NO. _____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

October Term, 2019

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HYUN JOO HONG and SONG HONG,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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# JOINT PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The questions presented in this case are as follows:

1. Is it permissible for courts to consider religion as an aggravating factor in determining sentences, or to favor a religion by sentencing defendants who used religion or religious affinity to perpetrate an offense more harshly than defendants who commit similar offenses which are secular in nature?

2. Where the defendants repeatedly argued that sentencing for religious affinity frauds should be treated no differently than sentencing for secular fraud schemes, and made clear that they wished that the court not use religion as an aggravating sentencing factor, did the Ninth Circuit, in applying the plain error standard of review, disregard the Supreme Court's recent decision in *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), which interpreted Rule 51(b) of the Federal Rules of Appellate Procedure not to require parties to make "formal exceptions," use "any particular language" or "label," or wait for the court's ruling, in order to preserve an objection, and held that claims are preserved where the parties give notice of the action they wish the court to take?

## PARTIES TO THE PROCEEDING

The petitioner is Hyun Joo Hong. She is presently incarcerated by the United States Bureau of Prisons at FDC SeaTac, in Seattle, Washington. The U.S. Bureau of Prisons lists Hyun Joo Hong's release date as February 28, 2024. The other petitioner is Sung Hong, the husband of Hyun Joo Hong. He is presently incarcerated by the United States Bureau of Prisons at Terminal Island FCI, in San Pedro, California. The U.S. Bureau of Prisons lists Sung Hong's release date as March 14, 2030.

The named respondent is the United States of America.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Hyun Joo Hong and Song Hong, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished. *See United States v. Sung Hong and Hyun Joo Hong*, 798 F. App'x 151, No. 18-30224 (9th Cir. March 17, 2020). *See also* Pet. App. 1a-4a. The district court's Judgments are unpublished. Pet. App. 6a-21a.

## JURISDICTION

The court of appeals entered its memorandum decision on March 17, 2020. Pet. App. 1a. This petition is timely pursuant to Rule 13.1, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Due Process Clause of the Fifth Amendment specifies that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.] " U.S. Const. amend. V.

The Equal Protection Clause and Due Process Clause of the Fourteenth Amendment provide: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, cl. 1.

28 U.S.C. § 994(d) directs the Sentencing Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." Guideline 5H1.10 states:

> **Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)**
>
> These factors are not relevant in the determination of a sentence.

*See* USSG § 5H1.10.

## STATEMENT OF THE CASE

### A. The Charges and Plea Agreements.

The Superseding Indictment charged Hyun Joo Hong (AKA Grace Hong), and her husband, Sung Hong (AKA Laurence or Lawrence Hong), with a conspiracy to defraud investors. Pet. App. 218a-251a.

Grace Hong pleaded guilty to: Conspiracy to Commit Wire Fraud (Count 1), in violation of 18 U.S.C. § 1349; and Wire Fraud (Counts 4, 8, 9 and 12), in violation of 18 U.S.C. § 1343. Pet. App. 203a-217a. Grace admitted that from May 2016 through March 2017, she and Lawrence engaged in a fraudulent scheme to cause investors to wire transfer funds into various entities they managed. Pet. App. 209a-211a. She admitted to misrepresenting that she held a Series 65 security license and worked as a derivatives trader for Deutsche Bank Asia, and misrepresenting the performance of the Hongs' businesses. Pet. App. 210a-211a.

Lawrence Hong pleaded guilty to: Conspiracy to Commit Wire Fraud (18 U.S.C. § 1349, Count 1); Conspiracy to Launder Monetary Instruments (18 U.S.C. § 1956(h), Count 21); and False Statement (18 U.S.C. § 1001(a)(2), Count 23). Pet. App. 183a-184a. In his plea agreement, Lawrence acknowledged a long-running scheme to defraud investors. Pet. App. 190a-196a. He admitted he had pleaded guilty to wire fraud in 2007 and that, while on

supervised release for that crime, he engaged in fraudulent activity and willfully made false statements to others, including federal employees. Pet. App. 191a-194a. He admitted to facts that supported his plea on all three counts. Grace and Lawrence waived their direct appeal rights conferred by 18 U.S.C. § 3742, and their right to bring a collateral attack, except for ineffective assistance of counsel claims.[1] Pet. App. 200a-201a; 215a.

**B. <u>The Sentencing Proceedings</u>.**

***Probation's Presentence Report and Recommendation – Grace Hong.*** The presentence report provided that Grace falsely represented to investors the Hongs' personal wealth, credentials, and qualifications, and that the Hongs misappropriated investment funds to pay personal expenses and maintain an extravagant lifestyle. PSR 4-6, ¶¶10, 11, 13, 15, 16. Probation detailed that the Hongs defrauded investors by representing before a church group in California that they provided investment services to replicate their alleged personal financial success for individuals of their purported shared religious faith. PSR 9, ¶43. Probation stated that 57 investors lost $12,766,352.67 between 2010 and 2017. PSR 5, ¶12.

Grace had no criminal history. PSR 8, ¶¶37, 38. In recommending an 84-month sentence, below the Guidelines range, Probation noted that Grace played a significant but secondary role to her husband. PSR 13-14, ¶77; SR 1, 5.[2] Probation stated that Grace's participation "appears to be an aberration of an otherwise law-abiding life," and that "it is reasonable to attribute her involvement in the crime to Mr. Hong's influence." SR 5.

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[1] Petitioner asserted before the Ninth Circuit that the plea agreements' appeal waiver provisions do not apply because the court violated the Constitution's due process, equal protection, establishment, and free exercise clauses by considering religion as an aggravating factor. Appeal waivers are unenforceable if the sentence violates the law or Constitution. *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). Accordingly, this petition rests on constitutional grounds, rather than statutory grounds or the United States Sentencing Guidelines.

[2] Citation to "PSR" refers to the presentence report, and citation to "SR" refers to Probation's sentencing recommendation.

***The Government's Initial Sentencing Memorandum Regarding Grace Hong.*** The government recommended a ten year sentence. Pet. App. 420a. Characterizing Lawrence Hong as a "storied career con-man," and acknowledging that Grace had no criminal history, the government provided that Lawrence likely "corrupted her in some respects" and "planted the initial seeds" of the investment fraud scheme. Pet. App. 421a; 440a-441a. However, the government maintained that Grace was willingly involved in nearly every aspect of the fraud. Pet. App. 421a.

***Grace Hong's Sentencing Memorandum.*** Grace Hong sought a sentence not exceeding two years imprisonment, or fifteen-plus months of electronically monitored home confinement. Pet. App. 454a; 483a-487a. Detailing the history of the Hongs' relationship, the defense showed that Lawrence engaged in controlling and abusive behavior, and that the Korean culture required Grace to obey and not question her husband. Pet. App. 452a; 472a-476a; 479a-483a; 489a. The defense explained that Grace made the misrepresentations at her husband's direction. Pet. App. 476a-477a. Grace admitted that she participated in a serious and harmful fraud. Pet. App. 477a.

Grace asserted that she did not know that Lawrence's offshore Korean family investment fund, the central lure used to attract investors, was a fiction. Pet. App. 477a; 479a-480a; 483a. The lion's share of the losses originated from three sophisticated investors who knew of Lawrence's past conviction. Pet. App. 477a-481a; 483a. Grace's parents lost their life's savings, $240,000, after succumbing to Lawrence's entreaties to invest with him. Pet. App. 467a-469a. Defense counsel explained that Grace would not have allowed her parents to invest had she known her husband's overseas fund was a sham. Pet. App. 477a.

Grace's counsel argued that although the Hongs received investments from people of faith and frequently stated their independent hope to use personal earnings to further missionary

activities, the Hongs never acted on behalf of a religious or charitable organization, and never pretended they were. Pet. App. 488a.

