No._____

In the
SUPREME COURT OF THE UNITED STATES

JORDAN SANDOVAL, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for Writ of Certiorari

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Questions Presented

Every federal circuit, in one form or another, gives cognizable deference to sentencing ranges produced by the United States Sentencing Commission's Sentencing Guidelines Manual.

(1) Currently, the circuits are split in defining the role of appellate courts in conducting a meaningful substantive reasonableness review of a Defendant's sentence given the substantial deference afforded to within-Guidelines sentences.

Where an applicable guideline fails to reflect sound judgment, is it acceptable for appellate courts to permit that guideline to anchor the sentencing at the expense of other sentencing objectives?

(2) Section 2A2.2 of the United States Sentencing Guidelines that governs sentencing for aggravated assault offenses fails to distinguish between intentional and reckless conduct.

Does this guideline's lack of adjustment for reckless crimes create disproportionate sentencing in contravention of Congress's goal of proportional sentencing?

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Jordan Sandoval petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Jordan Sandoval*, Case No. 19-2041, affirming the district court's sentence was published and is reported at 959 F.3d 1243.[1] At Mr. Sandoval's sentencing hearing, the district court orally rejected Mr. Sandoval's argument that his sentence was substantively unreasonable because it relied on a flawed Guideline

[1] App. 1a-2a. "App." refers to the attached appendix. "ROA Vol." refers to the record on appeal, contained in three volumes. Mr. Sandoval refers to the documents and pleadings in those volumes as Vol. I-III followed by the page number found on the bottom right of the page (e.g. ROA, Vol. III, 89).

(U.S.S.G. §2A2.2).[2]

Statement of Jurisdiction

On May 22, 2020, the Tenth Circuit affirmed the district court's decision to deny Mr. Sandoval's challenge to United States Sentencing Guidelines (U.S.S.G.) § 2A2.2 and the sentence imposed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Order of March 19, 2020, this petition is timely if filed on or before October 19, 2020.

Pertinent United States Sentencing Guidelines

U.S.S.G. § 2A2.2:

(a) Base Offense Level: 14

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by 2 levels.

(2) If (A) a firearm was discharged, increase by 5 levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add 3

[2] App. 3a

(B) Serious Bodily Injury add 5

(C) Permanent or Life-Threatening Bodily Injury add 7

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 4 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 6 levels.

However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed 10 levels.

Statement of the Case

Mr. Sandoval, pleaded guilty to the crime as charged—assault resulting in serious bodily injury in violation of 18 U.S.C. § 113(a)(6). He admitted he was reckless when he drove while intoxicated (DWI) and caused a collision. ROA, Vol. III, 5. The crash caused permanent injury to Jane Doe's pinky finger.

Mr. Sandoval did not challenge the probation office's sentencing calculations.[3] Instead, he argued it was unreasonable to apply the U.S.S.G §

[3] The presentence report (hereinafter PSR) calculated Mr. Sandoval's total offense level as 18, based on the following calculation:

14 (base offense level, Criminal History Category I)
\+ 7 (special offense characteristics for victim's permanent injury)
\- 3 (acceptance of responsibility under U.S.S.G §§ 3E1.1(a)-(b))

ROA, Vol. II, 5-6.

2A2.2 Guideline in his case. ROA, Vol. I, 10. He explained that § 2A2.2 covered intentional, purposeful conduct, not reckless behavior. The Sentencing Commission drafted the section assuming the "heartland offense included intentional acts of maliciousness." *Id*. at 11. This is evidenced by Appendix A to the Sentencing Guidelines, as well as the commentary to § 2A2.2. A court that uses the Guideline to sentence a person convicted of reckless assault creates a disproportionate sentence because reckless behavior is necessarily less culpable than that in the typical aggravated assault. Such impermissible disproportion is also revealed in U.S.S.G. § 2A1.4, the involuntary manslaughter Guideline. It too proposes a lower sentence when someone is killed rather than injured by reckless behavior. Mr. Sandoval argued that the court could remedy the disproportionate sentence by imposing a sentence no greater than twelve months and a day. *Id*. at 18. The district court disagreed and sentenced Mr. Sandoval to a within-Guidelines sentence of 27 months.

