No. _____

IN THE
Supreme Court of the United States

ELVIS REDZEPAGIC
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should grant *certiorari* to resolve the circuit split regarding the correct offense level that is to be used in sentencing violations of 18 U.S.C. §§ 2339B(a)(1), (d) (attempt to provide material support to foreign terrorist organizations)—U.S.S.G. §2X1.1 (attempts) or § 2M5.3(a) (completed offense).

Whether this Court should grant certiorari to instruct federal courts how to consider properly the need to avoid unwarranted sentence disparities pursuant to 18 U.S.C. § 3553(a)(6).

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PETITION FOR CERTIORARI

Petitioner Elvis Redzepagic respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

On June 12, 2023, the judgment of the United States Court of Appeals for the Second Circuit was filed in a Summary Order. *United States v. Redzepagic*, No. 21-2993, 2023 WL 3938445, at *1 (2d Cir. June 12, 2023). The decision is attached as Exhibit A.

On July 26, 2023, Mr. Redzepagic filed a petition for rehearing and suggestion for rehearing *en banc*. The Second Circuit denied his petition on August 17, 2023. That order is attached as Appendix B.

JURISDICTION

On June 12, 2023, a three-judge panel for the Second Circuit issued a decision in Petitioner's appeal. Subsequently, on August 17, 2023, the Second Circuit denied Mr. Redzepagic's petition for rehearing and suggestion for rehearing *en banc*. [1] This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS

18 U.S.C.A. § 3553 -Factors to be considered in imposing a sentence

[1] The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). The petition for rehearing in this case was denied on August 17, 2023, making the petition for writ of *certiorari* due on November 15, 2023. A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2.

(a) 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 forth 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 sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing

Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence 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.

U.S.S.G. 2X1.1 – Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

(a) Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

(b) Specific Offense Characteristics

(1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

(2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.

(3) **(A)** If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.

(B) If the statute treats solicitation of the substantive offense identically with the substantive offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.

(c) Cross Reference

(1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

(d) Special Instruction

(1) Subsection (b) shall not apply to:

(A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5): 18 U.S.C. § 81; 18 U.S.C. § 930(c); 18 U.S.C. § 1362; 18 U.S.C. § 1363; 18 U.S.C. § 1992(a)(1)-(a)(7), (a)(9), (a)(10); 18 U.S.C. § 2339A; 18 U.S.C. § 2340A; 49 U.S.C. § 46504; 49 U.S.C. § 46505; and 49 U.S.C. § 60123(b).

(B) Any of the following offenses: 18 U.S.C. § 32; and 18 U.S.C. § 2332a.

I.

STATEMENT OF THE CASE

Mr. Redzepagic pled guilty to one count of attempt to provide material support to foreign terrorist organizations, in violation of 18 U.S.C. §§ 2339B(a)(1), (d) and 2. The district court sentenced Redzepagic to 200 months' imprisonment, to be followed by five years' supervised release. On appeal, Redzepagic contended that his sentence was both procedurally and substantively unreasonable.

As is relevant to this petition, Redzepagic argued that the district court procedurally erred when it used USSG § 2M5.3(a) to calculate Mr. Redzepagic's base offense level because this guidelines section applies to substantive offenses under 18 USC § 2339B, not attempt crimes. Redzepagic argued that he suffered prejudice because it is not certain that he would have received the same sentence in the absence of the error, especially since Mr. Redzepagic would have benefited from a three-level adjustment per USSG § 2X1.1(b)(1) and received a variance at sentencing.

The Second Circuit held, on plain error review, that even if the district court erred by using the wrong guideline provision and by not subtracting three offense levels pursuant to section 2X1.1(b)(1), it was of no consequence. *Redzepagic*, 2023

WL 3938445 at *1.

Also relevant to this petition, Redzepagic argued that the district court erred when it failed to consider properly the need to avoid unwarranted sentencing disparities per 18 U.S.C. § 3553(a)(6). The district court cited one case, *United States v. Ceasar*, 10 F.4th 66 (2d Cir. 2021), as "the same" as Mr. Redzepagic's crime at his sentencing. That single case did not amount to a review of nationwide sentencing disparities as required by §3553(a)(6). *See e.g.*, *United States v. Toohey*, 132 F. App'x 883, 886–87 (2d Cir. 2005) (disparity review requires comparing all defendants sentenced for similar conduct).

On June 12, 2023, the Court of Appeals for the Second Circuit issued a summary order ("the decision") affirming Mr. Redzepagic's sentence and judgment. *Redzepagic*, 2023 WL 3938445, at *1.

Mr. Redzepagic's petition for certiorari should be granted for at least two reasons. First, the decision deepened a circuit split, and intra-circuit confusion, when it failed to reach the question of which guideline applies in attempted material support cases—U.S.S.G. §2M5.3(a) or U.S.S.G. §2X1.1—to calculate the base offense level. The Second Circuit's position remains unclear. The circuits that have addressed this issue side with Mr. Redzepagic. Nonetheless, district courts in the Second Circuit take the outlier view and routinely apply U.S.S.G. § 2M5.3 in sentencing attempts and conspiracies under § 2339B. Because this guidelines error occurs with such frequency in serious cases like Mr. Redzepagic's, and there remains tension between circuits, granting *certiorari* is necessary to secure nationwide

uniformity.

