

No. 18-759

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IN THE  
*Supreme Court of the United States*

MATTHEW D. SAMPLE,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

MOTION FOR LEAVE TO FILE BRIEF OF  
*AMICUS CURIAE* AND BRIEF OF THE  
NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONER

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**MOTION FOR LEAVE TO FILE BRIEF OF THE  
NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONER**

Pursuant to Supreme Court Rule 37.2(b), the National Association of Criminal Defense Lawyers move this Court for leave to file the attached brief as *amicus curiae* in support of petitioner, Matthew D. Sample. Petitioner has consented to the filing of the brief. Respondent has not consented to the filing of the brief.

*Amicus* will address the importance of restitution in the federal criminal law and how the Tenth Circuit's

decision imperils Congress' goal of ensuring that restitution is paid in full in every case in which it is ordered. *Amicus* will also address how the Tenth Circuit's decision is in significant tension with the broad discretion traditionally vested in sentencing judges.

*Amicus* is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL was founded in 1958 and is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in this Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular importance to NACDL and the clients its attorneys represent are issues involving restitution in the federal criminal system and the discretion of sentencing courts. NACDL submits that its perspective on the importance of this Petition and whether to grant certiorari will be of "considerable help" to the Court. Sup. Ct. R. 37.1.

For these reasons, *amicus* respectfully requests that this Court grant them leave to file the attached brief.

January 14, 2019

Respectfully submitted,

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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

In particular, this Petition presents a question of great importance to NACDL and the clients its

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<sup>1</sup> In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief, in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Due to the late retention of counsel, notice was given four days prior to the filing date. Petitioner has consented to the filing of this brief. Respondent has not consented to the filing of this brief.

attorneys represent because of the significance of restitution in the federal criminal system. *See* Pet. 17 (restitution ordered in 15% of all federal offenses). NACDL also cares deeply about the discretion of sentencing courts to consider all relevant information in imposing a just sentence and has filed *amicus* briefs in many of this Court’s most important sentencing cases. *E.g.*, *Gall v. United States*, 552 U.S. 38 (2007). Given NACDL’s expertise in these matters, NACDL submits that its perspective on the importance of this Petition and whether to grant certiorari will be of “considerable help” to the Court. Sup. Ct. R. 37.1.

### SUMMARY OF THE ARGUMENT

In this case, the Tenth Circuit held that a sentencing court could not consider the degree to which a defendant’s “earning capacity” would allow him to pay restitution to the victims of his financial fraud when fashioning a sentence. Pet. App. 11a-12a. As the Petition explains, this holding warrants review because it deepens a conflict of authority over whether district courts may sentence a defendant to probation or to a reduced prison term to enable that defendant to earn income to pay restitution, Pet. 8-15, and because the Tenth Circuit was wrong on the merits, Pet. 18-26.

Review also is warranted because the question presented is recurring and important. Restitution is ubiquitous in federal criminal law. It is imposed on numerous defendants—both rich and poor—for a wide variety of crimes, from robberies and assaults to Ponzi schemes. But while Congress intended restitution be satisfied in every case to the fullest extent possible, the Tenth Circuit’s decision puts this goal at risk by refusing

to allow sentencing courts to even consider a defendant's capacity to pay restitution when imposing a sentence. Because of restitution's importance within the federal criminal scheme, this Court should grant review to determine whether the capacity to make restitution payments is an appropriate sentencing consideration.

This Court's review also is necessary because the Tenth Circuit's decision is in significant tension with the historical tradition of broad discretion in the information a court may consider when imposing a sentence. This discretion has been critical to ensuring that sentencing is not merely the mechanical meting out of punishment, but is individualized and designed to promote the ends of justice. Because the Tenth Circuit's decision breaks from this tradition, this Court should grant review.