Mr. Sandoval appealed to the Tenth Circuit Court of Appeals; it affirmed the district court. While the Tenth Circuit agreed that a defendant's mens rea is usually pertinent in fashioning a sentence, it concluded that other factors exist that influence ascribing an appropriate penalty. In so deciding, the Tenth Circuit reiterated its holding from a 2017

case—that a within-guidelines sentence will be presumed reasonable "even if the Guideline at issue arguably contains serious flaws or otherwise lacks an empirical basis." *United States v. Sandoval*, 959 F.3d 1243, 1246 (10th Cir. 2020); quoting *United States v. Wireman*, 849 F.3d 956, 964 (10th Cir. 2017).

Reasons for Granting the Writ

Congress has instructed district courts to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of the Sentencing Reform Act (SRA), 18 U.S.C. § 3553(a), and the factors in § 3553(a) are to "guide appellate courts ... in determining whether a sentence is unreasonable" on appeal. *United States v. Booker*, 543 U.S. 220, 261-63 (2005). *Booker* indicated appellate review should help "iron out sentencing differences" in district courts' application of the "numerous [statutory] factors that guide sentencing," and that reasonableness review requires appellate courts to ensure district courts are mindful of their statutory sentencing obligations and impose terms that comply with the substantive provisions of § 3553(a). *Id.* at 261-63; *see also Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007). In *Rita*, this Court held that circuit courts could adopt a "presumption of reasonableness" for within-Guidelines sentences, but stressed that district

courts may *not* apply "a legal presumption that the Guidelines sentence should apply." 551 U.S. at 351.

Problematically, since this Court's rulings in *Rita, Gall,* and *Kimbrough v. United States*, 552 U.S. 85 (2007), the circuit courts have developed inconsistent and constitutionally questionable approaches to reasonableness review. *Kimbrough* is particularly relevant here, as it permits a sentencing court to question the Commission's construction of a Guideline. In *Kimbrough,* the Supreme Court held that, given the Sentencing Commission's failure to "take account of empirical data and national experience" in formulating the drug guidelines, district courts may reasonably rely on a policy disagreement with those guidelines to justify imposing a below-guidelines sentence. 552 U.S. at 111. But only a few circuits reverse sentences on policy grounds; others almost never do. A few circuits engage with the factors of § 3553(a) when reviewing for substantive reasonableness; most never do.[4] *Compare Wireman,* 849 F.3d at 963 (holding that "a within-guideline-range sentence that the district court

[4] Specifically, the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth circuits apply a presumption of reasonableness (these circuits are collectively referred to herein as the "presumption circuits"). The First, Second, Ninth and Eleventh circuits do not apply the presumption, but accord within-Guidelines sentences "great weight." Under both approaches, the circuits defer to the Guidelines, but the presumption circuits routinely fail to engage critically with the Guidelines for within-Guidelines sentences.

properly calculated...is entitled to a rebuttable presumption of reasonableness...and this presumption of reasonableness holds true *even if* the Guideline at issue arguably contains 'serious flaws' or otherwise 'lack[s] an empirical basis[.]' (emphasis in original, internal quoted authority omitted)) *with United States v. Dorvee*, 616 F.3d 174, 182 (2d Cir. 2010) (highlighting the § 3553 factors in ensuring that sentencing is not unreasonable, and stating "if the district court miscalculates the typical sentence at the outset, it cannot properly account for atypical factors and we, in turn, cannot be sure that the court has adequately considered the § 3553(a) factors.")

Consequently, reasonableness review is not helping to "iron out sentencing differences" nationwide, but rather is exacerbating them. Tellingly, the U.S. Sentencing Commission has urged Congress to amend the SRA to resolve circuit splits over the application of reasonableness review, and many commentators have asserted that appellate review of sentences—and all of federal sentencing under advisory Guidelines—would benefit significantly from this Court's further guidance on the contours of reasonableness review.

Reasonableness review has proven strikingly dysfunctional in circuits like the Tenth Circuit that have adopted a so-called "presumption of

reasonableness" for reviewing within-Guidelines sentences. Pointedly, there has yet to be a single appellate ruling that expounds upon—or even discusses—when and how this "presumption" can be rebutted or the consequences of any such rebuttal. Rather than function as this Court outlined in *Rita,* the "presumption of reasonableness" has been used to convert the Guidelines into a safe harbor exempting within-Guidelines sentences from substantive reasonableness review. Circuits functionally treating within-Guidelines sentences as *per se* reasonable not only conflicts with this Court's precedents, but also raises constitutional concerns in light of this Court's Sixth Amendment jurisprudence in *Booker* and its progeny.

