No. 21–___

In the
Supreme Court of the United States

Sinmyah Amera Ceasar,

Petitioner,

-v-

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Gall v. United States*, 128 S. Ct. 586 (2007), this Court held that appellate courts must review the substantive reasonableness of all sentences under a deferential abuse of discretion standard, in recognition of district judges' superior vantage point in weighing the 18 U.S.C. § 3553(a) factors as to individual defendants. In a series of decisions, the Second Circuit, based on its view that "terrorism is different," has applied a far stricter standard -- amounting to *de novo* review -- to reverse sentences in terrorism cases as too low and substantively unreasonable. In the Circuit's view, in terrorism cases, one factor -- the seriousness of the offense -- swamps all others and precludes sentences toward the lower end of the statutory range set by Congress. Other Circuits have also adopted this approach.

The question presented is: Does the application of a stricter standard of review in assessing the substantive reasonableness of terrorism sentences contravene Gall and 18 U.S.C. § 3553(a)?

PARTIES TO THE PROCEEDING

Petitioner Sinmyah Amera Ceasar was appellee in the Court of Appeals.

Respondent United States of America was appellant in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

OPINIONS AND ORDERS BELOW

The opinion for the United States Court of Appeals for the Second Circuit is reported at 10 F.4th 66, and appears at Pet. App. 1a-53a. The District Court's written opinion appears at Pet. App. 54a-108a. The Second Circuit's order denying panel rehearing and rehearing *en banc* appears at Pet. App. 109a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231. It entered judgment on August 6, 2019 and filed an amended judgment on August 12, 2019. The government appealed, asserting jurisdiction under 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291. Petitioner challenged jurisdiction based on the government's filing of notice of appeal 36 days after the judgment was filed. The Second Circuit rejected the challenge and heard the government's appeal, vacating the sentence on August 18, 2021. It denied rehearing on November 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2339B provides that a person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both."

18 U.S.C. § 3553(a) provides:

> **Factors to be considered in imposing a sentence. --**The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set froth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) The kinds of sentences and the sentencing range established [by the United States Sentencing Guidelines];

(5) Any pertinent policy statement [issued by the Sentencing Commission];

(6) The need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) The need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Based on the view that "terrorism is different," *United States v. Mumuni*, 946 F.3d 97, 112-113 (2d Cir. 2019), the Courts of Appeals, with the Second Circuit leading the way, have fashioned a new form of substantive review applicable to terrorism sentences. Instead of reviewing terrorism sentences with the deference that this Court's precedents require, the Circuits are conducting, in essence, *de novo* review. And they are regularly reversing as "shockingly low" terrorism sentences, including

very harsh sentences, based on nothing more than disagreement with the district judges.

This case presents this phenomenon in the starkest terms. Petitioner, a psychologically impaired young woman who had suffered a lifetime of physical and sexual abuse, pled guilty to a non-violent terrorism offense, providing material support to ISIS through online propaganda and recruitment. After violating her bail conditions and deleting evidence of that, she also pled guilty to obstruction of justice. The district court conducted a three-day hearing, in which it fully explored her offense conduct, her background and psychological condition, her motivations for her offense conduct, and her risk of re-offending. Based on its conclusions that her psychological condition led to the offense, that she needed treatment, that she was amenable and committed to treatment, and that with proper treatment she would pose almost no risk to the public, the district court imposed a total sentence of 48 months followed by eight years of supervised release. The district court's reasons for the sentence, and its

application of the sentencing factors of 18 U.S.C. § 3553(a) were set forth on the record and a 53-page opinion.

The Second Circuit found no procedural error nor did it take issue with any of the facts found by the district. It simply disagreed with the length of the sentence, deeming it "shockingly low" and therefore substantively unreasonable. In its opinion, the Second Circuit made clear that it reviews downward variances in terrorism cases more strictly, and less deferentially, based on its view that "terrorism is different." In its view, any terrorism offense is so serious, dangerous, and undeterrable that the seriousness of the offense must take precedence over all other factors. Applying this standard, the Court of Appeals gave no deference to the district court's careful weighing of the substantial mitigating factors against the seriousness of the offense. Instead, it conducted essentially a *de novo* review, re-weighing the § 3553(a) factors itself on the cold record and substituting its own sentencing inclinations for the district court's determination after an evidentiary hearing. It focused on the percentage variance from the Guidelines range, as a measure of the "shockingly low"

nature of the sentence. The standard of review applied here is in clear conflict with this Court's decision in *Gall v. United States,* 552 U.S. 38, 41 (2007) and with the holding of *United States v. Booker,* 543 U.S. 220 (2005) that the Guidelines are advisory only.