***Sung Hong – Sentencing.*** For Sung (Lawrence) Hong, Probation calculated a guideline range of 235-293 months. Finding that range to overstate the seriousness of the offense, Probation recommended a sentence of 144 months, with three years of supervised release and restitution of $12,778,215.98. SR.

The government argued for a total offense level of 38 and a Criminal History Category III, yielding an advisory Guidelines range of 292 to 365 months. The government recommended a sentence of 292 months. The government justified the sentencing recommendation, in part, by emphasizing the religious nature of the victims and the harm caused. Pet. App. 253a ("the Hongs so callously ravaged financially, emotionally, and spiritually;"); Pet. App. 264a ("Given the nature of the Hongs' fraud, the damage is also emotional and spiritual").

In his sentencing memorandum, Lawrence recommended a sentence of 96 to 120 months. Pet. App. 396a. Lawrence noted that, while he agreed there was a $12 million loss, "not all monies were obtained in the same way." Pet. App. 400a. Lawrence's counsel argued that more than half the loss amount, $7 million, came from two sophisticated investors who did not suffer substantial hardship. Pet. App. 400a.

***The Sentencing Hearing.*** In denying a minor role adjustment, the court concluded that Grace Hong fully participated in the scheme's planning, organizing, and decision-making. Pet. App. 66a-70a. The court stated that Grace prepared and transmitted false statements about the sums invested, and greatly benefited from the criminal activity in the form of lavish trips, meals, a mansion, designer handbags, and cars. Pet. App. 70a.

The court applied to Grace a base offense level of 34, added 20 points for a loss exceeding $9,500,000, four points for substantial hardship to five or more victims, four points for the violation of commodities law (Guideline 2B1.1(b)(19)), and subtracted three points for acceptance of responsibility, resulting in a 151-to-188 month range. Pet. App. 71a-72a; 74a. In imposing Grace's sentence, the court affirmed the denial of a minor role adjustment, explaining that Grace "played an integral, important role in the entire scheme," and that she misrepresented her credentials, and "took God's name and relied on the beliefs of people to make investments, approaching them in a way to emphasize the nature of her religious beliefs." Pet. App. 177a.

Seeking a two-point adjustment under Guideline 2B1.1(b)(9)(A) for misrepresentations made while acting on behalf of a religious or charitable organization, the government argued that the hedge funds that the Hongs started were named after a river in the book of Genesis, and that Hongs represented that half of the fund's profits would go to the Pishon River Foundation. Pet. App. 54a; 60a-61a. The government asserted that the Hongs intended to "dupe people out of their money" by saying their money would go to glorify God. Pet. App. 54a. Similarly, the government argued that the Hongs told a significant majority of these victims that by investing in the Hongs' funds, they could glorify God by having more money to tithe to churches. Pet. App. 55a.

When the court noted that the Hongs "were pushing the religious benefits of investing and having more money," Lawrence's counsel responded that that no witnesses asserted they relied on any assertion by the Hongs that they represented a religious organization. Pet. App. 54a-55a. While not disagreeing that the Hongs' pitch asserted that the more money the investors earn, the more they could spread the glory of God through charitable contributions, Lawrence's counsel argued that the investors were in it to make money. Pet. App. 56a057a. Defense

counsel noted that there was no agreement to require that a percentage of the Hongs or investors' profits would go to a religious organization, and that there is no guideline allowing an adjustment for targeting church members or using a religious motivation. Pet. App. 57a. Lawrence's counsel further argued that the Pishon Foundation was inactive, and that when it was operational only the Hongs donated to the Pishon Foundation. Pet. App. 58a. The district court declined to apply the religious organization adjustment. Pet. App. 75a; 61a-62a.

In sentencing Lawrence Hong, the court found a total offense level of 36, and a Guidelines range of 235 to 293 months. Pet. App. 70a-71a. In his allocution, Lawrence stated that Grace acted under his coercion, and that she committed the crime out of love for him. Pet. App. 115a-116a. Before sentencing Lawrence, the court emphasized that the offense targeted "religious victims" who were "spiritually damaged." Pet. App. 116a-117a. The court also cited as an aggravating factor the fact that Lawrence started the scheme within nine months of release from his 2007 conviction for fraud, even though his terms of supervised release admonished him not to break any laws. Pet. App. 118a-119a. The court concluded that Lawrence is "one of those con men who will never, ever be able to stop conning people." Pet. App. 119a. The court sentenced Lawrence to 180 months (15 years), three years supervised release, and $12,726,352.67 restitution. Pet. App. 119a-120a.

As to Grace Hong, the government argued that she touted her Christian faith and preyed upon other Christians. Pet. App. 122a. The prosecutor quoted a victim who stated that as a minister and missionary, he chose to invest with the Hongs because of their professed faith and desire to help ministers. Pet. App. 122a. The government played portions of the video of Grace speaking at the Lancaster Prophetic Conference. Pet. App. 121a-122a. The prosecutor maintained that "the easiest way to separate people from money is to prey upon the faith and

trust that you share with them." Pet. App. 124a. Referring to two victims, the government provided that the Hongs targeted them because of their religious affiliation. Pet. App. 126a. The government disputed that Grace truly believed that her husband was managing billions of dollars for wealthy families in Korea. Pet. App. 130a-132a.

Emphasizing that Grace is "overwhelmed with regret," the defense asserted that Grace's willingness to accept responsibility "stems from a core part of Grace on which much of this case has focused, her faith." Pet. App. 140a. Defense counsel noted that the government sought to call into question the authenticity of Grace's faith, and falsely painted her as a sophisticated, westernized woman, blinded by greed, even though traditional Korean culture requires women to obey and listen to their husbands so to ensure harmony. Pet. App. 140a-141a, 167a.

The defense argued that "Lawrence instructed Grace to talk, dress, and act the part of a high-society wife," and that the luxury items and trips were purchased either by Lawrence or at his direction. Pet. App. 143a, 146a, 152a. The defense explained that Grace's conduct arose from her belief in her husband, and her deep-seated desire to serve and obey her husband. Pet. App. 150a. Defense counsel asserted that Grace's "beliefs, cultivated by her faith, her upbringing, and her good heart, were genuine." Pet. App. 150a. The defense maintained that 90% of the time Lawrence directed Grace to make the misrepresentations. Pet. App. 159a-160a. Grace's counsel asserted that until her arrest, she believed that Lawrence was managing large amounts of money for billionaire Koreans, and that he would make everybody whole in the long run. Pet. App. 164a.

Noting that Grace pleaded guilty to conduct occurring from May 2016 through March 2017, the court stated it considered Grace's relevant conduct from at least 2011 to 2017,

involving approximately 57 individuals, and a $12 million loss. Pet. App. 175a-176a. The district court concluded that Grace played an integral part in the sham. Pet. App. 178a.

***Imposition of Sentence.*** While recognizing that Grace has three young children, the court stated that Grace needed to be imprisoned. Pet. App. 179a. The court sentenced Grace to 72 months (six years) imprisonment, three years supervised release, a $5,000 special assessment, and $12,726,352.67 restitution. Pet. App. 179a-180a.

**C. <u>The Direct Appeal</u>.**

Hyun Joo Hong and Sung Hong jointly claimed on direct appeal that the district court violated the First Amendment and Fifth Amendment by considering religion in determining the Hongs' sentences, by imposing a harsher sentence for a religious affinity fraud than it would have imposed for a secular fraud scheme, and by injecting its own sense of religiosity into the sentencing.[3] *See* Ninth Cir. No. 18-30227, Dkt. #16 at 2, 16-17.

