2014), the district court varied from a Guidelines range of 135-168 months' imprisonment to a sentence of three years' probation. *Id.* at 885. The district court emphasized several defendant-specific factors favoring that probationary sentence, including that it "would allow Cole to work and earn money to make restitution to the victims of the fraud." *Id.* at 886. The Government appealed, arguing that "the district court improperly based the sentence on Cole's socioeconomic status" in conjunction with "her restitution obligations." *Id.* The Eighth Circuit affirmed, finding "no error" in the district court's consideration of Cole's

earning capacity. *Id.* In the Eighth Circuit's view, the district court had both "appropriately considered the section 3553(a) factors in varying downward to a probationary sentence," and made "precisely the kind of defendant-specific determinations that are within the special competence of sentencing courts." *Id.* at 887 (quotation omitted).

Similarly, in *United States v. Menyweather*, 447 F.3d 625 (9th Cir. 2006) (en banc), the defendant pleaded guilty to one count of fraudulently using credit cards to make purchases totaling between $350,000 and $500,000. *Id.* at 628. Despite a Guidelines imprisonment range of 21-27 months, the district court ordered the defendant to serve five years of probation, in part so that she could make restitution. *Id.* The Ninth Circuit affirmed the sentence, explaining that the district court legitimately considered that "a sentence of probation may have made Defendant better able to provide restitution to the victims of her crime." *Id.* at 636. The "goal of obtaining restitution for the victims of [an] offense is better served by a non-incarcerated and employed defendant." *Id.* at 634 (citation omitted).

The Ninth Circuit has since reaffirmed that rule. In *United States v. Edwards*, 595 F.3d 1004 (9th Cir. 2010), the district court varied from a Guidelines range of 27-33 months to a sentence of probation. *Id.* at 1010. It explained that "its order of restitution would satisfy the requirement that Edwards's sentence have general deterrent value, and a probationary sentence would best accomplish the goals of the restitution order because it would enable Edwards to earn the money he is required to pay." *Id.* at 1016.

The Ninth Circuit affirmed. *Id.* at 1016-17; *see also United States v. Rangel*, 697 F.3d 795, 803-04 (9th Cir. 2012) (endorsing rule of *Menyweather*); *United States v. Burgum*, 633 F.3d 810, 815 (9th Cir. 2011) (same); *United States v. Kim*, 2008 WL 5054584, at *4 (D. Idaho Aug. 29, 2008) (imposing probation instead of prison term because it "will allow Kim to continue working thereby enabling him to pay restitution"); *cf. United States v. Anekwu*, 695 F.3d 967, 989 (9th Cir. 2012) (noting favorably that "the district court referenced Anekwu's inability to pay restitution to show that the court had considered imposing a lesser sentence to facilitate the payment of restitution").

The Sixth Circuit has held the same in a thoroughly reasoned, albeit unpublished, decision.[2] In *United States v. Musgrave*, 647 F. App'x 529 (6th Cir. 2016), the defendant faced a 57-71 month Guidelines range. The district court, however, sentenced him to one day's imprisonment, in order "to facilitate payment of restitution" amounting to $1.7 million. *Id.* at 536. The district court explained that "the goal of obtaining restitution for the victims is best served by a non-incarcerated and employed defendant." *Id.* Rejecting the notion that it was basing the sentence on

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[2] Unpublished decisions in the Sixth Circuit may be cited and considered by subsequent panels "for their persuasive value." *United States v. Keith*, 559 F.3d 499, 505 (6th Cir. 2009). Accordingly, "when there is no published decision on point," the Sixth Circuit typically follows a well-reasoned unpublished decision. *Hood v. Keller*, 229 F. App'x 393, 398 n.5 (6th Cir. 2007) (quotation omitted). For an example, see *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007).

the defendant's "socio-economic status," the court emphasized it instead was fulfilling the "statutory requirement . . . [that it] consider the need to provide restitution to any victim of the offense." *Id.*