The Second Circuit's view that terrorism is "different," such a serious crime that the offense conduct precludes a substantial downward variance, is the latest example of a national trend. This case presents in clear relief the Second Circuit's overbearing scrutiny of the sentencing determination and disregard of the *Gall* standard in terrorism cases. There was no procedural error, the district court made detailed and unchallenged findings, and it considered all factors, including the seriousness of the offense, deterrence, and the need to protect the public. The Second Circuit simply threw out the district court's painstaking analysis of the § 3553(a) factors and substituted its own.

The distinct standard of review for terrorism sentences based on the seriousness of such cases as a class not only conflicts with *Gall*. It undermines the statutory directives of section of 18 U.S.C. § 3553(a), which

requires the district court to consider all factors to arrive at the sentence sufficient, "but not greater than necessary" to comply with all the purposes of sentencing. This standard is at odds as well with the statutory scheme in which Congress has enacted graduated penalties for offenses related to terrorism, distinguishing between types of conduct. For providing material support for a terrorist organization, the offense here, Congress has prescribed a sentencing range of zero to 20 years. Clearly Congress meant to allow some offenders to be sentenced at the bottom of that range. The Second Circuit's opinion here precludes a sentence even close to the lower end of the statutory range.

A. The District Court Decision

Amera Ceasar, a 24 year old woman suffering post-traumatic stress disorder from a lifetime of physical and sexual abuse, pled guilty to conspiring to provide material support to a foreign terrorist organization in violation of 18 U.S.C. §§ 2339B(a)(1) & (d), through her online activities supporting ISIS and connecting people who wished to fight abroad with those who could help them travel. Pet. App. 7a-8a. She was arrested at JFK

airport, on her way to Sweden to marry an ISIS supporter. *Id.* She immediately cooperated with the government and pled guilty to one count of conspiring to provide material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B(a). Pet. App. 8a. After almost 18 months of providing significant cooperation that, according to the government, "resulted in the collection of some evidence valuable to several national security investigations," she was released on bail pending sentencing. Pet. App. 8a-9a.

She violated the terms of her release by using social media to contact her former friends and associates, including several of those against whom she was cooperating. Pet. App. 9a-10a. This was easily uncovered when she submitted her laptop to pretrial services to install monitoring software. Pet. App. 10a. Ceasar later told the government's expert that the reason she re-contacted those she had informed against, was to find out about their legal cases and how they were proceeding. CA Sealed App. 65. Subsequent investigation showed that she had deleted many Facebook and text messages from her cellphone and had instructed some of her contacts to do

the same. *Id.* She made false and misleading statements to the FBI when questioned about her violations. *Id*. Her bail was revoked, the government rescinded the cooperation agreement, and Ceasar was charged with and pled guilty to obstruction of justice based on her deletion of the messages. Pet. App. 10a-11a.

Providing material support for a terrorist organization is an offense for which Congress authorized a range of 0 to 20 years. 18 U.S.C. § 2339B. Obstruction of justice also carries a sentence of 0 to 20 years, although sentences for obstruction of justice for defendants such as Ceasar, with no criminal history and a two-level enhancement for destruction of records, average 16-17 months, not including the 17% of such defendants sentenced to probation only. U.S.S.G. § 2J1.2; U.S. Sentencing Commission, Judiciary Sentencing Information (JSIN), https://www.ussc.gov/guidelines/judiciary-sentencing-information. Under U.S.S.G. § 5G1.2(d), however, the maximums were "stacked," and the operation of 18 U.S.C. § 3147 (requiring a consecutive sentence up to 10 years for committing a crime while on pretrial release) added another ten years, dramatically increasing

the maximum sentence to 50 years or 600 months. The maximalist terrorism Guideline, U.S.S.G. § 3A1.4, with its terrorism enhancement that ratchets up both the offense level and the criminal history category, created a range of 360-600 months for conduct that Congress has determined merits a sentence of 0 to 20 years, plus obstruction of justice by concealing the violation of her bail conditions. Pet. App. 95a-96a.

At sentencing, the government requested a Guidelines sentence, based on Ceasar's violations of pretrial release and obstruction of justice. It contended that this showed she was likely to reoffend and return to supporting terrorists. CA 95-105. The defense sought a substantial downward variance from the Guidelines range based on Ceasar's severe psychological condition of post-traumatic stress disorder, resulting from a lifetime of physical and sexual abuse, her multiple medical conditions, her treatment thus far, and her need for intensive treatment. It argued, based on expert evaluations, that Ceasar had disavowed ISIS and , with proper treatment and support, Ceasar presented no danger of reoffending. The district court held a three-day evidentiary hearing on the question of

Ceasar's likelihood of reoffending and possible danger to the community, in which five witnesses were called to testify about her history, her psychological condition, and her risk of reoffending. Pet. App. 12a-24a.