## ARGUMENT

### **I. This Case Presents An Important Issue Impacting Defendants Of All Incomes Convicted Of A Variety Of Crimes.**

It can hardly be denied that “[r]estitution plays an increasing role in federal criminal sentencing today.” *Hester v. United States*, No. 17-9082, \_\_ S. Ct. \_\_, 2019 WL 113622, at \*1 (U.S. Jan. 7, 2019) (Gorsuch, J., dissenting from the denial of certiorari). That is because sentencing courts may order restitution as a remedy for a broad range of federal crimes. Restitution may be ordered for any offense under title 18, certain drug-related offenses under the Controlled Substances Act, and certain offenses relating to air commerce and safety. *See* 18 U.S.C. § 3663(a)(1)(A). Indeed, in fiscal year 2016, courts ordered restitution in 83.9% of robbery cases and

78.2% of arson cases. *Overview of Federal Criminal Cases Fiscal Year 2016* 5 (U.S. Sentencing Comm'n 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf).

Further, a court *must* order restitution in connection with certain crimes resulting in physical injury or financial loss, including crimes of violence, consumer product tampering, and property offenses. *See* 18 U.S.C. § 3663A(a)(1), (c)(1). Taken together, between 2014 and 2016, federal courts sentenced 33,158 defendants to pay \$33.9 billion in restitution. U.S. Gov't Accountability Off., GAO-18-203, *Federal Criminal Restitution: Most Debt is Outstanding and Oversight of Collections Could Be Improved* 16 (2018).

Courts have broad discretion when fashioning restitution orders. For example, courts are free to order restitution for a victim's necessary medical expenses, rehabilitation costs, lost income, and funeral expenses, *see* 18 U.S.C. §§ 3663(b)(2)(A)-(C), 18 U.S.C. § 3663(b)(3), for the lost value of property, *see* 18 U.S.C. §§ 3663(b); 3663A(b), for loss related to identity theft, *see* 18 U.S.C. § 3663(b)(6), and for lost income and necessary child care, transportation, and other expenses related to victims' participation in the investigation or prosecution of the offense, *see* 18 U.S.C. § 3663(b)(4). Courts may even order restitution where a crime has no identifiable victim "based on the amount of public harm caused by the offense," which, once paid, will be distributed to state entities. 18 U.S.C. § 3663(c)(1)-(3).

Moreover, Congress anticipated that sentencing judges would be able to structure their sentences and

restitution orders to permit defendants of *all* incomes to make victims whole, to the best of the defendant's ability. See S. Rep. No. 97-532, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2515, 2536 (noting that Section 3663's purpose "is that the court is devising just sanctions for adjudicated offenders, should insure that the wrongdoer make good[], to the degree possible, the harm he has caused his victim"); see *United States v. Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009) (noting that restitution's purpose is "to ensure that victims, to the greatest extent possible, are made whole for their losses"). That is clear from the fact that Congress did not insist that a defendant's sentence only include restitution if the defendant's earning ability would permit the defendant to fully satisfy it and instead included an avenue for defendants to satisfy restitution orders in circumstances where a defendant had no ability to pay. 18 U.S.C. § 3663(b)(5) (providing that a defendant can, with the victim's consent, "make restitution in services in lieu of money").

Yet much of the restitution ordered by federal courts goes unpaid. "[B]etween 1996 and 2016, the amount of unpaid federal criminal restitution rose from less than \$6 billion to more than \$110 billion." *Hester*, 2019 WL 113622, at \*1 (Gorsuch, J. dissenting from the denial of certiorari) (citing U.S. Gov't Accountability Off., GAO-18-115, *Federal Criminal Restitution: Factors to Consider for a Potential Expansion of Federal Courts' Authority to Order Restitution* 14 (2017); Dep't of Justice, C. DiBattiste, U.S. Att'ys Ann. Stat. Rep. 79-80 (1996) (Tables 12A and 12B)). And the Tenth Circuit's decision in this case will only exacerbate that problem—

it limits what courts may consider when fashioning their restitution awards in a way that necessarily will result in more unpaid debt.