In its March 17, 2020 memorandum decision, the Ninth Circuit concluded that the plea agreements' appellate waiver provisions applied, and dismissed the appeals, because the Hongs' sentences were below the Guidelines ranges and not illegal. Pet. App. 2a-4a. Citing *United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012),[4] and concluding that the Hongs first raised the claim on direct appeal, the panel reviewed under the plain error standard the Hongs' joint claim regarding improper consideration of religion. Pet. App. 2a. In rejecting the Hongs' claim, the panel stated:

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[3] Grace Hong separately claimed that district court violated her constitutional right to due process and right to present a defense as well as her right to the effective assistance of counsel by considering a series of new allegations which the government leveled in a supplemental sentencing memorandum untimely filed late in the evening, two days before the sentencing hearing.

[4] The Ninth Circuit in *Chi Mak*, held that constitutional issues not originally raised at trial are reviewed for plain error. *Id.* at 1133.

> The district court did not plainly err in describing how the Hongs used religion to carry out their fraudulent scheme, in commenting on video footage showing Grace Hong speaking to a church group, or in mentioning the spiritual harm suffered by the Hongs' victims. The Hongs point to no binding legal authority precluding a sentencing court from considering the religion of the victims or noting the spiritual impact of an offense on the victims. And the evidence that the Hongs point to clearly contradicts their assertions that the court discriminated against them on the basis of their religion, *see Zant v. Stephens*, 462 U.S. 862, 885 (1983), and that the court based their sentences on its own religious convictions.

Pet. App. 2a-3a.

## REASONS FOR GRANTING THE PETITION

### A. Supreme Court Review Is Warranted To Address The Important Question Of Whether It Is Constitutionally Permissible For Courts To Consider Religion As An Aggravating Factor In Sentencing, Or For Courts To Impose A Harsher Sentence Than It Would Have For A Purely Secular-Based Offense.

A writ of certiorari is warranted because this case presents the important questions of whether it is constitutionally permissible for sentencing courts to (1) favor religious victims by imposing harsher sentences for religious affinity frauds than secular fraud schemes, (2) consider religious "spiritual harm" as a unique aggravating factor warranting harsher punishment than "secular" harms, or (3) impose harsher sentences for defendants adjudged to be religious hypocrites. The Constitution requires this Court to answer these questions with a resounding "no."

In violation of the Fifth Amendment and Fourteenth Amendment's due process and equal protection clauses, as well as the First Amendment's establishment and free exercise clauses, the district court allowed religious considerations to seep into what should have been a sober analysis of a typical white collar crime. The Hongs' sentences were infused with religious distinctions, religious analysis, and even religious language. At the government's urging, the court improperly imposed a harsher sentence because the offense involved a religious affinity

fraud rather than a secular affinity fraud scheme, and because the scheme allegedly involved "spiritual harm."

### 1. The Government Relentlessly Exhorted The District Court To Impose A Harsher Sentence Because The Offense Involved A Religious Affinity Fraud Scheme Rather Than A Secular-Based Affinity Fraud Scheme.

During the sentencing proceedings, the government relentlessly argued that religious affinity fraud requires harsher sentencing than secular fraud schemes. Rather than identifying the offense as solely a financial crime, the government maintained that the offense was a religious crime warranting a harsher sentence due to "spiritual" harm:

> Your Honor, the impact of this fraud *isn't just financial*, because of the nature of *the religious nature* of this fraud. It's emotional, and *it's spiritual*.

Pet. App. 79a-80a (emphasis added). *See also* 264a. Here, the government emphasized that the harm from the religious affinity fraud is necessarily greater than its secular equivalent.

The government repeatedly argued that the Hongs targeted investors because they shared religious beliefs. Pet. App. 419a, 421a, 423a-424a, 428a, 441a; 252a-160a, 274a-275a. Seeking to place devoutly religious victims in a special category, the government argued that the Hongs "preyed upon *the most vulnerable of victims* – those that trusted the Hongs based upon their purported shared religious beliefs." Pet. App. 438a (emphasis added). *See also* Pet. App. 253a, 274a. The government quoted a victim who stated that the Hongs engendered trust by presenting themselves as Christians who had ties to Christian ministers and leaders. Pet. App. 419a. The government charged that "the Hongs were willing to go to any length and tell any lie in order to separate these *devoutly religious* individuals from their money." Pet. App. 438a-439a (emphasis added).

Citing the video of the Hongs' appearance at the Lancaster Prophetic Conference, the government faulted Grace for her religious hypocrisy. The government maintained that Grace

feigned tears in proclaiming that upon praying to God for guidance on what to say, God woke her up at 3:00 a.m. and said, "'Jehova-jireh. I am your provider.' So we know, the best of times are here, and everyone will be okay, and the churches will be okay." Pet. App. 438a-439a. The government characterized the audience as "devoutly religious." Pet. App. 259a. The government asserted that some victims chose not to submit impact statements because "they may not want to relive the emotional and *spiritual* trauma caused by the Hongs' conduct." Pet. App. 440a (emphasis added).

The government argued that "[b]y focusing their fraudulent efforts on those who shared their purported religious beliefs," the Hongs "were able to use the basic tenets of religion – faith and trust – in order to convince their victims to hand over their hard-earned life or retirement savings." Pet. App. 257a. The government acknowledged that in "any fraud scheme . . . victims are left wondering why they invested with somebody. Why did they get duped?" Pet. App. 80a. However, the government argued that the damage resulting from the Hongs' scheme is greater because "when it's targeted based upon their religious beliefs, *it's a deeper harm*." Pet. App. 80a (emphasis added). The government maintained that the crime was "worse than a Ponzi scheme" because some of those victims get paid back, while Lawrence "used that *religious hook* to convince these people, and lie to them, to leave their money in." Pet. App. 84a (emphasis added). The government also focused on religion in Grace's sentencing. Pet. App. 135a-136a. The government asserted that "*this isn't just a financial case*," as "the defendant was the one touting her religious beliefs, targeting other Christians." Pet. App. 123a (emphasis added). The government's repeated arguments could be no clearer – that religious affinity fraud merits greater punishment than secular frauds.

The government repeatedly emphasized religion and "spiritual harm" in its arguments addressing disparity. *See* Pet. App. 283a. For example, in distinguishing a secular fraud case, the government argued:

> There's not *a religious element* to that fraud. *The core of this case is the religious fraud*, the core of this case. The harm that emotional harm, that *spiritual harm, that the Court identified this morning*, it flows from not only Lawrence Hong's fraud, but Grace Hong's fraud.

Pet. App. 136a. In describing "the core" of the offense as "religious fraud," the government sought for the court to perceive the offense as not just a financial offense in violation of federal statutes, but also as an offense against religion. By focusing on the "spiritual harm," the government effectively argued that religious affinity frauds warrant harsher punishment than secular frauds.

Further distinguishing religious affinity frauds from secular frauds in its disparity analysis, the government argued for greater punishment by asserting that a separate fraud case was not an affinity fraud with a "religion component . . . targeting people based upon the same religion, over and over and over again." Pet. App. 91a. In distinguishing another secular-based fraud case, the government argued that Lawrence's case involved a defendant who preyed on "the religious belief, preying with an 'E,' as he prayed with them, with an 'A.'" Pet. App. 84a. The government exclaimed that Lawrence "prayed with these victims." Pet. App. 94a. Here, the government effectively argued the act of praying with victims in a fraud scheme requires harsher punishment than would be merited for a secular fraud scheme. Pet. App. 94a. By focusing on the Hongs' praying with their victims, the government appealed to the court's own sense of religiosity being offended. In furthering its claims that religious affinity frauds require harsher sentencing, the government distinguished two other cases by noting that "they do not appear to

involve investment fraud, let alone investment fraud targeting a class of individuals based on their faith and religious beliefs." Pet. App. 281a.