The undisputed evidence established that Ceasar's father had sexually abused her from age 4 to 11 years old, that her mother was ill and went blind and Ceasar was her mother's primary caretaker while still a child, that her mother entered a nursing home when Ceasar was 13, and that Ceasar was placed in foster care, where she was abused in three foster homes over four years. Pet. App. 11a-12a. She had experienced suicidal ideation from age 11. Pet. App. 12a. Starting at age 16, Ceasar had three successive Islamic marriages, arranged by her mosque, with older men who abused her. In the third marriage, she suffered a miscarriage and was hospitalized for suicidal depression. *Id*.

Dr. Katherine Porterfield, a clinical psychologist and expert in truam and extremism, had been treating Ceasar, had spent over 130 hours with her, and reviewed her medical records and the case materials. Porterfield testified that Ceasar suffered from complex PTSD, with a serious condition

of disassociation, resulting from a lifetime of abuse that was "quite astonishing." Pet. App. 22a. Dr. Porterfield testified that Ceasar's psychological impairment was "very much at the root of her very misguided and destructive dysfunctional actions." *Id.* Ceasar's actions on pre-sentencing release were a form of relapse because she was released without sufficient support. Pet. App. 23a. Without any family, friends, or support, she returned to the only community she knew, her online associates. Pet. App. 23a-24a. Dr. Porterfield testified that Ceasar was committed to treatment, that she desperately needed treatment, that her condition was amenable to treatment, and that more time in prison without treatment would do her harm. She concluded that with proper treatment and support, Ceasar would rebuild her life in a healthy way. Pet. App. 23a-24a.

Dr. Marc Sageman, a forensic psychiatrist and terrorism expert, testified that, in his opinion, Ceasar's attachment to ISIS had been emotional rather than ideological: she was basically looking for a community to take care of her and she "idealized" ISIS because they took

her in. Pet. App. 20a-21a. Dr. Sageman testified that Ceasar posed no risk of violence and little risk of rejoining a destructive community. Pet. App. 21a-22a. The best way to mitigate any risk would be to introduce her to a community that would care for her. Pet. App. 22a. Daisy Khan, the founder and director of Women's Islamic Initiative for Spirituality and Equality ("WISE"), offered just such a community. Pet. App. 74a-75a. She was an expert on counter-extremism and women in Islam. She had met with Ceasar several times in jail and concluded, like Dr. Sageman, that Ceasar's motivations to support ISIS had been personal, not ideological, and that she had no longer any commitment to the organization. *Id.* Ms. Khan testified that Ceasar needed reeducation, healing and membership in healthy and productive Muslim community, which she had found. Ms Khan would start a pilot program to manage her rehabilitation. *Id*.

The government called two expert witnesses, only one of whom had met Ceasar. Pet. App. 13a-18a. Dr. Kostas Katsavdakis testified that that he interviewed Ceasar and conducted a threat assessment of her risk for "targeted violence or extremist beliefs," which meant, "in this particular

case for extremist attitudes or acts," and found she posed a "moderate risk" based on nine factors. CA 220. At the same time, he acknowledged that her risk of becoming physically violent was low. CA 221. His nine factors included her mental illness and failed relationships with the men who abused her. Pet. App. 16a-17a, CA 227-32.

Dr. Lorenzo Vidino testified as an expert on radicalization, recruitment and deradicalization. Pet. App. 13a. He had not met Ceasar but reviewed some of her social media postings and post-arrest statements about her social media activity. Pet. App. 13a. He described her roles helping as a "disseminator" and "connector." He testified that deradicalization required ending one's personal involvement with terrorism, distancing oneself from extremist activity and the group's ideology, breaking contact with those associated with the group or supporting its ideology, and accepting the punishment for crimes committed. Pet. App. 14a. Signs of deeper disengagement included providing intelligence and/or serving as a witness in court. Pet. App. 77a. Vidino opined that Ceasar's communications while on pretrial release

sounded like someone who supports ISIS. Pet. App. 15a. Vidino testified that the United States had no deradicalization programs. *Id.* Neither of the government's experts discussed Ceasar's immediate and productive cooperation with the government against ISIS supporters and whether that affected their views.

Ceasar made a statement to the court, in which she disavowed ISIS, acknowledged the wrongfulness of her conduct, stated that she had been depressed and had sought community and specifically a husband in the group, and that through therapy, she understood her limitations in perception and now knew how destructive ISIS was. Pet. App. 25a, CA 447.

At the end of the hearing, defense counsel asked for a sentence of time served with lifetime supervised release, and psychological treatment. The government asked the court to impose a Guidelines sentence, that is, at least 30 years in prison. Pet. App.24a-25a.