Accordingly, this Court's review and intervention is needed to fulfill Congress' intent to ensure that defendants satisfy restitution orders to the greatest extent possible. The logic in affording sentencing judges broad discretion in fashioning their restitution orders appears in the line of cases in which the courts have seen fit to tailor their sentences to allow non-wealthy defendants to pay restitution. For example, in *United States v. Kim*, the court reduced the defendant's sentence to one month followed by nine months of home detention because that arrangement would allow the defendant, who was convicted of selling counterfeit t-shirts at a flea market, to "continue working thereby enabling him to pay restitution," whereas a guidelines sentence would likely cause the defendant to be deported, thereby "depriving his victims of the restitution to which they are entitled." No. CR-07-170-S-BLW, 2008 WL 5054584, at \*4 (D. Idaho Aug. 29, 2008). Likewise, in *United States v. Peterson*, the court imposed a sentence of one day imprisonment, followed by a five-year term of supervised release, after acknowledging that this arrangement would permit the defendant, who was convicted of theft resulting from a gambling addiction, to maintain his "reasonably well-paying job" and pay \$100 a month towards restitution, whereas a guidelines sentence would have caused him to lose his job. 363 F. Supp. 2d 1060, 1062-63 (E.D. Wis. 2005). And in *Culter v. United States*, the court noted that, at sentencing on one count of uttering a forged

security, the “[c]ourt took pains to craft a sentence that would allow [the defendant] to continue working” as a member relations specialist at a non-profit and “thus meet her restitution obligations.” 241 F. Supp. 2d 19, 20-21 (D.D.C. 2003); *see also id.* at 20 (describing how defendant “had been saving some of her salary from [her job] in order to pay restitution to the former employer whom she had defrauded”).

In addition to providing victims with the maximum level of recompense (as Congress intended), considering the capacity to pay restitution when imposing a sentence benefits defendants. The “[f]ailure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration.” *Hester*, 2019 WL 113622, at \*1 (Gorsuch, J., dissenting from the denial or certiorari) (citing Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 123-129 (2014)). Given the difficulty those convicted of federal crimes often have in “maintaining or finding employment,” Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 124 & nns. 115-16 (2014) (internal quotation marks omitted), if courts intend that defendants be able to discharge these obligations, it is only sensible that courts be able to consider a defendant’s earning capacity and prospects.

The facts underlying this Petition illustrate this point. It is not difficult to imagine how rare it is that a defendant ordered to pay over a million dollars in restitution would be able to maintain, post-conviction, a six-figure annual income that would make such payments feasible. *See* Pet. 4-5. As scholars have noted, even those in “trusted or high-income positions prior to



conviction experience large earnings losses after release from prison,” frequently because felony convictions may disqualify them from employment in certain fields. Lollar, *supra*, at 124 n.115 (citing Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 Am. Soc. Rev. 526, 528 (2002)). If courts cannot even consider the capacity of defendants to pay the restitution they order (mandatorily in many cases), they risk consigning them to the “significant, long-term consequences” that accompany being unable to pay restitution. Lollar, *supra*, at 124. Indeed, these restitution obligations can become an “insurmountable hurdle” to defendants actually completing their sentences. *Id.* at 125.

It is clear Congress intended that restitution orders be imposed on—and satisfied, to the extent possible, by—defendants of all incomes following convictions for a variety of crimes. The Tenth Circuit’s decision imperils this goal. This Court should grant certiorari.

## **II. This Case Presents An Important Question Regarding The Broad Discretion Of Sentencing Judges.**

This Court also should review the Tenth Circuit’s decision because it unduly constrains the “broad discretion” traditionally afforded to sentencing judges. *Beckles v. United States*, 137 S. Ct. 886, 893 (2017) (citation omitted). A critical and “longstanding” component of that discretion is that sentencing courts may consider practically any information they deem relevant in imposing an appropriate sentence. *United States v. Watts*, 519 U.S. 148, 151 (1997) (per curiam). This “durable tradition” is as old as federal sentencing

itself. *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017). “[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.” *Pepper v. United States*, 562 U.S. 476, 488 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)); see also Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 14-15 (1998) (collecting early examples of discretion in sentencing).