Referring to the 300-month sentence imposed in *United States v. Meadows*, 866 F.3d. 913, 915-16 (8th Cir. 2017), the government indicated that the religious nature of the Hongs' fraud made the offense just as serious as the secular Ponzi scheme in *Meadows*. Pet. App. 94a-95a. In comparing *Meadows*, the government asserted that "we didn't get a religious organization [enhancement], but one might say, for seriousness of the offense, they're similar." Pet. App. 94a-95a.

**2. The District Court Violated The Constitution By Considering Religion As An Aggravating Factor In Sentencing.**

The government's arguments were not lost on the district court. Indeed, the court never voiced disagreement with the government's extensive arguments concerning religion and spiritual harm, including the government's repeated assertions that religious fraud offenses required harsher sentencing than similar secular schemes. The district court's statements at sentencing must be evaluated in the context of the government's repeated exhortations to give special protections for sincere members of a religious group by imposing harsher sentences due to the religious affinity nature of the Hongs' fraud scheme.

Significantly, the court echoed the government's language emphasizing the religious nature of the offense, characterizing the victims as religiously devout, and the harm they allegedly suffered as spiritual in nature. Before pronouncing Lawrence's sentence, the court stated:

> Your offense targeted and involved *religious victims*. You used God as a way to gain their trust. You made statements like, "God gave us knowledge," in your

> presentation in August of 2016. You -- I didn't give you a religious adjustment,[5] but clearly, it was a close call.

Pet. App. 116a-117a (emphasis added). Notably, the court, echoing the government,[6] did not just refer to "victims," but rather to "religious victims." *Id.* Although the court declined to impose a "religious organization adjustment" under the Guidelines,[7] the court's comments reflect that it had determined that the Hongs' use of religion as a tool to defraud religiously faithful adherents warranted harsher sentences.

The court focused on the "religious victims," even though this was a typical fraud case. Indeed, whatever the reason investors trusted the Hongs, they sought a financial gain and suffered a financial loss, just as in any fraud case. Some of the investors were quite sophisticated and knew of Lawrence's conviction. Pet. App. 478a, 480a; 401a-402a. Although the Hongs' case constitutes a typical fraud, in sentencing Lawrence the court rested on religious grounds by emphasizing the spiritual damage suffered by the victims:

> But you have emotionally and *spiritually damaged* these victims, and many of them will never recover from your activities. You made certain false statements to the government in connection with – and you pled guilty to that crime as well. I think, as one of the speakers today said, the trauma was felt *not just financially but* emotionally and *spiritually as well*.

Pet. App. 117a (emphasis added). Here, the court twice raised the specter of spiritual harm. By distinguishing emotional harm from spiritual harm, the court clearly equated spiritual harm with religious harm, and relied on religious harm as an aggravating factor for sentencing. Indeed, the plain meaning of "spiritual harm" is religious harm. *See Vasquez v. Los Angeles County*, 487 F.3d 1246, 1253 (9th Cir. 2007) (holding that in the Establishment Clause context, "spiritual

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[6] Pet. App. 257a.
[7] Pet. App. 53a, 61a-62a.

harm resulting from unwelcome direct contact with an allegedly offensive religious or anti-religious symbol is a legally cognizable injury and suffices to confer Article III standing").

By emphasizing spiritual damage, and distinguishing it from financial harm, the district court, in violation of the Constitution, gave weight to religion as a basis for the sentence. *Cf. United States v. Gunderson*, 211 F.3d 1088, 1089 (8th Cir. 2000) (where defendant committed bankruptcy fraud while operating a faith-based counseling service, the sentence did not violate Guideline 5H1.10's prohibition on consideration of religion because the court's reliance on the defendant's "practice of giving moral advice indicates that it was concerned that his crime reflected a moral failure, not a spiritual failure"). The district court's focus on spiritual damage establishes that it agreed with the prosecution's exhortations to impose a harsher sentence because the Hongs engaged in a religious affinity fraud rather than a secular fraud. Indeed, the court's statements concerning "spiritually damaged" victims echoed the government's extensive and strongly worded disparity arguments asserting that the Hongs' religious affinity fraud merits a harsher sentence than comparable secular frauds because of the "spiritual damage." *See* Pet. App. 440a; 252a-253a, 264a, 274a-275a; 79a-80a, 84a, 136a.

By giving weight to religious "spiritual harm," the court, in effect, found that a harsher sentence is warranted for victimizing religious persons. But the courts have not recognized Christians, or any other religious group, as a class of victims deserving of special protection through enhanced sentencing for all federal offenses. Although USSG § 2H1.1, cmt. n.3 & 4 allow for an adjustment where the defendant targeted persons for their religion, those provisions apply to "hate crimes" rather than run-of-the-mill cases in which the victims happen to be religious.

In *United States v. Dupre*, 462 F.3d 131,144-45 (2d Cir. 2006), the Second Circuit provided that although fraud grounded in religious themes may pose an especially effective threat, "membership in religious groups cannot, standing alone, make victims 'vulnerable' for purposes of the enhancement, even where a fraud involves reliance on religious themes or imagery." In holding that the religious affiliation of certain victims does not justify a vulnerable victims enhancement under Guideline 3A1.1(b), the Second Circuit specified that there is "no reason to believe that evangelical Christians as a class are 'unusually susceptible' to fraud." *Id.* at 145. Similarly, the Second Circuit provided that evangelical Christians were not victims requiring greater societal protection. *Id.* at 146. Supreme Court review is warranted because the Ninth Circuit's decision in the Hongs' case conflicts with the Second Circuit's approach.

The Hongs did not dispute at sentencing that they used religion or faith as a tool of the fraud, or that a number of their victims were devout Christians. Nevertheless, the Constitution does not permit harsher sentencing for religious affinity fraud cases. Indeed, to hold otherwise would favor victims who are persons of faith, such as devout Christians, Jews, Muslims, Hindus, or Buddhists, over secular victims, or favor members of one faith over members of another faith. The victims of Ponzi schemes and secular affinity frauds arising from, for example, membership in a chess club or college alumni association, suffer just as much as victims of religious affinity frauds. All victims of fraud suffer a betrayal of trust and a blow to their finances, and those harms should be weighted the same, whether the victims live religious or secular lives. The mere fact that the Hongs appeared to be hypocritical in using their Christian faith to perpetrate the fraud does not mean that they should be punished more harshly than persons committing "secular" fraud schemes. Indeed, all fraud schemes involve hypocritical behavior, and imposing harsher sentences for persons who acted as religious "hypocrites" necessarily violates the

Establishment Clause because such sentences reflect a need to serve as a deterrent for targeting adherents a particular religion.

Matters of religion, as well as race, ethnicity, or national origin, have no place as aggravating factors in sentencing. Cannon 2.3(B) of the ABA Model Code of Judicial Conduct (2018) instructs that a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, . . . based upon race, sex, gender, religion, national origin, ethnicity. . . ." In enacting 28 U.S.C. § 994(d), Congress directed the Sentencing Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, *creed*, and socioeconomic status of offenders." Emphasis added. The Commission established Guideline 5H1.10, which specifies that the factors enumerated in § 994(d) as well as religion, "are not relevant in the determination of a sentence." The dictates of 28 U.S.C. § 994(d) and Guideline 5H1.10 likely derive, in part, from constitutional concerns regarding sentencing based on consideration of race, nationality or "creed."

Reflecting that 28 U.S.C. § 994(d) and Guideline 5H1.10's prohibition against consideration of religion is rooted in the Constitution is *United States v. Sprei*, 145 F.3d 528, 529-30, 536 (2d Cir. 1998), in which the Second Circuit applied 28 U.S.C. § 994(d) and Guidelines 5H1.10's prohibition on consideration of religion. The Second Circuit held that the court improperly granted a downward departure where the defendant, an Orthodox rabbi, asserted that long-term incarceration would unduly harm the religious community's custom for fathers to arrange the marriages of their children. *Id.* at 530, 535-36. Relying on the Supreme Court's Establishment Clause analysis in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706-07 (1994), the Second Circuit in *Sprei* explained that "[b]y according special deference to the customs of a particular religious community, the district court has

chosen to treat adherents of one religious sect more favorably than non-adherents who might also desire to assist in planning their children's futures." *Sprei*, 145 F.3d at 536.