The district court imposed a sentence of 48 months, stating its reasons in open court, followed by a 53-page written opinion. Pet App. 26a-27a. In court, it concluded that the Guidelines range was excessively harsh and

discussed the sentencing factors. *Id.*, CA 456-60. Crediting the defense experts, it found that Ceasar had "moved substantially toward rejection of ISIL and now abjures the terrorist ideology." Pet. App. 26a, CA 458. The court considered Ceasar's history and characteristics, finding that she had "a tragically traumatic life with serious sexual, physical, and emotional abuse," rejection and lack of support, and as a result, had "sought acceptance" with ISIS. CA 458-59. It stated that it considered specific and general deterrence, including deterring others from doing "what this defendant has done, that is, betray . . . the United States citizens, and its law enforcement by giving information to ISIL members or those who sought ISIL membership who are in this country." Pet. App. 26a, CA 459. The court stated that it also "must consider incapacitation," or "will the people of the country be sufficiently protected by her being in prison?" *Id.* It also considered rehabilitation and that "rehabilitation in prison, as we all know, is very difficult," and the question of appropriate "punishment for doing bad acts; in this case, the aiding of ISIL." Pet. App. 26a. The district court stated: "*The defendant's sentence in the first instance in this case since*

national defense is involved must ensure that the public is adequately protected and that the Defendant is adequately punished for her serious criminal conduct while it considers what the Court believes is already your serious rehabilitation and the fact that you are well on your way." CA 460.[1] The court concluded that it was "apparent that this young woman is in need of intensive educational, emotional, and economic support to address the trauma she has experienced and which has, in part, motivated her actions." Pet. App. 26a.

The government objected and the court replied that it would follow with a written opinion, but added that "a major factor is that, based on [the court's own] repeated observations" as well as the expert testimony, "she is well on her way towards rehabilitation" and she "will present when this sentence has been served almost no danger to this country and that this sentence will also save her as a human being." Pet. App. 27a, CA 469.

[1] The Second Circuit's opinion, in quoting the district court's statement, omitted this critical statement with ellipses. Pet. App. 26a.

In its written opinion, which it attached to the judgment as its Statement of Reasons, the district court recounted at length Ceasar's background, the offense conduct, and the experts' and Ceasar's testimony. Pet. App. 27a-28a, 58a-93a. It stated that it had carefully considered the sentencing factors of § 3553(a). Pet. App. 28a, 98a. It credited the expert testimony and found that Ceasar "sought ISIL as a way to deal with her harsh circumstances and because of clinical issues affecting her judgment." Pet. App. 98a. The court set forth her criminal conduct and stated that "there is no question that Defendant's criminal offenses were serious." Pet. App. 99a. Based on the expert testimony, the court concluded that "rehabilitation and specific deterrence of Defendant seem to go hand in hand." Pet. App. 28a. The court discussed the lack of deradicalization programs in the United States and stated for this reason, it considered some further incarceration necessary. *Id*. However, the court concluded that, given her physical and psychiatric conditions, a lengthy prison term and prolonged separation from a supportive community would be detrimental and "harmful to Ceasar's development as a productive

member of society," and "detrimental to the goal of rehabilitation." *Id.* 47, Pet. App.28a-29a. The court determined that a supportive community like that offered by Daisy Khan was essential to Ceasar's rehabilitation, and that the prison term should be tailored to minimize the length of time Ceasar would go "without effective medical and social supports." Pet. App.103a.

B. The Court of Appeals' Reversal

The Second Circuit reversed, holding that this sentence was substantively unreasonable and "shockingly low." Pet App. 7a. Although the district court had weighed the seriousness of the offense, deterrence and the need to protect the public with Ceasar's history and need for treatment, the Second Circuit decided that the district court placed too much "emphasis" on Ceasar's need for rehabilitation and not enough weight on the more punitive factors. Pet. App. 6a, 42a. In particular, the Court of Appeals ruled that the district court gave insufficient weight to the seriousness of the offense. Pet. App. 42a-43a, 46a-48a. The Circuit would have given this factor much more weight because terrorism

"presents a particularly grave threat," requiring "incapicitat[ion for a longer period of time." Pet. App. 32a-33a.

In its opinion, the Second Circuit set forth Ceasar's offense conduct, her arrest, and cooperation with the government, her release and violation of her conditions, and the subsequent charge and plea to obstruction of justice based on her deletion of text and Facebook messages. These facts were mostly taken from the district court's opinion. Pet. App. 7a-11a. The Court then set forth the "undisputed" facts of Ceasar's extreme abuse and neglect since early childhood, continuing through foster care, and then through three marriages to abusive older men. Pet. App. 11a-12a. The Court then set forth the hearing testimony of the five experts in some detail, again mostly from the district court's opinion. Pet. App. 12a-24a.