The Sixth Circuit affirmed, emphasizing that district courts are not categorically prohibited from accounting for all considerations that are in some sense "correlated with socio-economic status," especially those "expressly enumerated for consideration by § 3553(a), including 'the need to provide restitution to any victim of the offense.'" 647 F. App'x at 534-35 (quotation omitted). To the contrary, the Sixth Circuit emphasized, the district court was "statutorily *required* to consider . . . the need to provide restitution" by Section 3553(a)(7). *Id.* at 536 (emphasis added).[3]

3. District courts within the First, Second, Third, Seventh, and D.C. Circuits have likewise imposed reduced prison sentences, or probationary terms, to enable defendants to earn money to pay restitution. *See United States v. Dennison*, 493 F. Supp. 2d 139, 140 (D. Me. 2007) (granting downward departure so that the defendant could work to pay restitution); *United States v. Galtieri*, 2015 WL 5178710, at *3 (E.D.N.Y. Sept. 3, 2015) (imposing below-Guidelines sentence of time-served plus supervised release, in part because a custodial sentence "would . . . prevent defendant from accepting a new offer of employment that will

[3] The Third Circuit also has suggested that it is "perfectly appropriate" for a district court to "try[] to avoid punishing the victim by imposing a sentence on the defendant that would greatly reduce the chance of restitution." *United States v. Levy*, 311 F. App'x 533, 534 (3d Cir. 2009).

enable him to begin paying the forfeiture judgment and restitution to his victims"); *United States v. Sharpe*, 2008 WL 304892, at *3 (E.D. Pa. Feb. 1, 2008) (imposing below-Guidelines sentence because "Defendant will be best able to remit her required restitution if she is not imprisoned, and thus able to maintain her employment and a steady flow of income" (citing 18 U.S.C. § 3553(a)(7))); *United States v. Goss*, 325 F. Supp. 3d 932, 936 (E.D. Wis. 2018) (imposing sentence of probation rather than imprisonment because "a prison sentence would harm the victim by causing defendant to lose her job and thus her ability to pay restitution, a significant concern under § 3553(a)(7)"); *Culter v. United States*, 241 F. Supp. 2d 19, 19-20 (D.D.C. 2003) (placing defendant in a halfway house instead of prison to "allow petitioner to continue working, and thus meet her restitution obligations").[4]

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[4] For other such cases from these jurisdictions, see *United States v. Hurtado*, 2018 WL 6131482, at *2 (2d Cir. Nov. 21, 2018) (noting that district court's initial "probationary sentence had been based in large part on Hurtado's promise to pay restitution from a portion of the income he earned from his ongoing, presumably legitimate, business operations"); *United States v. Diambrosio*, 2008 WL 732031, at *5 (E.D. Pa. Mar. 13, 2008) (imposing a sentence of five years' probation, in part because "[a] non-incarcerative sentence will enable Defendant to continue making payments on his $2.1 million restitution obligation"); *United States v. Peterson*, 363 F. Supp. 2d 1060, 1062 (E.D. Wis. 2005) ("[I]n the present case, where defendant had a reasonably well-paying job and the restitution amount was manageable, § 3553(a)(7) weighed in favor of a sentence that would allow him to remain in the community and working."); *United States v. Eggleston*, __ F. Supp. 3d __, 2018 WL 5919304, at *3 (E.D. Wis. Nov. 9, 2018) (imposing below-Guidelines sentence to "facili-

4. This Court has recognized that it is "essential" to maintain "clarity and consistency" in the law of criminal sentencing. *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018); *see also Kimbrough v. United States*, 552 U.S. 85, 107 (2007) ("uniformity" is "an important goal of sentencing"). Where consistency has given way to a patchwork quilt of differing rules, the Court's review is required. *See Hughes*, 138 S. Ct. at 1775; *Kimbrough*, 552 U.S. at 107; *see also* S. Rep. No. 98-225, at 45 (1983) ("Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public.").

The same is true here. The sentences that Cole, Menyweather, Edwards, and Musgrave received would have been reversed in the Fourth, Tenth, and Eleventh Circuits. Petitioner's sentence, on the other hand, would have been affirmed in the Sixth, Eighth, and Ninth Circuits. And it seemingly would not even have been appealed by the Government in the First, Second, Third, Seventh, or D.C. Circuits. This stark disparity in the law of sentencing—and in crime victims' ability to obtain restitution—is intolerable. The Court should grant review and resolve the division of authority.