### 3. The Government And District Court's Use Of Religion As A Theme Demonstrates That The Hongs Were Punished Based On The Court's Sense Of Religious Harm.

The government expressly and repeatedly argued that the Hongs' offense was religious in nature, and that the offense required harsher punishment because it inflicted "spiritual harm" on "devoutly religious" individuals. Pet. App. 79a-80a, 84a, 91a, 94a-95a, 135a-136a; 259a, 281a, 283a; 438a-439a. In imposing sentence, the court adopted the government's characterization of the offense and the harm it inflicted. Responding to the government's arguments regarding the religious harm to the victims and the religious culpability of the Hongs, the court made biblical references. In sentencing Lawrence, the court stated:

> And, obviously, the government is asking for much more time than Mr. Berg received, and that's not going to happen. But I think there is a couple of things that are appropriate. Grace's motto and your statement was, "You reap what you sow."[8] You reap what you sow. You've sowed a lot of misery to a lot of investors who lost a lot of money.

Pet. App. 118a (emphasis added). In isolation, such a comment may not raise concern. However, in the context of a sentencing infused by religious arguments, this biblical reference strengthens the conclusion that the court sentenced the Hongs not just for fraud as defined by statute, but also for religious fraud. By relying on the biblical dictate that persons must reap what they sow, the court telegraphed that the Hongs deserve a sentence equaling the "misery"[9] that they sowed. The court's statement is akin to the biblical metric of "[A]n eye for an eye, and a tooth for a tooth."[14] The court determined the Hongs' punishment based on the spiritual harm

[8] Galatians 6:7 (King James) provides: "Be not deceived; God is not mocked: for whatsoever a man soweth, that shall he also reap."

[9] Pet. App. 118a.

they "sowed," rather than sentencing the Hongs based solely on the statutory sentencing parameters, Sentencing Guidelines, and § 3553(a) factors. *See Robinson v. Polk*, 444F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., concurring in the denial of rehearing en banc) (the Constitution does not allow religious considerations to replace legal ones). In applying a biblical metric for sentencing, the court transformed the bench into the pulpit.

The district court even questioned the sincerity of Grace's religious beliefs. In imposing sentence, the court found that Grace shed false tears at the Christian conference. Pet. App.177a-178a. The court stated:

> You cannot watch that and believe that she was *sincere*; that God really woke her up at 3:00 in the morning, and she really heard God say what she told us.

Pet. App. 179a. The question was not whether Grace sincerely believed that God communicated with her, but whether the Hongs made false statements about investing. They did, but the district court improperly became distracted by focusing on questions of religion, not finance. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (inquiry into religious views is "not only unnecessary but also offensive," and "courts should refrain from trolling though a person's or institution's religious beliefs").

Continuing with biblical references, the court found:

> Her life has been a big lie for the last five or six years. I'm sure that she's sorry, now, as to where she is, because most defendants who come before the Court for sentencing are sorry they're standing there. But I wish that she had been a little more *repentant* a little earlier.

Pet. App. 178a (emphasis added). The words "repent," "repentant" and "repentance" are commonly known as religious or biblical terms. Once again, the court applied a biblical or religious metric – the need for timely repentance – for Grace's conduct. *See Polk*, 444 F.3d at 227 (Wilkinson, J., concurring in the denial of rehearing en banc) (constitutionally problematic

for the jury in a capital case to read and debate biblical text as the basis for a life and death decision). *See also Romine v. Head*, 253 F.3d 1349, 1369 (11th Cir. 2001) (granting habeas relief in capital case where the trial "saturated with evidence relating to religion," and prosecutor gave the jury "a hell fire and brimstone mini-sermon" exhorting the jury to follow the law of God).

By chastising Grace for not being more "repentant" or religiously "sincere,"[10] the court expressed that Grace had offended the court's own sense of religiosity. Indeed, the court stated that Grace failed to timely "repent," rather than providing it wished that she had earlier ceased her criminal behavior and expressed contrition for her actions. The court had earlier professed that it did not "challenge in any way this defendant's religious beliefs." Pet. App. 176a. However, by stating that it wished Grace "had been a little more *repentant* a little earlier," and by questioning her religious sincerity,[11] the court challenged Grace's faithfulness to her professed religious values and expressed that its own sense of religiosity had been offended. *See, e.g.*, *Torres v. State*, 124 So. 3d 439, 442 (Fla. Dist. Ct. App. 2013) ("No one should be punished, or conversely shown leniency, merely because he or she may be a member of a particular religion").

The district court had no reason to invoke biblical language in imposing sentence, but nevertheless chose to do so. In effect, the court voiced its opprobrium for the Hongs being religious hypocrites rather than violating criminal statutes. *Cf. United States v. Gunderson*, 211 F.3d 1088, 1089 (8th Cir. 2000) (court did not hold the defendant "to a higher standard based on his professed faith"). By applying a biblical metric for sentencing, and indicating that its own sense of religiosity had been offended, the court breached the First Amendment wall separating

[10] Pet. App. 178a.
[11] Pet. App. 178a.

church from state and violated the Due Process Clause. Given the central role of religious freedom in our constitutional system, even the appearance of judicial favoritism merits reversal.

The court's written Statement of Reasons bolsters the conclusion that the court applied considerations of religion as an aggravating factor in sentencing the Hongs. Indeed, court's written Statement of Reasons for Grace's sentence provides:

> The instant offense took place over a seven-year period, and involved 57 victims; the defendant targeted victims, in part, based on their *religious ties*; the defendant's actions not only ruined victim's lives financially, but emotionally *and spritually* (sic). The defendant has no known criminal history. The Court imposes a custodial sentence of 72 months (6 years). The Court finds that such a sentence is sufficient, but not greater than to meet the goals of sentencing.

Statement of Reasons (filed under seal) (emphasis added). The fact that the court honed in on the victims' "religious ties" and spiritual damage establishes that the court sentenced the Hongs more harshly than it would have for a secular affinity fraud.

#### 4. The Court Imposed Harsher Sentences For The Hongs' Religious Affinity Fraud Than It Would Have Imposed For A Secular Fraud.

In comparing the Hongs' case to specific other cases, the government expressly argued that the religious aspect of the Hongs' fraud warranted harsher sentencing. *E.g.* Pet. App. 80a-81a, 91a-92a, 94a-95a, 136a; 281a, 283a. Even when the government was not directly comparing the Hongs' conduct to other cases, the government raised the issue of disparity by, for example, asserting that the Hongs deserved harsher punishment not because their conduct caused greater loses or financial hardship, but rather because the offense was a religious fraud that caused spiritual harm. *E.g.* Pet. App. 79a-80a, 136a; 252a, 264a. The fact that the court echoed the language of the government's arguments reflects that the government succeeded in its disparity arguments. *E.g.*, Pet. App. 116a-117a. Further reflecting that the government succeeded in arguing that the religious aspect of the fraud and harm warranted harsher

sentencing than similar secular frauds is the fact that the court imposed extraordinarily lengthy sentences – 180 months (15 years) for Lawrence, and 72 months (six years) for Grace. Pet. App. 119a-120a, 179a-180a.

In light of the extensive record reflecting that the court applied religion as an aggravating factor, it is perplexing that the Ninth Circuit panel concluded that "the evidence that the Hongs point to clearly contradicts their assertions that the court discriminated against them on the basis of their religion, *see Zant v. Stephens*, 462 U.S. 862, 885 (1983), and that the court based their sentences on its own religious convictions." Pet. App. 2a-3a. The panel never detailed what evidence "clearly contradicts" the Hongs' positions. Moreover, the panel never addressed the Hongs' central argument – that the court may not impose a harsher sentence for religious fraud schemes than it would have imposed for similar secular schemes.