Finally, the Court of Appeals set forth the district court's sentencing decision, including a block quote of it weighing the factors it considered, which omitted with ellipses the district court's key statement that it had to weigh the seriousness of the offense and the need to protect the public against Ceasar's severe abuse and need for treatment: "*The defendant's*

sentence in the first instance in this case since national defense is involved must ensure that the public is adequately protected and that the Defendant is adequately punished for her serious criminal conduct while it considers what the Court believes is already your serious rehabilitation and the fact that you are well on your way." Pet. App. 26a, CA 460. The Court of Appeals briefly summarized the district court's written opinion, acknowledging that the court "recogniz[ed] the seriousness of Ceasar's crimes," "the importance of specific deterrence, as well as general deterrence, to protect the public," and that it concluded that "in this instance, rehabilitation and specific deterrence go hand in hand." Pet. App. 28a.

The Second Circuit found no procedural error or erroneous fact finding, which were not alleged. To the contrary, it expressed "admiration for the district court's meticulous inquiry and analysis." Pet. App. 29a. It simply disagreed with the district court's weighing of the factors and found the sentence "shockingly low" compared to other terrorism cases it looked at. *Id*.

The Court of Appeals began its analysis by proclaiming terrorism "a particularly grave threat" because of its dangerousness and the "difficulty of deterring and rehabilitating the criminal," quoting its prior opinion in *United States v. Mumuni*, 946 F.3d 97, 112-113 (2d Cir. 2019) ruling that "terrorism is different from other crimes" and warrants greater punishment. It also quoted its pre-*Booker* opinion in *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) holding that "terrorists and their supporters should be incapacitated for a longer period of time". Pet. App. 32a. It concluded that Ceasar's traumatic history and need for treatment could not "cancel out the seriousness of her offense." Pet. App. 33a. Despite its just-stated admiration for "the district court's meticulous inquiry and analysis," Pet. App. 29a, and the district court's repeated, explicit consideration of the serious offense conduct and the need to protect the public, the Second Circuit found that "the district court appears to have considered her background and rehabilitation nearly to the exclusion of countervailing sentencing factors." Pet. App. 33a.

The Second Circuit viewed Ceasar's sentence "in the context of the crimes she committed, other defendants who have committed similar terrorism crimes, and our treatment of them," and concluded that the sentence was "shockingly low and therefore substantively unreasonable." Pet. App. 35. It discussed two prior decisions it characterized as "similar terrorism crimes," in which it reversed downward variances, both of which involved serious procedural error. *United States v. Mumuni*, 946 F.3d 97; *United States v. Stewart*, 590 F. 3d 93 (2d Cir. 2009). *Stewart* reversed a 28-month sentence imposed on a lawyer for providing material support to terrorists and violating a SAMS agreement by passing messages from her high-level terrorist client to his confederates. Pet. App. 35-37. Although the *Ceasar* opinion states that the court "found Stewart's sentence to be 'strikingly low,'" *Stewart* did not hold the sentence was substantively unreasonable but reversed for procedural error only. 590 F.3d at 151. As the *Ceasar* opinion reports, Mumuni "pleaded guilty to multiple terrorism counts, including conspiracy and attempt to provide material support to ISIS, conspiracy to assault federal officers, attempted murder of federal

officers, and assault of a federal officer with a deadly or dangerous weapon." Pet.App. 38a. The Second Circuit reversed the 17-year sentence imposed as both procedurally and substantively unreasonable, holding that "an 80% downward variance" from the 85-year Guidelines range was not justified by the mitigating factors of youth, lack of criminal record, and good behavior in detention. Pet. App. 37-39a.

The Second Circuit concluded that in this case, the district court's "approximately 87% downward variance from the bottom of the 360-to 600-month Guidelines range" "based on Ceasar's need for rehabilitation and the potential detrimental effects of a long prison sentence on her physical and mental wellbeing" was based on a factor that "could not bear the weight assigned it" because of the "danger to the lives and safety of innocents" posed by a terrorism offense. Pet. App. 41-42a.

The Second Circuit went on to conduct its own analysis of some of the § 3553(a) factors. Pet. App. 42-51a. Noting that the district court recognized that Ceasar's crimes were serious, Pet.App. 43a, and found that in this case rehabilitation and deterrence "go hand in hand," it nonetheless

concluded that the district court weighed these factors incorrectly. Pet. App. 42a-44a. Although the point of the three-day hearing in district court was to address the effect of Ceasar's pretrial release conduct on her likelihood of reoffending, and the district court's opinion spent three pages discussing this specific conduct in damning detail, Pet. App. 70a-73a, the Second Circuit quoted only one sentence and complained that Ceasar's reoffending conduct was "nearly absent from the district court's discussion." Pet. App. 43a. Based on this characterization, the Circuit ruled that the district court "fail[ed] to give adequate weight to the gravity of Ceasar's reoffending conduct while on presentence release, her conduct to obstruct justice, and the demonstrated threat she posed to the public when at liberty." Pet. App. 45a-46a.