The sentencing decision made in this case that led to the imposition and affirmance of an aggravated assault prison sentence for reckless conduct showcases the problematic results of dysfunctional reasonableness review. The "presumption of reasonableness" functionally elevates the Guidelines to an edict and all other § 3553(a) factors are downgraded and their effect practically excised. Here, (1) the district court imposed a sentence on a first-time offender who presented significant mitigating considerations showing that the Guideline failed to consider his specific conduct when it was created, and (2) the Tenth Circuit affirmed this sentence by clinging to the presumption of reasonableness, which it

believes "holds true even if the Guideline at issue arguably contains serious flaws or otherwise lacks an empirical basis." *Wireman*, 849 F.3d at 964. Reflecting the Guidelines-centric approach to sentencing that still takes place in too many lower courts, neither the district court nor the Tenth Circuit gave even lip service to any of the relevant § 3553(a) factors other than the Guidelines.

The Tenth Circuit's affinity for reflexively affirming within-Guidelines sentences led the district court to approach Mr. Sandoval's sentencing as if only the Guidelines mattered; in turn, the Tenth Circuit affirmed a significant prison sentence for a nonviolent first offender using a rubber-stamp approach to reasonableness review it has adopted only for within-Guidelines sentences. This case thus highlights how some district courts are still disregarding the statutory instructions of § 3553(a) that *Booker* made central to federal sentencing, and how some circuit courts are disregarding this Court's instructions for reasonableness review set forth in *Rita, Gall, and Kimbrough.*

Since this Court's decision in *Booker*, the federal courts of appeal have struggled to define the contours of substantively reasonable sentences within the statutory requirements of the Sentencing Reform Act and constitutional limitations. This case presents an ideal vehicle for the Court

to begin to define those contours.

A. THE CIRCUITS' DISPARATE APPROACHES TO REASONABLENESS REVIEW UNDERMINE THE BENEFITS OF APPELLATE REVIEW OF SENTENCES

The sentencing guidelines have a real and pervasive effect on sentencing. *Molina-Martinez v. United States*, 136 S.Ct 1338, 1349 (2016). They serve as the sentencing court's "starting point and initial benchmark" (its "anchor"), and are the "lodestar" of most sentencing proceedings. *Id*. at 1346 (citations omitted). "[W]hen a guidelines range moves up or down, offenders' sentences [tend to] move with it." *Id*. (citation omitted). This naturally results from the fact that the guidelines were created to address "the same objectives that federal judges must consider when sentencing defendants," i.e., the factors set forth in 18 U.S.C. § 3553(a). *Id*. at 1342.

But what if a guideline doesn't do its job? What if the lodestar is but a mirage? May a sentencing judge ignore that fact and impose a guideline sentence anyway? That is the question in this case. It is a question that divides the circuits, and it should be addressed by this Court.

Appellate review has been a central component of the modern federal sentencing system since the passage of the SRA, and Congress has long indicated that it considers such review to be integral to the SRA's goals "to promote fairness and rationality, and to reduce unwarranted disparity, in

sentencing." S. Rep. No. 98-225, p. 150 (1983). Recognizing the continued importance of appellate review to achieve the goals of modern sentencing reform, this Court in *Booker* preserved a key role for Courts of Appeals in the review of sentences for reasonableness. *See* 543 U.S. at 261-64. To reinforce and ensure continued attentiveness to the statutory sentencing factors Congress established in 18 U.S.C. § 3553(a), *Booker* explained that those factors are now to "guide appellate courts...in determining whether a sentence is unreasonable." *Id.*

Since *Booker*, however, the federal appellate courts have struggled to determine just how reasonableness review should operate, both formally and functionally. In a series of 2007 rulings, this Court explained that reasonableness review was akin to an abuse-of-discretion standard embodying procedural and substantive protections that require circuit courts to ensure that district courts (1) approach the sentencing process with a proper understanding of their statutory obligations, and (2) reach sentencing outcomes that comply with the substantive provisions of § 3553(a). *See Gall*, 552 U.S. at 49 (stressing need to "consider all of the § 3553(a) factors"); *Kimbrough*, 552 U.S. at 109-11 (conducting reasonableness review to ensure sentence would "achieve § 3553(a)'s purposes"); *Rita*, 551 U.S. at 351 (stressing consideration of whether a

"Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). Unfortunately, despite additional guidance on the structure and substance of appellate review provided by these cases, circuit splits have emerged over the past decade as the Courts of Appeals have proven unable on their own to develop consistent and constitutionally sound approaches to reasonableness review. *See, e.g.*, Carrie Leonettia, De Facto Mandatory: A Quantitative Assessment Of Reasonableness Review After Booker, 66 DePaul L. Rev. 51 (2016) (lamenting disparate circuit approaches to reasonableness review creating a "patchwork of guideline sentencing in which defendants' sentences are dictated more by the happenstance of geography than by the Supreme Court's jurisprudence"); Note, More Than a Formality: The Case for Meaningful Substantive Reasonableness Review, 127 Harv. L. Rev. 951 (2014) (discussing a "number of notable circuit splits" concerning reasonableness review); D. Michael Fisher, Still in Balance? Federal District Court Discretion and Appellate Review Six Years After Booker, 49 Duq. L. Rev. 641, 649-61 (2011) (noting that "the courts of appeals have differed over how to apply the [reasonableness] standard" and "have split on several important legal questions").

The Commission itself has also expressed concerns about the

disparate approaches to reasonableness review. At a hearing before a House Judiciary Subcommittee in October 2011, the Chair of the U.S. Sentencing Commission urged Congress to make statutory amendments to the SRA to resolve circuit splits over the interpretation and application of this Court's rulings in *Rita*, *Gall*, and *Kimbrough*. *See* Prepared Testimony of Judge Patti B. Saris Before the House Judiciary Subcommittee on Crime Terrorism, and Homeland Security (Oct. 12, 2011), *http://www.ussc.gov /Legislative_and_Public_Affairs/ Congressional_Testimony_and_ Reports/Testimony/2 0111012_Saris_Testimony.pdf*. In her written testimony, the Commission Chair outlined various factors that "limit the effectiveness of appeals in alleviating sentencing differences" and noted that many judges have "voiced concerns regarding the courts' inability to apply a consistent standard of reasonableness review." *Id.* at 12, 14. In urging Congress to make statutory amendments to the appellate review provisions of the SRA, the Commission not only suggested that circuit splits over reasonableness review have become intractable, but also revealed that the Commission believes it is effectively powerless to harmonize the disparate circuit jurisprudence concerning appellate review of federal sentencing determinations. *Cf. Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (suggesting certiorari review may be especially important if

and when a circuit split concerning sentencing rules cannot be resolved through the Sentencing Commission's use of its Guideline amendment authority).

Not long after the U.S. Sentencing Commission articulated its concerns to Congress about the widely varying application of reasonableness review in the circuits, an Associate Deputy Attorney General testifying on behalf of the U.S. Department of Justice expressed similar concerns at a hearing before the Commission. *See* Statement of Matthew Axelrod at U.S. Sentencing Commission, Hearing on the Current State of Federal Sentencing (Feb. 16, 2012), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_16_Axelrod.pdf. Through this testimony, the Justice Department stressed concerns that "federal sentencing practice continues to fragment" resulting in "growing sentencing disparities," *id.* at 6-10, and it spotlighted "differences in the way circuit courts view the sentencing guidelines and their role in overseeing sentencing practice and policy ... [with some] appellate courts [taking] a 'hands-off' approach to their review of district court sentencing decisions and the guidelines [while] others are scrutinizing the guidelines more closely." *Id.* at 8.

The Tenth Circuit's adherence to a rebuttable presumption of

reasonableness must be examined by this Court because it conflicts with this Court's precedent in *Booker*, *Rita,* and *Kimbrough*. As a practical matter, many of the "presumption circuits"[5] treat within-Guidelines sentences as *per se* reasonable; an approach that leaves any challenge to a Guideline nearly impossible. The approach also disregards this Court's instructions in *Rita* and Congress's instructions in § 3553(a), but also rekindles concerns about the kind of unconstitutional judicial fact-finding that spawned the *Booker* ruling. A presumption of reasonableness simply acts to replace a *de jure* mandatory system with a *de facto* mandatory system, affording much weight to Guidelines sentences while discouraging variances from the Guidelines on any legitimate grounds. *See* Leonettia, De Facto *Mandatory*, 66 DePaul L. Rev. at 93-94; *see also* Amy Baron-Evans & Kate Stith, Booker *Rules*,160 U. Pa. L. Rev. 1631, 1734-35 (2012) (explaining how misapplication of a presumption of reasonableness "would clearly be unconstitutional"); Scott Michelman & Jay Rorty, *Doing* Kimbrough *Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines,* 45 Suffolk U. L. Rev. 1083, 1097 (2012) (explaining constitutional problems when functional "presumption of unreasonableness for sentences outside the Guidelines creat[e a] *de facto*

[5] For a list of "presumption circuits," *see* FN 4.

mandatory system.")