**5. Supreme Court Review Is Warranted To Resolve The Split In The Circuits Regarding Whether The Improper Consideration Of Religion In Sentencing Creates The Appearance Of Bias Or Prejudice Requiring Resentencing, Or Whether A Showing Of Actual Harm Is Required.**

The case at bar presents an appropriate vehicle for this Court to resolve whether the appearance of bias arising from the improper consideration of factors such as religion, race or nationality, warrant resentencing, or whether a showing of actual harm is required. In the Hongs' case, the district court's adoption of the government's arguments concerning "spiritual" damage and the court's repeated biblical references at the very least created the appearance that the improper consideration of religion played a role in sentencing. Nevertheless, the Ninth Circuit panel in the Hongs' case required a showing that the court's improper consideration of religion actually impacted the sentence. Pet. App. 2a-3a. Even if the Hongs cannot show that the impermissible consideration of religion actually impacted the court's sentencing determinations, a new sentencing should be required because there is a sufficient risk that a

reasonable observer, hearing or reading the court's remarks, might infer that the court improperly considered religion in sentencing, and thus was biased.

Review is warranted because unlike the Ninth Circuit, other circuits have applied the appearance of justice/reasonable person standard originally established by the Second Circuit in *United States v. Leung*, 40 F.3d 577, 586-87 (2d Cir. 1994). In *Leung*, the Second Circuit expressed confidence that the district court harbored no bias against the defendant because of her ethnic origin or alien status. *Id.* Nevertheless, in remanding the case to a different judge, the Second Circuit provided that "even the appearance that the sentence reflects a defendant's race or nationality will ordinarily require a remand for resentencing." *Id.* The Second Circuit established the appearance of justice/reasonable person standard by specifying that "there is a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that Leung's ethnicity and alien status played a role in determining her sentence." *Id.* at 586-87. *See also United States v. Kaba*, 480 F.3d 152, 156-59 (2d Cir. 2007) (vacating the sentence despite concluding that the district court harbored no bias). Significantly, in *Pepper v. United States*, 562 U.S. 476, 489 n.8 (2011), the Supreme Court cautioned that "sentencing courts' discretion under § 3661 is subject to constitutional constraints," and parenthetically quoted *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994), as stating that a "defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing." A writ of certiorari should be granted because the Ninth Circuit panel ignored the Supreme Court's reliance on *Leung*.

Other circuits have followed the Second Circuit's lead in applying the appearance of justice/reasonable person standard. While noting that the district court did not expressly adopt the government's position regarding the defendant's Cuban heritage, the Seventh Circuit in

*United States v. Trujillo-Castillon*, 692 F.3d 575, 579 (7th Cir. 2012), stated that the sentencing court "did nothing to reasonably assure the defendant that his Cuban heritage would not factor into its calculus." *Id.* The Seventh Circuit held that the district court "arguably" made the defendant's national origin a sentencing factor, and that a "reasonable observer hearing or reading the remarks might certainly think so." *Id.*

Similarly, in *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991), the Fourth Circuit did not require a showing of actual bias, but rather held that a due process violation arose from the mere appearance of bias:

> Courts, however, cannot sanction sentencing procedures that create *the perception* of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. Regrettably, we are left with *the apprehension* that the imposition of a lengthy prison term here *may have* reflected the fact that the court's own sense of religious propriety had somehow been betrayed.

*Id.* at 740-41 (emphasis added). Supreme Court review is warranted because the Ninth Circuit panel's decision in the Hongs' case is clearly at odds with the approach of the Fourth Circuit and other circuits. The Ninth Circuit's position also appears to conflict with Supreme Court authority. *See In re Murchison*, 349 U.S. 133, 136 (1955) (explaining "[b]ut our system of law has always endeavored to prevent even the probability of unfairness"). *See also Pepper v. United States*, 562 U.S. 476, 489 n.8 (2011).

Other circuits appear to stand on the Ninth Circuit's side by requiring a showing that the improper consideration of religion actually impacted the proceedings. For example, the Eleventh Circuit provided that "[w]hen religion is the basis of a due process challenge, courts look to whether the religious features of the trial substantially impaired the fairness of the proceeding; they do not ask, in the abstract, whether the events at trial violated the Establishment Clause."

*Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1289-90 (11th Cir. 2014). *See also United States v. Hoffman*, 626 F.3d 993, 999 (8th Cir. 2010) ("Nothing suggests that the district court's personal view of religion in any way influenced an aspect of [the defendant's] sentence."); *United States v. Traxler*, 477 F.3d 1243, 1249 (10th Cir. 2007) (concluding that a due process challenge to a judge's religious comments applies only to those circumstances where impermissible personal views expressed at sentencing were the basis of the sentence).

In *Arnett v. Jackson*, 393 F.3d 681, 688 (6th Cir. 2005), the Sixth Circuit, in denying habeas relief where the trial judge had referred to a passage from the Bible, held that "[t]here [was] nothing in the totality of the circumstances of [defendant's] sentencing to indicate that the trial judge used the Bible as her final source of authority." Dissenting from the *Arnett* majority, Judge Clay provided that when "a judge directly and publicly relies on a religious source to reach a specific legal result, she flouts a defendant's fundamental expectation that he will not be adjudged according to *any* religious tenets, regardless of whether the sentencing judge herself adheres to those tenets." *Arnett v. Jackson*, 393 F.3d 681, 691 (6th Cir. 2005) (Clay, J., dissenting). Judge Clay further asserted:

> If the Constitution sanctions such direct reliance on religious sources when imposing criminal sentences, then there is nothing to stop prosecutors and criminal defense lawyers from regularly citing religious sources like the Bible, the Talmud, or the Koran to justify their respective positions on punishment. The judge would be placed in the position of not only considering statutory sentencing factors, but also deciding which religious texts best justify a particular sentence. Under this approach, the judgments of trial courts could begin to resemble the fatwas of religious clerics, and the opinions of appellate courts echo the proclamations of the Sanhedrin. The result would be "sentencing procedures that create the perception of the bench as a pulpit for which judges announce their personal sense of religiosity." *Id.*

*Arnett*, 393 F.3d at 691 (quoting, in part, *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991). Review is warranted in light of this stark split in the circuits, and the Ninth Circuit's failure to heed Supreme Court authority.

### 6. Supreme Court Review Is Warranted In Order To Affirm That The Constitution Forbids Consideration Of Religion In Sentencing.

Review is warranted because the Ninth Circuit panel in the case at bar failed to properly apply Supreme Court authority. This Court in *Zant v. Stephens*, 462 U.S. 862, 885 (1983), specified that a defendant's right to due process is violated if he is sentenced based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant." Later, in dicta, the Supreme Court in *Wade v. United States*, 504 U.S. 181, 186 (1992), provided that "a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion." *See also California v. Ramos*, 463 U.S. 992, 1021-22 (1983) (Marshall, J., dissenting) (citing *Zant* as "noting that jury may not consider race, religion, or political affiliation, and suggesting that factors which are truly mitigating cannot be the basis for imposing a death sentence"). Religion, like race or national origin, constitutes an impermissible consideration in sentencing, implicating the Fifth Amendment's Due Process Clause and the First Amendment's establishment and free exercise clauses. *See Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1074-75 (2d Cir. 1996) (forcing defendant to attend Alcoholics Anonymous violates the Establishment Clause because of the program's substantial religious component).

