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No. \_\_\_\_\_

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2019**

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Roberto Cruz Olavarria,

Petitioner,

v.

United States of America,

Respondent.

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**PETITION FOR WRIT OF *CERTIORARI*  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT**

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**Rachel Brill**  
263 Domenech Avenue  
San Juan, PR 00918  
(787) 753-6131  
For Petitioner Roberto Cruz-Olavarria

### **QUESTIONS PRESENTED**

1. Whether there is a need for extensive justification and heightened scrutiny when imposing and reviewing sentences at the statutory maximum.
2. Whether this Court should address an apparent circuit split and determine that the seriousness of the offense is not pertinent to supervised release revocation proceedings.

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Judgment of the United States Court of Appeals for the First Circuit, dated March 27, 2019: *United States v. Roberto Cruz-Olavarria*.

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Petitioner respectfully prays that a writ of *certiorari* issues to review the judgment and opinion of the United States Court of Appeals for the First Circuit affirming the judgment against him.

**PROCEEDINGS AND OPINIONS BELOW**

The Judgment of the Court of Appeals for the First Circuit affirming Petitioner's conviction was handed down on March 27, 2019. It is attached as **Appendix A**.

**JURISDICTIONAL GROUNDS**

Petitioner requests review of the Judgment by the First Circuit. Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **RELEVANT STATUTORY PROVISIONS**

Sentencing, both for an offense of conviction and for violating the terms of supervised release, is governed by **18 U.S.C. § 3553(a)**.

### **STATEMENT OF THE CASE**

On June 25, 2012, Mr. Cruz pled guilty to possessing a firearm modified to shoot automatically, that is, a machinegun under 26 U.S.C. §5845(b), a crime under 18 U.S.C. §922(o). He was sentenced, in December, 2012, to thirty-six months of imprisonment and three years of supervised release.

Mr. Cruz completed his prison term and was placed on supervised release on January 22, 2015. He successfully completed six months of home confinement on electronic monitoring, a special condition of supervision. He was also tested regularly for illicit drug use during his time on supervised release and, despite having a prior history of drug use, all his tests results were negative.

More than a year and a half into his supervised release term, on September 1, 2016, Mr. Cruz was arrested with a pistol which had been modified to fire automatically. Mr. Cruz was indicted and on December 14, 2016 pled guilty to being a felon in possession of a firearm and to possessing a machinegun, under 18 U.S.C. §§ 922(g)(1), 922(o), and 924(a)(2).

On June 22, 2017, the court imposed a sentence at the statutory maximum of ten years for those crimes, more than double the applicable guidelines sentencing range, which was calculated to be 37 to 47 months. Additionally, on that same date, the court revoked Mr. Cruz's supervised release, and imposed a sentence of imprisonment at the two-year statutory maximum, also



representing a not insignificant increase from the recommended guideline range of 12-18 months. Throughout the sentencing hearing, and particularly during the revocation proceeding, the judge made mention of the seriousness of the offense as a factor in imposing sentence.

Mr. Cruz filed an appeal. The First Circuit affirmed both sentences, determining that there was a valid waiver of appeal as to the new criminal charges, and that the revocation sentence was substantively reasonable. **Appendix A.** In affirming both sentences, the court failed to address the significance of a sentence at the statutory maximum, and ratified the seriousness of the offense as an appropriate factor to consider in connection with the revocation.

## **REASONS FOR GRANTING THE WRIT**

### **I. This Court Should Recognize the Need for Extensive Justification and Heightened Scrutiny When Imposing and Reviewing Sentences at the Statutory Maximum.**

Title 18 U.S.C. § 3553(a), the bedrock foundation of federal sentencing, requires that a court impose a sentence “sufficient but not greater than necessary.” Although there is not a “rigid mathematical formula,” *Gall v. United States*, 552 U.S. 38, 47 (2007), when the sentencing guidelines are injected into the mix, “the farther the judge’s sentence departs from the guidelines sentence . . . the more compelling the justification based on facts in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed.” *United States v. Smith*, 445 F.3d 1, 4 (1<sup>st</sup> Cir. 2006). When a sentence differs from the advisory guideline range, courts must consider the “extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Gall*, 552 U.S. at 50.

It is now time for this Court to recognize that varying or departing *to the statutory maximum* is even more significant than merely sentencing above the recommended guideline range. Doing so should require even more consideration and justification than what is presently required for an upward departure or variance that does not result in the highest possible penalty. And review of such a sentence should be more exacting.

Sentencing at the statutory maximum when it is not for the “worst of the worst” can be a particular concern. “District courts should generally reserve sentences at or near the statutory maximum for the worst offenders.” *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017). When “treating [a defendant] as the worst of the worst has no grounding in the record[, it] is inconsistent with the parsimony clause.” 854 F.3d at 193. And when too many sentences reach that level, with too insufficient justification for doing so, the effect can be flattening, trivializing truly offensive conduct, and therefore counter-productive to the purposes of sentencing. *Cf.*, *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010).