The Court of Appeals next reviewed "the sentences imposed in a handful of recent material support cases" to "illustrate the unwarranted disparity reflected by the 48-month sentence imposed here." Pet. App. 46a-48a. It picked three cases provided in the government's brief, in which there were no mitigating factors and the court simply imposed the

Guideline sentence, the statutory maximum. *United States v. Naji*, No. 16-CR-653 (FB) (E.D.N.Y. June 11 , 2019); *United States v. Saidakhmetov*, No. 15-CR-95, 2018 WL 461516 (E.D.N.Y. Jan. 18, 2018) (WFK); *United States v. Juraboev*, No. 15-CR-95, 2017 WL 5125523 (E.D.N.Y. Nov. 1, 2017) (WFK). The Second Circuit acknowledged that these cases all involved defendants who had or were planning to travel to Syria to fight and lacked mitigating circumstances, but nonetheless found Ceasar's sentence out of proportion with them. Pet. App. 48a-49a.

REASONS FOR GRANTING THE WRIT

The Second Circuit, leading a nationwide trend, clearly applies a stricter standard of review of downward variances in terrorism cases, based on its idea that "terrorism is different" and the seriousness of the offense must weigh more heavily than other factors. In a series of recent cases, the Second Circuit has marked out a course of essentially *de novo* review of downward variances in terrorism cases, imposing a one-way upward ratchet on sentencing in such cases and virtually precluding any sentence toward the lower end of the statutory range. This overbearing

scrutiny of terrorism sentences is in clear conflict with this Court's precedent requiring "a deferential abuse of discretion standard" for substantive reasonableness review of all sentences. *Gall v. United States*, 552 U.S. 38, 41 (2007). Only this Court can correct this wayward course and hold that the same standard of review must apply to all cases.

1. The Second Circuit's *De Novo* Standard of Review for Terrorism Cases, Departs From Established Law, Violates the Statutory Sentencing Scheme, and Precludes Sentences Toward the Lower End of the Sentencing Range.

The Second Circuit's decision in this case departs from long-established precedent requiring deference to the district court's sentencing determination to substitute its own views on how the factors should be weighed for those of the district court. *Gall,* 552 U.S. at 41. It is the clearest example of its pattern of decisions placing terrorism cases outside the usual rules for sentencing and review of sentences. In case after case, it and other Courts of Appeals have engaged in *de novo*-type review of terrorism sentences to reverse significant downward variances as substantively unreasonable. This pattern has run through simple material support cases,

like this one, *see United States v. Khan*, 997 F.3d 242 (5th Cir. 2021), as well as more serious cases involving attempted violent acts where lengthy sentences have been imposed even with a variance for mitigating circumstances. *United States v. Daoud*, 980 F.3d 581 (7th Cir. 2020) (reversing 16-year sentence as too low for a mentally ill 19-year-old who agreed to set off a fake bomb in a government sting operation, where Probation Department recommended 15 years); *United States v. Mumuni*, 946 F.3d 97 (2d Cir. 2019)(reversing a 17-year sentence for material support and assault and attempted murder of federal officer where defendant was 21 years old and had no criminal record); *United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012) (reversing a 22-year sentence for a bomb plot where defendant provided significant cooperation against others and spent years in prison before ceasing his cooperation, and the government had originally offered a sentence of 25 years).

In each case, the Court of Appeals determined that the district court did not give sufficient weight to the seriousness of the offense, even where, as here, the district court repeatedly emphasized the seriousness of the

offense, *Ceasar*, A. 46, 460, where the district court described the offense as a "a violent and heinous act" the seriousness of which "cannot be understated or downplayed," *Daoud*, 980 F.3d at 589, and where the district court described the deadly result if the crime had succeeded and stated that "the seriousness and heinousness of the act of terrorism . . . cannot be overstated," *Ressam*, 679 F.3d at 1082. *See also Khan*, 997 F.3d at 247 (5th Cir. 2021) (finding that district court "failed to give 'significant weight' to the seriousness of Khan's offense").

By focusing, contrary to *Gall*'s teaching, 552 U.S. at 47-49, on the percentage of the variance from the Guidelines range, the Second Circuit and other Circuits are precluding variances toward the lower end of the statutory range for terrorism cases, regardless of mitigating factors. *Ceasar*, Pet. App. 41a("approximately 87% variance" from the range); *Mumuni*, 946 F.3d at 106, 112, 113 (referring at three points to the "80%" reduction from the range); *Ressam*, 679 F.3d at 1089 (emphasizing that the variances were two-thirds and three-fourths below the respective ranges). What the Second Circuit, and the others, are saying is that any case involving

terrorism, even non-violent material support to a terrorist organization, is too serious for a substantial variance -- that the seriousness of the offense must trump all other factors.