The district court and the Ninth Circuit in the Hongs' case appear to have failed to heed the directives of the Supreme Court for the lower courts not to use religion as a basis for sentencing. Although the Ninth Circuit panel in the Hongs' case cited *Zant*, the panel failed to

give this Court's admonition in *Zant* proper effect. Pet. App. 2a-3a. The Ninth Circuit panel's decision is also at odds with its sister circuits. In *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991), a case involving a well-known televangelist, the Fourth Circuit specified that courts "cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it." The sentencing court stated that the defendant "'had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests*.'" *Id.* (emphasis in original). The Fourth Circuit held that these comments violated due process because the judge factored "his own sense of religiosity and victimization" in imposing the sentence. *Id.* Just as in *Bakker*, the court in the Hongs' case violated due process by considering religion in imposing sentence, using biblical language, and making other comments reflecting that the court's own sense of religiosity had been offended.

The Hongs used connections to people made through their religious faith to recruit investors. But the critical questions here are whether the victims deserved special consideration because they were religious, whether the Hongs deserved harsher punishment because they committed a fraud while also professing adherence to a religious faith, and whether the court may consider religious affinity frauds as deserving greater punishment than secular fraud schemes. Because the Constitution prohibits such considerations from influencing the sentence, there is a compelling basis for review.

### B. Review Is Warranted Because Contrary To The Supreme Court's Recent Decision In *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), The Ninth Circuit Applied The Plain Error Standard Of Review.

In *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), the Supreme Court held that a defendant who "advocates for a shorter sentence than the one ultimately imposed"

sufficiently preserved a claim that a longer sentence is unreasonable, thereby avoiding "plain error" review under Federal Rule of Criminal Procedure 52(b). The Court provided that the "rulemakers, in promulgating Rule 51, intended to dispense with the need for formal 'exceptions,'" and "chose not to require an objecting party to use any particular language or even to wait until the court issues its ruling." *Id.* at 766. The Court explained that "[t]he question is simply whether the claimed error was 'brought to the court's attention.' Rule 52(b)." *Id.*

**1. Facts.**

On appeal before the Ninth Circuit, the Hongs presented the following issue:

> Did the district court violate the First Amendment and Fifth Amendment by considering religion in determining the Hongs' sentences, by imposing a harsher sentence for a religious affinity fraud than it would have imposed for a secular fraud scheme, and by injecting its own sense of religiosity into the sentencing?

*See* Ninth Cir. No. 18-30227, Dkt. #16, p. 2 (Opening Brief). Counsel for the appellants argued that novo review should apply because the constitutional violation is a matter of law, and the record is sufficiently developed to address the issue. *Id.* at 22. In addition, the Hongs argued against the government's assertion that the plain error standard of review should apply. *Id.* at. 20-23, 50-52; Ninth Cir. No. 18-30227, Dkt. #27, pp. 36-37 (Answering Brief); Ninth Cir. No. 18-30227, Dkt. #39, pp. 3-6, 19 (Reply Brief). The Hongs asserted that de novo review should apply because trial counsel gave clear notice that religion may not be considered as an aggravating factor in sentencing, and that religious affinity frauds warrant no harsher punishment than similar secular fraud schemes. *Id.* at 3-6.

After the appellants filed their consolidated reply brief, the Supreme Court issued *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), addressing whether plain error may apply to a claim challenging the reasonableness of the sentence. The Hongs raised *Holguin-Hernandez* in their Rule 28(j) supplemental authorities letter. *See* Ninth Cir. No. 18-30227, Dkt.

#52. In conclusory fashion, the Ninth Circuit panel stated that "[b]ecause they raise this claim for the first time on appeal, we review it for plain error." Pet. App. 2a. The panel cited *United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012), which simply repeats the general rule that constitutional issues not originally raised at trial are reviewed for plain error. *Id.*

**2. Argument.**

A grant of a writ of certiorari is warranted because the Ninth Circuit panel's determination to apply the plain error standard ignores and contravenes the Supreme Court's decision in *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020). Although the Hongs' counsel cited *Holguin-Hernandez* in its Rule 29(j) letter of supplemental authorities, the Ninth Circuit panel made no mention of this Court's recent decision. *Holguin-Hernandez* is significant because it instructed the circuit courts not to expand the application of the plain error standard beyond the intent of the drafters of the court rules. *See* Fed. R. Crim. P. 52(b). Rule 51(b) of the Rules of Criminal Procedure states, in part:

> (b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made *or sought*—of *the action the party wishes the court to take, or* the party's objection to the court's action and the grounds for that objection.

Emphasis added. Looking to the language of Rule 51(b), this Court explained that "[b]y 'informing the court' of *the* '*action*' he 'wishes the court to take,'. . . a party ordinarily brings to the court's attention his objection to a contrary decision." *Holguin-Hernandez*, 140 S. Ct. at 766. By providing that a claim is preserved for appellate review where the party informs the district court of the "action" he desires the court to take, this Court established a practical, rather than hyper-technical, approach to reviewing the record to determine whether to apply the plain error standard.

In *Holguin-Hernandez*, defense counsel at sentencing argued that there "would be no reason under [18 U.S.C. §] 3553 that an additional consecutive sentence would get [petitioner's] attention any better than" the five years in prison the court had already imposed for the current trafficking offense. *Holguin-Hernandez*, 140 S. Ct. at 765. Defense counsel also argued that the defendant understood that, if he offended again, he was "going to serve his life in prison." *Id.* Counsel urged the court to impose either "no additional time or certainly less than the [G]uidelines." *Id.* The court sentenced the defendant to a consecutive term of 12 months, a sentence at the bottom of, but not below, the Guidelines range. *Id.* Concluding that the defendant had forfeited the argument that the 12-month sentence was unreasonably long by failing to object on substantive reasonableness grounds, the Tenth Circuit applied the plain error standard of review. *Id.*

The Supreme Court in *Holguin-Hernandez* held that the defendant's district-court argument for a specific sentence preserved his claim on appeal that his sentence was unreasonably long. *Holguin-Hernandez*, 140 S. Ct. at 764. This Court specified:

> We do not agree with the Court of Appeals' suggestion that defendants are required to refer to the "reasonableness" of a sentence to preserve such claims for appeal. *See* 746 Fed. Appx. 403; *United States v. Peltier*, 505 F.3d 389, 391 (C.A.5 2007). The rulemakers, in promulgating Rule 51, *intended to dispense with the need for formal "exceptions"* to a trial court's rulings. Rule 51(a); *see also* Advisory Committee's 1944 Notes on Fed. Rule Crim. Proc. 51, 18 U.S.C. App., p. 591. They chose *not to require an objecting party to use any particular language or even to wait until the court issues its ruling*. Rule 51(b) (a party may "infor[m] the court" of its position either "when the court ruling or order is made or" when it is "sought"). The question is simply whether the claimed error *was "brought to the court's attention*." Rule 52(b).

*Holguin-Hernandez*, 140 S. Ct. at 766. Here, this Court interpreted the intent of Rule 51 to not require "formal 'exceptions'" or "any particular language," or to require the party to wait for the court's ruling. Significantly, the Supreme Court in *Holguin-Hernandez* instructed that its

"decisions make plain that reasonableness is *the label* we have given to 'the familiar abuse-of-discretion standard' that "applies to *appellate* review" of the trial court's sentencing decision. *Id.* (emphasis supplied and added). In short, *Holguin-Hernandez* establishes that if the party gave notice of the action he wished the district court to take, the claim or objection is preserved, and that plain error standard may not apply merely because the appellant failed to attach a specific "label" to the claim.