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tate[] the further payment of restitution, an important factor under § 3553(a)(7)," and explaining that "Defendant had real earning potential, given his current employment, and unlike some defendants, for whom repayment was highly unlikely, it appeared that he could make a substantial dent in the obligation here" (footnote omitted)).

B. The Question Presented Is Exceptionally Important, And This Case Presents An Ideal Vehicle To Resolve It

1. As the numerous appellate and district court decisions just discussed confirm, the question presented is frequently recurring. The question is also self-evidently important, because it directly implicates district courts' ability to implement Congress's long-established mandate to maximize the likelihood that crime victims receive restitution from their perpetrators.

As Congress has recognized, the "economic and personal costs of crime to the American people are enormous." S. Rep. No. 104-179, at 17 (1996). Nationally, the annual costs of crime total billions, if not trillions, of dollars. GAO, *Costs of Crime: Experts Report Challenges Estimating Costs and Suggest Improvements to Better Inform Policy Decisions*, GAO-17-732, at 1 (Sept. 2017).[5] For decades, therefore, Congress has deemed it "essential" that our criminal justice system "recognize the impact that crime has on . . . victim[s], and, to the extent possible, ensure that offender[s] be held accountable to repay these costs." S. Rep. No. 104-179, at 18; *see also id.* at 12 (recognizing that restitution is an "integral part" of justice system).

Consistent with those goals, in 1982 Congress gave federal courts statutory authority to order restitution in a wide range of criminal cases. Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat.

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[5] https://www.gao.gov/assets/690/687353.pdf.

1248. And in 1986, Congress directed district courts, in selecting a sentence for a criminal defendant, to consider "the need to provide restitution to any victims of the offense." *See* 18 U.S.C. § 3553(a)(7).

But those enactments were just the beginning. In 1996, frustrated that federal courts were ordering restitution in only a small minority of criminal cases, S. Rep. No. 104-179, at 13, Congress passed the Mandatory Victims Restitution Act ("MVRA") to "ensure that victims of a crime receive full restitution," *Dolan v. United States*, 560 U.S. 605, 612 (2010); *see* 18 U.S.C. § 3664(f)(1)(A) (district courts "shall order restitution to each victim in the full amount of each victim's losses"); S. Rep. No. 104-179, at 12 ("The purpose of [the MVRA] is to improve the administration of justice in Federal criminal cases by requiring Federal criminal defendants to pay full restitution to the identifiable victims of their crimes."). Congress followed up with the Crime Victims' Rights Act, which codified crime victims' "right to full and timely restitution" and provided victims with the means to enforce that right. Pub. L. No. 108-405, § 102, 118 Stat. 2260, 2269 (2004); *see* 18 U.S.C. § 3771(a)(6). And in 2016, concerned that crime victims still were not being paid full restitution, Congress enacted the Justice for All Reauthorization Act, which, among other things, directed the U.S. Government Accountability Office ("GAO") to review and assess the federal criminal restitution process. Pub. L. No. 114-324, § 18, 130 Stat. 1948, 1963; *see* 18 U.S.C. § 3612(k).[6]

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[6] The Executive Branch also has recognized the vital importance of restitution to crime victims and society alike. The

While Congress's efforts have substantially increased the amount of restitution *ordered* by district courts, they have only negligibly improved victims' actual receipt of money. GAO, *Federal Criminal Restitution: Most Debt is Outstanding and Oversight of Collections Could Be Improved*, GAO-18-203, at 34 (Feb. 2018) ("GAO 2018").[7] Restitution is now ordered for approximately 15 percent of all federal offenses. *Id.* at 16. And over the past ten years, courts ordered restitution against more than 10,000 offenders per year, totaling an average of about $12 billion annually. GAO, *Federal Criminal Restitution: Factors to Consider for a Potential Expansion of Federal Courts' Authority to Order Restitution*, GAO-18-115, at 33-34 (Oct. 2017).[8] Yet, the GAO recently found, as much as 91% of the $110 billion in outstanding restitution is uncollectible, primarily because "the offender has no, or only a nominal, ability to pay the debt." GAO 2018, at 22, 25.