The Second Circuit has explicitly articulated this justification for its overbearing scrutiny of sentences in terrorism cases. Quoting its own opinions in *Mumuni*, 946 F.3d at 112, and *Meskini,* 319 F.3d at 92, it reasoned that "terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal." Pet. App. 32a. It purports to discern from the Guidelines' terrorism enhancement "Congress's considered judgment that terrorism is different from other crimes." *Mumuni,* 946 F.3d at 112. The result is a virtual bar against substantial variances in cases involving terrorism, even cases with significant mitigating factors.

There is no basis for the sweeping conclusion that Congress considers all terrorism-related offenses to be so serious as to justify a categorical limit on downward variances in sentencing. Congress expresses the seriousness of an offense by setting the statutory sentencing range, and it imposes

limits on downward variances with mandatory minimums. Certainly there are active, violent terrorism offenses that carry extremely serious sentences, including life sentences, *e.g.* 18 U.S.C. § 1992(b) (terrorist attacks against railroad carriers and mass transportation systems, § 2332a and f (use of weapon of mass destruction and bombing places of public use), 18 U.S.C. § 924(c). There are also severe mandatory minimums applicable to terrorism offenses. *E.g*. 18 U.S.C. § 924(c) (30 year consecutive mandatory sentence for using a destructive device in furtherance of such an offense). But the sentencing range for providing material support to a foreign terrorist organization is 0 to 20 years, 18 U.S.C. § 2339B, the same range as wire fraud, 18 U.S.C. § 1343. Clearly Congress intended for some offenders to receive sentences at the lower end of the statutory range -- that is what a range is for. And any variance to the lower end of the statutory range would necessarily be a very large one because the terrorism Guidelines have created a structure in which virtually every material support case winds up at the statutory maximum.

The "terrorism enhancement" of U.S.S.G. § 3A1.4 increases the offense level for the material support offense by 12 levels, from a base offense level of 26, U.S.S.G. § 2M5.3, to 38. It also places every defendant in Criminal History Category VI, making the Guidelines range for every defendant 360 to life. U.S.S.G. Chapter Five Table. Therefore, every defendant convicted of that offense has an effective Guidelines range at the statutory maximum of 20 years for 18 U.S.C. § 2339B. The "handful of recent material support cases" picked by the court below to illustrate "unwarranted disparity," all Guideline sentences at the statutory maximum, demonstrate this uniformity. Although the enhancement applies only to conduct "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" it is applied in almost every case of providing material support to a terrorist organization. *See, e.g.*, *United States v. Khan*, 938 F.3d 713 (5th Cir. 2019); *United States Awan*, 607 F.3d 306, 317 (2d Cir. 2010) (reversing denial of the enhancement); *United States v. Jayyousi*, 657 F.3d 1085, 1114 (11th Cir. 2022) (holding enhancement applicable). See Sameer Ahmed, *Is History*

Repeating itself? Sentencing Young American Muslims in the War on Terror, 126 Yale L.J. 1520, 1526-31 (2017). Therefore, any case with such strong mitigating factors that it warrants, in the district court's discretion, a sentence toward the lower end of the statutory range necessarily requires a large percentage variance from the Guidelines range.

But the Second Circuit's standard of scrutiny for terrorism sentences, holding the offense so "different" from other offenses that its seriousness limits the extent of downward variances, does not permit a sentence close to the bottom of the statutory sentencing range. It places terrorism offenses in a separate category for sentencing and undermines the statutory sentencing scheme of 18 U.S.C. § 3553(a), in which all sentencing factors are to be considered for all offenses. These factors include "the kinds of sentences available," *id.*, (a)(3) -- that is, the entire statutory sentencing range prescribed by Congress. It conflicts with this Court's precedents, depriving the district court of the deference required by *Gall* and imposing excessive adherence to the Guidelines range for one category of offenses, in violation of *United States v. Booker*, 543 U.S. 220 (2005).

2. The Second Circuit's Standard of Review for Substantive Reasonableness is in Clear Conflict with This Court's Precedent.

The extent to which the Circuit's opinion in this case conflicts with *Gall* cannot be overstated. In *Gall*, the Eighth Circuit had reversed a large -- what it stressed was a "100%" -- variance to probation as unreasonable because, in its view, the district court "did not properly weigh" the seriousness of his offense, placed too much weight on Gall's withdrawal from the conspiracy, his post-offense rehabilitation, and his youth, and failed to consider whether unwarranted disparity would result. This Court reversed, holding that these factors were not sufficient to support a ruling that the district court abused its discretion under the deferential standard applicable to substantive reasonableness review. *Id*.