In the Hongs' case, the petitioners clearly and repeatedly objected to the government's disparity arguments that religious fraud schemes warrant harsher sentences. The Hongs also gave notice of the action they wished the court to take. As the Hongs argued in their reply brief,[12] the issue of whether the Hongs deserved a harsher sentence because of the religious nature of the affinity fraud was unquestionably in play during sentencing, with the parties taking opposing positions. The government repeatedly argued that the Hongs' offense was religious in nature, and that the offense required harsher punishment than secular fraud schemes because it inflicted "spiritual harm" on "devoutly religious" individuals. Pet. App. 79a-80a, 84a, 91a, 94a-95a, 135a-136a; 258a, 281a, 283a; 438a-439a. In its pleadings and at sentencing, the government's exhortations seeking harsher sentencing based on the religious nature of the affinity fraud were made as part of its disparity analysis. Pet. App. 91a, 94a-95a, 135a-136a; 281a, 283a.

The defense did not remain silent. Defense counsel argued that there is nothing special about the fraud committed by the Hongs:

> Now, there's so much made of the house, and the cars, and the yacht, and the vacation, and the shopping. Some of this was part of the fraud, Your Honor. I don't deny that. *Because every fraud involves trust. This is not a special case*.

[12] The arguments presented in this section are set forth in the petitioners' reply brief. *See* Ninth Cir. No. 18-30224, Dkt. #39, pp. 3-6.

> Every fraud you ever see, people trust the person they're giving their money to. They might be motivated by greed. They might be motivated by altruistic reasons, thinking it will help a charity, or an organization, *or for the glory of God*. They might be motivated for some other reason, because they have their own agenda. *But there's always trust*. You know, nobody ever comes before you that took money from people that didn't trust them.

Pet. App. 101a. Here, in stating that "this is not a special case," defense counsel essentially argued that religious affinity frauds are no different than secular fraud schemes, as all frauds involve a breach of trust even though the victims' motives may be "greed" or to further "the glory of God." In making this argument, defense counsel challenged the government's assertions that the religious nature of the affinity fraud warranted harsher sentencing and that the Hongs' use of religion to perpetrate the fraud should be considered as an aggravating factor.

During sentencing, defense counsel also asserted:

> Now, he lied about the money in Korea. *That's what this fraud is about*. He told people that, "I live well. I make a lot of money for investors in Korea." They were completely fictitious. *That's the crime here.* And people *trusted* him because of that, and *they may have trusted him because they prayed with him*. You know as well as I, Your Honor, that *we get a lot of frauds in here involving religious groups, and that people are trusted*. Mr. Chatterjee was an elder in his temple. We've had – I've had more Mormon clients than I can shake a stick at in these areas. It's just they are trusting people, and faith is part of their makeup, and they foolishly trust people with money. As [one victim stated], "I should have done my due diligence." Now, that doesn't excuse what he did. I'm not there [sic] to do that. I'm here to try *to put things in context*.

Pet. App. 108a (emphasis added). Here, once again, defense counsel "put things in context" by arguing that religious affinity frauds should be judged no differently than secular fraud schemes because trust is the common thread of all fraud schemes. Similarly, by arguing that "the house and the cars" were part of "the persona that allowed them to defraud people," defense counsel made it clear that religious affinity was not the only means by which the Hongs' manufactured trust. Pet. App. 101a.

In objecting to the Guideline 2B1.1(b)(9)(A) enhancement for acting on behalf of a religious organization, defense counsel again emphasized that religion was not necessarily the primary tool of the fraud. Defense counsel argued that although the Hongs received investments from people of faith and frequently stated their independent hope to use personal earnings to further missionary activities, they "never acted on behalf of a religious or charitable organization and never pretended they were." Pet. App. 488a. Defense counsel asserted that the victims invested for personal gain. Pet. App. 488a.

In addition, during the sentencing hearing, defense counsel asserted:

> You've got -- I had a case like this *where a fellow represented that he was part of the Vatican*. And he was soliciting contributions and pharmaceuticals, and he ended up selling them on the black market. That's what this speaks to. *And I appreciate that there could be a guideline that says, if you prey upon members of your church, or you use a religious motivation for activity, then there might be an adjustment. But we don't have that in the guidelines, at least not yet,* Your Honor.

Pet. App. 57a (emphasis added). Here, defense counsel expressly argued that a defendant's use of religious motivation to perpetrate a fraud cannot serve as a basis to impose a lengthier sentence. Defense counsel's arguments – that religious affinity was not the sole motivating factor and that the victims deserved no special consideration because of their religious beliefs – preserved the claim the Hongs raised on appeal.

Defense counsel made clear their claim that the religious nature of an affinity fraud may not serve as a basis to impose a harsher punishment than similar secular fraud schemes. Likewise, the Hongs' counsel gave notice to the court regarding what action it wished the court to take – not to impose a harsher punishment merely because the defendants used religion or religious affinity to commit the offense. Because the plea agreements contained an appeal

waiver provision,[13] the Hongs did not challenge on appeal the substantive reasonableness of the sentence, or rest on Sentencing Guideline 5H1.10, which prohibits consideration of religion. Opening brief, pp. 34, 42. Rather, the Hongs rested their claim on appeal on constitutional grounds,[14] asserting that the district court breached the First Amendment wall separating church and state, and violated the Due Process Clause as well as the Equal Protection Clause. Opening brief, pp. 18-20.

The mere fact that the Hongs' trial counsel did not cite these constitutional clauses should not give reason to apply the plain error standard of review. Indeed, the Hongs had made it clear what action they wished the court to take. Requiring anything more would base the application of the plain error standard of review on a "label," which this Court specified may not be the basis to apply the plain error standard. *See Holguin-Hernandez*, 140 S. Ct. at 766.

Similar to the defendant in *Holguin-Hernandez*, the Hongs' arguments were presented to seek a lower sentence. The Hongs challenged the government's repeated arguments to apply disparity analysis to sentence them more harshly than defendants committing secular fraud schemes. Moreover, at the district court level, there is no clear imperative to attach a label to each argument seeking a lower sentence. In the Hongs' case, the district court judge must have understood that the defendants were arguing that because the dynamics of all fraud cases are similar, it would be unfair to sentence the Hongs more harshly based on the fraud scheme's religious component.

Although not controlling to the majority's decision in *Holguin-Hernandez,* Justice Alito's concurring opinion maintained that this Court's decision did not decide what is sufficient to

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[13] Pet. App. 200a-201a; 215a.

[14] Citing *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007), and other Ninth Circuit authority, the Hongs maintained that appeal waiver provisions do not bar claims on appeal which are constitutional in nature. Opening brief, pp. 23-24.

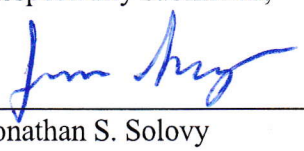
preserve a procedural error, as opposed to substantive errors. *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 767 (2020) (Alito, J, concurring). This Court's holding in *Holguin-Hernandez* applies because the Hongs' claim on appeal is substantive in nature. Even if the claim could be described as "procedural," the plain error should not apply because the error concerns fundamental principles enshrined in the Constitution.

This Court's intent in *Holguin-Hernandez* would be subverted if circuit courts applied it in an unduly narrow fashion. *Holguin-Hernandez* has been applied in contexts other than in cases in which the issue on appeal is the substantive reasonableness of the sentence. For example, in *United States v. Abney*, 957 F.3d 241, 247, 249 (D.C. Cir. 2020) , the District of Columbia Circuit held that the defendant, by stating that he wanted to "say something" at sentencing, preserved for appellate review his claim that his right to presentence allocution was violated. The *Abney* court also provided that although the case involved a claim of procedural error, "because the procedural right involved is a requisite of any sentencing and its omission is easy to detect, we treat it as akin to the straightforward claim of excessive sentence in *Holguin-Hernandez*. *Id.* at 249.

## CONCLUSION

Petitioners respectfully submit that this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, vacate the judgment below, and require a new sentencing hearing. Alternatively, the petitioners pray for such other relief as this Court deems just.

Respectfully submitted,



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