In light of Congress's unambiguous restitution mandate—and the staggering restitution shortfall piling up despite that mandate—the question presented is crucially important. To put it bluntly: Au-

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U.S. Department of Justice ("DOJ"), for example, identified improving debt collection—including restitution—as a major management initiative in its 2014-2018 strategic plan. DOJ, *Strategic Plan: Fiscal Years 2014-2018* (2014), https://www.justice.gov/sites/default/files/jmd/legacy/2014/02/28/doj-fy-2014-2018-strategic-plan.pdf.

[7] https://www.gao.gov/assets/690/689830.pdf.

[8] https://www.gao.gov/assets/690/687728.pdf.

thorizing district courts to impose lower prison or probationary sentences to maximize the likelihood in appropriate cases of restitution furthers Congress's long-held goal of ensuring crime-victim restitution. Precluding district courts from that approach, in contrast, thwarts that goal.

2. This is an ideal vehicle to address the question presented. The district court was explicit that it selected a probationary sentence to preserve petitioner's earning capacity and ensure the payment of restitution to victims, *see supra* at 5—an approach expressly permitted by the Sixth, Eighth, and Ninth Circuits, and followed by district courts in five other circuits. The Tenth Circuit below was equally clear that, in its view, that consideration is impermissible—just as it would be impermissible in two other circuits. The Tenth Circuit held that petitioner must be resentenced "without considering [his] earning capacity" or that, if he were not imprisoned, his "income [would] allow[] him to make restitution payments to his victims." Pet. App. 11a-12a. If the Court grants certiorari and adopts the Sixth, Eighth, and Ninth Circuits' rule, the decision below would have to be reversed.

C. The Decision Below Is Incorrect

Contrary to the Tenth Circuit's holding, a district court may fashion a sentence to preserve a defendant's earning capacity so that he can make restitution to the victims of his crime.

1. This Court has repeatedly recognized district courts' primacy in federal sentencing—in particular, the "broad discretion" the Sentencing Reform Act

gives district courts to craft sentences based on whatever facts and circumstances they deem relevant. *Beckles v. United States*, 137 S. Ct. 886, 893 (2017) (quotation marks omitted); *Gall v. United States*, 552 U.S. 38, 50-52 (2007). The Act forbids sentences from being based on a few factors, such as the defendant's race, sex, and religion. *See* 28 U.S.C. § 994(d). But beyond those narrow and express prohibitions, the Act provides that "*[n]o limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (emphasis added).

The Act also sets forth various theoretical goals in Section 3553(a) that courts must consider in crafting sentences. Examples are the need to promote respect for the law; to avoid unwarranted disparities; to provide the defendant with access to educational training; and to protect the public. *See* 18 U.S.C. § 3553(a)(2). But, as then-Judge Kavanaugh has explained, the Section 3553(a) factors "are vague, open-ended, and conflicting; different district courts may have distinct sentencing philosophies and may emphasize and weigh the individual § 3553(a) factors differently; and every sentencing decision involves its own set of facts and circumstances regarding the offense and the offender." *United States v. Gardellini*, 545 F.3d 1089, 1093 (D.C. Cir. 2008). As a result, sentencing courts not only generally have the power to consider whatever particularities concerning the defendant they deem relevant, but they may do so in service of most any penological objective.

2. Under this framework, the Tenth Circuit was wrong to hold it categorically impermissible for a district court to impose a shorter prison sentence or probationary term because a defendant's earning capacity would allow him, if not in prison, to make restitution payments to his victims. Start with the plain text of Section 3553(a)(7). That subsection requires sentencing courts to consider "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). Other provisions of the U.S. Code similarly instruct district courts not only to order, but also to facilitate, the payment of restitution. *See id.* § 3664(f)(1)(A) (requiring courts to order restitution "to each victim in the full amount of the victim's losses"); *id.* § 3771(a)(6) (granting crime victims "[t]he right to full *and timely* restitution as provided in law" (emphasis added)).