Congress has codified the Nation’s tradition of sentencing discretion most prominently in 18 U.S.C. § 3661, which provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense” that a sentencing court may “receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661; see *Pepper*, 562 U.S. at 480. The Court has stated that “Congress could not have been clearer” in setting forth an expansive mandate for sentencing courts to consider any information relevant in imposing a sentence. *Id.* at 490-91. That has included, for instance, evidence of prior acts for which the defendant was acquitted, see *Watts*, 519 U.S. at 149, as well as evidence of post-sentencing conduct during a remand for resentencing, see *Pepper*, 562 U.S. at 492.

This broad discretion is so fundamental to traditional sentencing principles because it is critical to achieving “more enlightened and just” sentences. *Williams v.*

*New York*, 337 U.S. 241, 250-51 (1949). It enables courts to account for not only the illegal act committed, but the circumstances underlying that act and the character of the offender. Sentencing judges therefore can use this discretion to consider social science research, their experience and insight from past sentences, or any other piece of information that would inform a just sentence. *See Gall*, 552 U.S. at 57-58; *Koon v. United States*, 518 U.S. 81, 98-99 (1996). This regime reflects that it is the Nation’s sentencing judges who are best positioned “to ensure that the sentence is properly calibrated to the particular circumstances of the offender and the offense,” and not simply a mechanical assignment of a term of years. *United States v. Pruitt*, 502 F.3d 1154, 1174 (10th Cir. 2007) (McConnell, J., concurring), *cert. granted, judgment vacated, and remanded*, 552 U.S. 1306 (2008).

The Tenth Circuit’s holding that sentencing courts must evaluate the § 3553(a) factors “without considering [the defendant]’s earning capacity” cannot be squared with these traditional principles. *See* Pet. App. 12a. No textual limitation on the authority of courts to consider earning capacity exists. The Tenth Circuit’s invocation of 28 U.S.C. § 994(d)—which directs the U.S. Sentencing Commission to assure “socioeconomic” neutrality in the guidelines—does not suffice. *See* Pet. App. 8a. As the Petition explains, earning capacity is not synonymous with “socioeconomic status.” *See* Pet. 20-21. This is illustrated by Part I above, which demonstrates that sentencing courts also consider the ability to pay restitution when sentencing low- and middle-income defendants. If anything, “earning capacity” is far better

correlated with “education,” “vocational skills,” and “previous employment record,” three considerations that Congress specifically *empowered* the Commission to consider in § 994(d).

Furthermore, the Tenth Circuit’s view of § 994(d) as imposing a limit on a sentencing court’s consideration of a defendant’s employment status, employment prospects, or earning capacity is in clear tension with this Court’s precedents. For instance, *Pepper* referred to the defendant’s status as “a top employee at his job” who was “supporting his wife’s daughter” as “a critical part of the ‘history and characteristics’ of a defendant that Congress intended sentencing courts to consider.” 562 U.S. at 492. *Kimbrough* likewise noted with approval the district court’s reference to the defendant’s “steady history of employment” in imposing a sentence under § 3553(a). *Kimbrough v. United States*, 552 U.S. 85, 110 (2007); *see also Gall*, 552 U.S. at 44, 59-60 (describing the sentencing court’s consideration of defendant’s post-offense conduct, including “the start of his own successful business” before concluding the sentence should have been affirmed).

The Tenth Circuit’s decision thus creates significant tension with § 3553(a) and § 3661 and the “durable tradition” of affording sentencing courts “discretion in the sort of information they may consider when setting an appropriate sentence.” *Dean*, 137 S. Ct. at 1175. The Court should grant review and address that tension.

## CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, *amicus curiae* the National Association

of Criminal Defense Lawyers urge this Court to grant the Petition for a writ of certiorari.

January 14, 2019

Respectfully submitted,

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