First, this Court rejected the Eighth Circuit's preoccupation with the size of the variance in percentage terms and any use of a mathematical formula that "uses a percentage of a departure as the standard for determining the strength of the justifications required" for a sentence. *Id*. at 47-49. Second, the Court held that, absent procedural error, reasonableness

review must defer to the district court's analysis of the § 3553(a) factors. *Id*. at 51 "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id*. Addressing the Eighth Circuit's conclusion that the district court "did not properly weigh the seriousness of Gall's offense," this Court pointed to the district court's statement that the sentence must reflect the seriousness of the defendant's drug distribution offense, and found that it "plainly did consider the seriousness of the offense." *Id.* at 53. The Eighth Circuit's own view that the district court nevertheless "did not properly weigh" this factor and placed too much weight on Gall's rehabilitation "gave virtually no deference to the District Court's decision that the § 3553(a) factors justified a significant variance in this case." *Id*. at 56-57. Instead its analysis "more closely resembled *de novo* review of the facts presented" and a determination that "in its view, the degree of variance was not warranted." *Id.* at 56. As to the Eighth Circuit's view that the district court did not consider whether the sentence of probation would create unwarranted disparities with codefendants, this Court noted that the

codefendants were not similarly situated and held that the district court properly "considered *the need to avoid unwarranted similarities*" among those not similarly situated. *Id*. at 56 (emphasis added).

The Second Circuit's opinion suffers from all the infirmities of the Eighth Circuit's opinion reversed in *Gall*. Its overbearing scrutiny of the facts and re-weighing of the § 3553(a) factors "more closely resembled *de novo* review of the facts presented" than the deferential abuse of discretion review required. *Id.* at 56. It took upon itself the task of determining which factors were most important, the seriousness of the offense and protection of the public. Although there was no procedural error or clear error in fact-finding, the Second Circuit simply threw out the district court's painstaking analysis and substituted its own. It concluded that the district court did not adequately weigh the seriousness of the offense when it "plainly did consider the seriousness of the offense." *Gall,* 552 U.S. at 53, 56-57. In its block quotation of the district court's analysis of the § 3553(a) factors, it left out the critical passage in which the district court weighed the seriousness of the offense and the need to protect the public against

Ceasar's ongoing rehabilitation. It focused on the percentage variance from the Guidelines range, despite *Gall*'s clear rejection of mathematical measures for determining reasonableness. *Id.* at 47-49. It ignored the district court's lengthy discussion of Ceasar's conduct on pretrial release but accused the district court of ignoring it. It scrutinized the rehabilitation program planned for Ceasar's release and found it wanting for lack of a track record.

Finally, as the Eighth Circuit did in *Gall*, the Second Circuit conducted an inappropriate "unwarranted disparity" review. In *Gall*, the defendant was compared to dissimilar codefendants; here, Ceasar was compared to dissimilar defendants in other cases, in which the conduct was more serious, there were no mitigating circumstances, and Guidelines sentences were imposed. *United States v. Naji*, No. 16-CR-653 (FB) (E.D.N.Y. June 11 , 2019); *United States v. Saidakhmetov*, No. 15-CR-95, 2018 WL 461516 (E.D.N.Y. Jan. 18, 2018) (WFK); *United States v. Juraboev*, No. 15-CR-95, 2017 WL 5125523 (E.D.N.Y. Nov. 1, 2017) (WFK). The Court of Appeals ignored other cases, like *United States v. Doe*, 32 F. Supp. 3d 368, 378-83 (E.D.N.Y.

2018), in which a sentence of two years plus ten years of supervised released was imposed for more serious conduct and the defendant had cooperated but had no history of abuse or trauma. And the *Mumuni* defendant, who pled guilty to not only material support, but attempted murder of and assault with a deadly weapon on a federal agent based on his attempted stabbing, could not be less similarly situated.

The Second Circuit simply concluded that this sentence was too low for a terrorism offense. The standard it applied, "shockingly low," is entirely subjective and allows the Court of Appeals to substitute its gut instincts for the considered judgment of the sentencing judge, who "is in a superior position to find facts and judge their import under § 3553(a) in the individual case." *Gall*, 552 U.S. at 51.

This case presents an ideal vehicle for this Court to redirect the Courts of Appeals back to applying the same standard for all sentences reviewed for substantive unreasonableness. It is a pure case of substantive reasonableness review, fully preserved and outcome-determinative, and unmuddied by any claims of procedural error. Given the trend in the

Circuits to follow this path of *de novo*-type review of downward variances in terrorism cases, only this Court can stop this usurpation of the district courts' role.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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