The only question, therefore, is whether some other statutory provision trumps these general directives regarding restitution—and specifically prohibits sentencing courts from considering defendants' earning capacities in situations such as this.

None does. In fact, the only statute the Tenth Circuit even cited (with a "cf." signal, at that) was 28 U.S.C. § 994(d). *See* Pet. App. 8a. That provision directs the U.S. Sentencing Commission to assure that the Guidelines are neutral as to the "socioeconomic status" of offenders. 28 U.S.C. § 994(d).

A moment's reflection makes plain that considering a defendant's earning capacity for purposes of enabling him to make money to pay restitution is not the same as considering his "socioeconomic status." Poor and working-class people sometimes have substantial

earning capacities, and rich people sometimes—indeed, almost always—have no need to continue working to pay full restitution to crime victims. Accordingly, under the approach followed in the Sixth, Eighth, and Ninth Circuits, what matters is not a defendant's absolute ability to pay, but the effect a prison term will have on his ability to make restitution relative to some other sentence available to the district court.

The facts of this case prove the point. If petitioner had possessed a million dollars in the bank at the time he was sentenced, his assets would have readily sufficed to make restitution, and he likely would have been imprisoned. *See* Pet. App. 36a-37a; *see also, e.g.*, *United States v. Harper*, 2013 WL 1628353, at *3 (E.D. La. Apr. 15, 2013) (even though defendant would "be unable to earn his salary while incarcerated," he "ha[d] ample assets to immediately pay"); *United States v. Miell*, 744 F. Supp. 2d 904, 960 (N.D. Iowa 2010) (noting "that [the defendant's] capacity to provide restitution will not be limited by his imprisonment, where he already has considerable personal wealth"), *aff'd*, 661 F.3d 995 (8th Cir. 2011).

Congress itself has recognized the distinction between a defendant's "socioeconomic status" and his earning capacity in related contexts. While the Sentencing Reform Act bars the former from playing any role in sentencing, Congress has directed district courts fashioning restitution orders to consider a defendant's "projected earnings and other income," as well as his "financial resources and other assets." 18 U.S.C. § 3664(f)(2)(A)-(B). Courts, in turn, have readily understood this dichotomy: "Socioeconomic status

is different than financial resources. The former has no place in sentencing, but the latter is required by statute." *See, e.g.*, *United States v. Adams*, 243 F. App'x 249, 250 (9th Cir. 2007) (citations omitted).

Indeed, if the Tenth Circuit were correct that considering a defendant's earning capacity is categorically impermissible, it would be difficult to understand why Congress enacted Section 3553(a)(7) at all. "[T]he need to provide restitution to any victims of the offense" could never actually impact a sentence. If a defendant is capable of paying restitution without earning additional income, or if he plainly would be unable to earn sufficient money to pay meaningful amounts of restitution even if not imprisoned, then the need to provide restitution would not provide any basis to alter his sentence. The need to provide restitution can materially impact a sentence *only* where the facts support a finding that the only likely way to ensure restitution is made is to allow the defendant to earn an income outside of prison. That is precisely what the district court determined here. *See, e.g.*, Pet. App. 36a ("[I]f you didn't have . . . your current job and your ability to make these payments, I might be doing something different.").

3. The Tenth Circuit expressed two other concerns with considering defendants' earning capacities in service of facilitating restitution payments. But neither justifies the rule it adopted.

First, citing cases from several circuits, the Tenth Circuit stressed that "courts should not rely on a defendant's wealth in fashioning a sentence." Pet. App.

7a. "Our system of justice," the court of appeals continued, "has no sentencing discount for wealth." *Id.* at 11a.

Insofar as "wealth" is synonymous with socioeconomic status, we have already answered that argument. Indeed, the Guideline from which the case law the Tenth Circuit cited derives—U.S.S.G. § 5H1.10—simply repeats Section 994(d)'s prohibition against considering a defendant's "socio-economic status."