This Court's approval and account of a "presumption of reasonableness" in *Rita* should have prompted the Courts of Appeals to begin developing a thorough and thoughtful jurisprudence concerning whether and how this "presumption" can be rebutted in certain settings based on particular § 3553(a) sentencing factors. *Cf. Pepper v. United States*, 562 U.S. 476, 487-93 (2011) (explaining how "evidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors" and why contrary Guidelines provision rests on "wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted"); *Kimbrough*, 552 U.S. at 109-11 (conducting reasonableness review with emphasis on "Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)").

A robust appellate jurisprudence about when the "presumption of reasonableness" can be rebutted on appeal and the consequences of such a rebuttal would help ensure, as *Rita* envisioned, that sentencing judges actively consult and engage all the § 3553(a) factors—even when deciding to impose a within-Guidelines sentence, and that circuit judges adequately assess the reasonableness of the resulting sentences. *Cf. Pepper*, 562 U.S. at

512-13 (Breyer, J., concurring) (explaining that "in applying reasonableness standards, the appellate courts should take account of sentencing policy as embodied in the statutes and Guidelines, as well as of the comparative expertise of trial and appellate courts").

Unfortunately, the presumption circuits have not embraced and applied a true "presumption of reasonableness" as this Court outlined in *Rita;* instead, circuit courts have utilized the "presumption of reasonableness" as a means to convert the Guidelines into a sentencing safe harbor for district courts so that *any* within-Guidelines sentence is essentially immune from substantive review. Despite circuit courts' assertions that they are applying only the "presumption" approved in *Rita*, the fact that there have been no significant appellate rulings in the last decade that seriously explore or even expressly discuss when and how the presumption can be rebutted by an appellant and what might be the legal consequences of any such rebuttal give the lie to those assertions. Such excessive deference to within-Guidelines sentences and the persistent lack of engagement with the § 3553(a) factors on appeal in within-Guidelines cases contravenes this Court's explanation that § 3553(a) is intended to "guide appellate courts ... in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261-63. In addition, as already

suggested, failure to affirmatively engage the § 3553(a) factors raises constitutional concerns in light of this Court's Sixth Amendment jurisprudence in *Booker* and its progeny. Both Justice Scalia's concurring opinion and Justice Souter's dissenting opinion in *Rita* exposed the potential for constitutional difficulties if the "presumption of reasonableness" were to be misapplied by the Courts of Appeals. *See Rita*, 551 U.S. at 368-81 (Scalia, J., concurring); *Rita*, 551 U.S. at 388-91 (Souter, J., dissenting). Indeed, Justice Souter's dissent in *Rita* was based on his fear that "a presumption of Guidelines reasonableness" could prompt sentencing judges to treat the Guidelines "as persuasive or presumptively appropriate," and then "the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right [thereby] ... undermining *Apprendi* itself." *Rita*, 551 U.S. at 388-91 (Souter, J., dissenting).

When deciding *Rita* in 2007, it was understandable and perhaps wise for this Court to assume that circuits would not come to apply the "presumption of reasonableness" in a manner that would ultimately vindicate Justice Souter's stated fears. But, over a decade later, it is evident that many circuits that have adopted the "presumption of reasonableness" have only perpetuated Guidelines-centric doctrines and practices that

ultimately encourage just the sort of rote, mechanistic reliance on the Guidelines and judicial fact-finding that this Court deemed unconstitutional in *Booker*. *See generally* Alison Siegler, *Rebellion: The Courts of Appeals' Latest Anti-Booker Backlash*, 82 U. Chi. L. Rev. 201 (2015) (detailing how "appellate courts continue to act as they did during the era of mandatory Guidelines ... even though the Supreme Court has time and again emphasized that this is not their role" and urging this Court to "step in—as it did in *Gall*, *Kimbrough*, *Nelson*, and *Pepper*—and stop this latest rebellion").

In addition to being constitutionally suspect, the circuit courts' persistently unsophisticated application of the presumption of reasonableness conflicts with the nuanced sentencing instructions of 18 U.S.C. § 3553(a). As this Court stressed in *Pepper*, the Guidelines are just one factor in § 3553(a)'s detailed list of "seven sentencing factors that courts must consider in imposing sentence," and it is inappropriate for courts to "elevate [certain] § 3553(a) factors above all others" given the "sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)." *Pepper*, 562 U.S. at 48793. The practice of some circuits to apply a blanket presumption of reasonableness for all

within-Guidelines sentences ignores the fact that the Sentencing Commission has itself indicated that the Guidelines do not produce sentences in accord with the mandates of 18 U.S.C. § 3553(a) in some cases. *See, e.g., Kimbrough,* 552 U.S. at 109-11 (conducting reasonableness review with emphasis on "Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)").