Keying sentences to the statutory maximum is the rationale behind the career offender provisions of the sentencing guidelines. 28 U.S.C. § 994(h) (“The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized . . .”). Sentencing at the statutory maximum without further scrutiny, then, can too easily equate run of the mill defendants with the most heinous of offenders.

This Court should now step in and hold that there should be additional justification required as well as a heightened scrutiny standard of review when the statutory maximum is imposed. After all, when a defendant receives such a sentence, no credit is provided for admissions, concessions,

or acceptance of responsibility, all of which serve to repair the harm caused by the offense, and save the government and the court the expense and resource drain of trial and the presentation of proof. A court sentencing at the statutory maximum, and an appellate court ratifying that sentence, without more, send the unwarranted and unreasonable message that contrition and acceptance have no role to play at sentencing.

Just as a major variance requires more significant justification than a minor one, a sentence at the statutory maximum should receive additional support and justification when imposed and heightened scrutiny on review. Addressing resolving statutory maximum sentences in this manner will serve to inject much-needed fairness and consistency into federal sentencing.

**II. This Court Should Address an Apparent Circuit Split and Now Mandate that the Seriousness of the Offense is not Pertinent to Supervised Release Revocation Proceedings.**

Confronted with a supervised release revocation proceeding, among the factors listed in 18 U.S.C. § 3553(a) that a sentencing judge must consider are “the history and characteristics of the defendant,” “applicable guidelines or policy statements issued by the Sentencing Commission,” and “the need to avoid unwarranted sentencing disparities” 18 U.S.C. § 3553(a) (1), (4), (6). Deterrence and protection against further crimes are also considerations, but particularly with respect to supervised release terms and sentences upon revocation, § 3583(c) “specifically does not require the district court to consider the factors listed in § 3553(a)(2)(A), all of which go to the seriousness of the defendant’s offense.” *United States v. Burden*, 860 F.3d 45, 56 (2d Cir. 2017).

This is because “supervised release is not, fundamentally, part of the punishment.” *United States v. Aldeen*, 792 F.3d 247, 252 (2d Cir. 2015). Instead, its purpose is to “fulfill[] rehabilitative ends, distinct from those served by incarceration.” *United States v. Johnson*, 529 U.S. 53, 59 (2000), *quoted in United States v. Brooks*, 889 F.3d 95, 99 (2d Cir. 2018). *See also Burden*, 860 F.3d at 56 (“Like 18 U.S.C. § 3583(c), § 3583(e) omits §3553(a)(2)(A) from the list of § 3553(a) factors that court are instructed to consider in . . . revoking supervised release.”).

Citing the Sentencing Commission, U.S.S.G. Chap. 7, Pt. A.3(b), the Second Circuit has noted that, “at revocation the court should sanction primarily the defendant’s breach of trust, while taking into account *to a limited degree*, the seriousness of the of the underlying violation and the criminal history of the violator.” *United States v. Sindima*, 488 F.3d 81, 86 (2d Cir. 1987) (emphasis in original).

In contrast, the district court and the First Circuit placed great weight on the underlying violation and the Petitioner’s criminal past. The appellate court noted: “Only minutes earlier, in sentencing Cruz-Olavarria for the new criminal conduct, the court had emphasized the severity of the new crimes - which also constituted the violations of supervised release. The court not only made clear its view that machine guns are distinctively dangerous, but it also highlighted that the new crimes included unlawful possession of a machine gun – i.e., the same crime for this Cruz-Olavarria was serving the term of supervised release.” The appellate court went on: “The court’s comments about Cruz-Olavarria’s repetitive dangerous conduct carried over to the court’s explanation for finding that the Guidelines range of 12 to 18 months did not fully account for the seriousness of his supervised release violations.” **Appendix A**, p. 9-10.

This Court should provide guidance to avoid further circuit confusion, and continued improper application of the sentencing statute during supervised release revocation proceedings.

### **CONCLUSION**

*Certiorari* is requested to provide district and appellate courts with meaningful standards in connection with sentences at the statutory maximum. Furthermore this Court should clarify an apparent circuit split concerning appropriate factors for consideration during supervised release revocation proceedings. For the foregoing reasons, this Court should grant the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the First Circuit, determine that the court below erred in affirming Mr. Cruz' statutory maximum sentence, and remand this case for further proceedings.

Respectfully submitted,

***s/Rachel Brill***

Rachel Brill  
263 Domenech Avenue  
San Juan, PR 00918  
(787) 753-6131  
Counsel for Petitioner Roberto Cruz-Olavarria

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