Even if the Guidelines could somehow be read more broadly to bar consideration of a defendant's prospective employment income, it would not matter. In *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court held that district courts "may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the [Sentencing] Commission's views." *Pepper v. United States*, 562 U.S. 476, 501 (2011) (citing *Kimbrough*, 552 U.S. at 109-10); *see also Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam) (describing the "point of *Kimbrough*" as "a recognition of district courts' authority to vary from the . . . Guidelines based on policy disagreement with them" (emphasis omitted)). Nothing in *the Guidelines* (or case law based on them), therefore, could prevent a district court in a situation like this from considering a defendant's earning capacity.

Second, the Tenth Circuit fretted that permitting district courts to reduce defendants' sentences based on their ability to earn money to pay restitution would undermine the statutory goal of "'afford[ing] adequate deterrence.'" Pet. App. 9a (quoting 18 U.S.C. § 3553(a)(2)(B)); *see also Engle*, 592 F.3d at 501-02 (expressing same concern). "White collar criminals,"

the Tenth Circuit asserted, may be more likely to commit crimes if they think their earning capacities may enable them to obtain shorter (or no) prison sentences. Pet. App. 9a-10a.

This concern is misplaced. Given the wide discretion district courts have in fashioning sentences and the wide array of individualized circumstances they confront, no defendant—white-collar or otherwise—can plausibly count on receiving the same kind of sentence as a similar offender. In fact, under our current advisory sentencing regime, "only a fool would think that he or she necessarily would receive the same sentence as [petitioner] for a similar . . . offense." *Gardellini*, 545 F.3d at 1095 (Kavanaugh, J.); *see also id.* ("[T]he next similarly situated tax offender cannot expect the same treatment," and "might well receive an above-Guidelines sentence.").

The Tenth Circuit also failed to appreciate the significant deterrent value of restitution and probation. As both Congress and this Court have recognized, restitution not only serves to make victims whole, but also promotes deterrence and other punitive purposes. *See, e.g.*, S. Rep. No. 104-179, at 18 (1996) (describing the "potential penalogical benefits" of requiring "even nominal restitution payments"); *Paroline v. United States*, 572 U.S. 434, 456 (2014) ("The primary goal of restitution is remedial or compensatory, but it also serves punitive purposes." (citation omitted)); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005) (recognizing that "[t]he purpose of awarding restitution" can be "to mete out appropriate criminal punishment for . . . [mis]conduct"). Restitution, the

Court has explained, "forces the defendant to confront, in concrete terms, the harm his actions have caused." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986) (citing Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 937-41 (1984)). Accordingly, for white-collar crimes, "in which the criminal's gain is usually equal to the victim's loss, restitution provides a particularly effective deterrent." 97 Harv. L. Rev. at 938-39.

Probation likewise promotes deterrence because, like incarceration, it imposes "substantial[] restrict[ions]" on a defendant's liberty. *Gall*, 552 U.S. at 48. Indeed, "[i]nherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'" *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). Typically, for example, "[p]robationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court." *Gall*, 552 U.S. at 48. "They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking." *Id.* (citing U.S.S.G. § 5B1.3). "Most probationers," as petitioner was here, are "also subject to individual 'special conditions' imposed by the court." *Id.* Accordingly, Congress made "probation a sentence in and of itself," U.S.S.G. ch. 5, pt. B, introductory cmt. (citing 18 U.S.C. § 3561), and the Sentencing Commission has recognized that

"[p]robation may be used as an alternative to incarceration" so long as, in a particular case, the sentence will "achiev[e] general deterrence," *id.*

This Court's decision in *Gall* illustrates the point. There, even though the defendant faced a 30-37 month Guidelines range, the Court upheld a district court's imposition of a probationary sentence. 552 U.S. at 48. In doing so, the Court declared that viewing a probation sentence—as the court of appeals did—as a "100% departure" inappropriately gave "no weight to the substantial restriction of freedom involved in a term of supervised release or probation." *Id.* (quotation omitted). Consequently, "the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole justified the sentence." *Id.* at 59-60.

So too here. The statutory directive to afford adequate deterrence is fully consistent with the district court's decision to impose a probationary term to facilitate the payment of restitution. That being so, the court of appeals was bound to respect the district court's carefully considered sentencing determination.

CONCLUSION

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

Respectfully submitted,

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