The presumption circuits' approach to substantive reasonableness review is particularly harmful in those cases such as Mr. Sandoval's where the Guidelines themselves failed to account for his specific conduct but were later embraced as controlling it. The implications can be severe for nonviolent first offenders like Mr. Sandoval. *See infra* Part II (noting problems with Guideline applicable to Mr. Sandoval). The presumption of reasonableness essentially enables some district and circuit judges to completely ignore Congress's detailed statutory sentencing instructions in 18 U.S.C. § 3553(a) and instead to impermissibly "elevate [the Guidelines] above all other [§ 3553(a) factors]," despite the statutory text which makes it a "sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)." *Pepper,* 562 U.S. at 487-93.

B. THE GOALS OF THE SENTENCING REFORM ACT NECESSITATE REVIEW OF THE SENTENCE IMPOSED IN THIS CASE

The district court's decision to impose Mr. Sandoval's 27-month, within-Guideline sentence as well as the Tenth Circuit's subsequent affirmance, bring into focus the troubling potential for disparity resulting from divergent approaches to reasonableness review. As noted, the Tenth Circuit does not believe that appellate review of an imposed sentence is warranted even where a Guideline rests on shaky ground:

> In our circuit, 'a within-guideline-range sentence that the district court properly calculated ... is entitled to a rebuttable presumption of reasonableness' on appeal." *United States v. Wireman*, 849 F.3d 956, 964 (10th Cir. 2017) (quoting *United States v. Grigsby*, 749 F.3d 908, 909 (10th Cir. 2014))."[T]his presumption of reasonableness holds true *even if* the Guideline at issue arguably contains serious flaws or otherwise lacks an empirical basis." *Id.* (internal quotations and citations omitted, emphasis in original).

United States v. Sandoval, 959 F.3d 1243, 1246 (10th Cir. 2020). Accordingly, neither the district court nor the Tenth Circuit gave any substantive attention to the significance of imposing a sentence on a first-time offender whose elevated Guideline range rested on a Guideline suspect in both design and application.

Proportionality is a key objective in sentencing. Indeed, the Sentencing Reform Act instructed the United States Sentencing

Commission to establish sentencing guidelines that would reconcile the multiple purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation—while promoting the dual goals of uniformity and proportionality. 28 U.S.C. § 991(b)(1). "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S.S.G. § 1A1.3 (2018).

The aggravated assault guideline undermines a central objective of the guidelines—proportionality—permitting similar punishment even where a defendant has a less culpable mental state. While the Guidelines generally reflect a tiered punishment based on a defendant's mental state, in Mr. Sandoval's case, his sentence would be identical if he had committed assaultive conduct with a more purposeful mens rea. Imposing the same or similar Guidelines sentence on two genuinely different offenders results in unwarranted uniformity, which is just as problematic as an unwanted disparity. Absent an engaging appellate review, such problems remain unaddressed and uncorrected at sentencing.

The failure of the Guidelines to account for reckless behavior in assaultive conduct yields unreasonable sentences. But the deference afforded to the Guidelines by the Tenth Circuit stripped Mr. Sandoval of any meaningful ability to challenge his unreasonable sentence. There is

abundant evidence—cited in Mr. Sandoval's briefing below—that the aggravated assault guideline was not formulated to consider recklessly-committed intoxicated-driving (DWI) cases. Yet the record below suggests that the district court largely ignored this Court's repeated admonition that a district court may not presume reasonable a sentence within the calculated Guidelines range. By giving little weight to counsel's argument about the flawed Guideline, the district court disregarded this Court's clear instruction to treat the Guidelines as just "one factor among several courts *must* consider in determining an appropriate sentence" as part of "§ 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough*, 552 U.S. at 111 (emphasis supplied).

Conclusion

Circuit courts that apply a presumption of reasonableness should refrain from treating Guidelines ranges as an absolute safe harbor, especially when sentences involve arguably broken Guidelines. To restore some integrity to the sentencing process, circuit courts must be empowered to engage critically with the Guidelines. Appellate review of sentences can provide important feedback to the Commission so that it may further refine the appropriate bounds of sentencing. For these reasons, Mr. Sandoval

prays this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: October 19, 2020

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APPENDIX