Second, this Court should grant this petition because district courts have not been given clear parameters on how to conduct a nationwide disparity review. Such instruction is important because when courts fail to conduct an adequate nationwide review, they risk imposing sentences that have not taken into account the potential for sentencing disparity as required by 18 U.S.C. § 3553(a)(6). This problem crystallized in Mr. Redzepagic's case. In terrorism cases like Mr. Redzepagic's, reviewing a single case, or even a microcosm of cases, is insufficient to alert a sentencing court to the potential for unwarranted sentencing disparities. Here, a disparity is made clear with one look at the national average sentence for this offense—his 200-month case is much higher than the national average. *See* U.S. Sent'g Comm'n, "Quick Facts: "National Defense Offenders;" (July, 2022).[2] Had the district court conducted a meaningful nationwide review, it would have been alerted to this statistical difference and adjusted accordingly or, alternatively, justified why a higher sentence than average was warranted. Given how commonplace this problem seems to be, this Court should grant this petition to provide clarification to the federal courts about how to conduct mandatory review for nationwide sentencing disparity per 18 U.S.C. 3553(a)(6).

This case provides an ideal vehicle to analyze these important nationwide issues.

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2 Found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY21.pdf (last visited 10/2/2022).

II.

ARGUMENT

A. The decision deepened a circuit split and intra-circuit confusion when it failed to reach the question of which guideline applies in attempted material support cases under 18 U.S.C. § 2339B.

In the Second Circuit, district courts routinely select the wrong foundational guidelines provision by using U.S.S.G. § 2M5.3, instead of U.S.S.G. § 2X1.1(b), in sentencing attempts and conspiracies under 18 U.S.C. § 2339B. *See, e.g., United States v. Khusanov*, No. 17-CR-475, 2022 WL 3228270, at *5 (E.D.N.Y. Aug. 10, 2022) (attempt); *United States v. Zakirov*, No. 15-CR-95-5, 2022 WL 2954161, at *5 (E.D.N.Y. July 26, 2022) (conspiracy and attempt); *United States v. Kasimov*, No. 15-CR-95-4, 2022 WL 1984059, at *5 (E.D.N.Y. June 6, 2022) (conspiracy and attempt); *United States v. Saleh*, No. 15-CR-517, 2021 WL 5544957, at *8 (E.D.N.Y. Nov. 17, 2021) (attempt); *Banol- Ramos v. United States*, No. 09-CR-498, 2018 WL 1441357, at *3 (S.D.N.Y. Mar. 22, 2018) (conspiracy); *United States v. Saidakhmetov*, No. 15-CR-95, 2018 WL 461516, at *3 (E.D.N.Y. Jan. 18, 2018) (conspiracy); *United States v. Juraboev*, No. 15-CR-95-1, 2017 WL 5125523, at *3 (E.D.N.Y. Nov. 1, 2017) (conspiracy); *United States v. Cordoba-Bermudez*, 4 F. Supp. 3d 635, 638 (S.D.N.Y. 2014) (conspiracy).

Like Mr. Redzepagic, the defendants in the above listed cases were charged and convicted of either attempting or conspiring to provide material support to a terrorist organization in violation of § 2339B. In each of these cases, including this

one, the district courts used § 2M5.3, the guidelines provision for a completed offense. Under the guidelines, however, unless another guideline section expressly covers an attempted offense, the appropriate base offense level for an attempt is the generic attempt guideline found in USSG § 2X1.1. *See e.g.*, *United States v. Amato*, 46 F.3d 1255, 1261 (2d Cir.1995) (§ 2X1.1 covers conspiracies in all cases, except when conspiracy is expressly covered by another offense guideline section). There is no express provision in the application notes or commentary to the guidelines that directs the sentencing court to apply §2M5.3 to attempted offenses under 18 U.S.C. § 2339B.

In Mr. Redzepagic's case, the Second Circuit bypassed the question of which guidelines provision, §2M5.3(a) or §2X1.1, applies in attempt material support cases under 18 U.S.C. § 2339B. The decision leaves the district courts without much needed guidance. Figuring out what guideline provision applies in the first instance is a crucial part of the guidelines' step by step process. Arguably, it is the most important step in that process because it is foundational and dictates any adjustments that follow. When a judge selects the wrong one, the sentence that follows rests on a shaky foundation.

The district courts' confusion surrounding the issue may stem from the Second Circuit's decision in *United States Skowronski,* 968 F.2d 242 (2d Cir. 1992). In *Skowronski*, the Court held that the applicable offense level for Hobbs Act conspiracy should be determined by reference to its substantive guideline counterpart, rather than § 2X1.1. *Id*. at 250. In so reasoning, the Court noted that conspiracy offenses

were specifically cross-referenced in the substantive offense's guideline. *Id*. But the reasoning in *Skowronski* is no longer viable. In *Amato*, the Second Circuit reexamined *Skowronski*, finding its reasoning no longer valid, because "[t]he deletion of § 2E1.5, with its cross-reference to § 2B3.1, deletes the provision of the Guidelines that provided the 'express' reference making § 2X1.1 inapplicable." *Amato*, 46 F.3d at 1261.

It does not appear that the Second Circuit has ever addressed any remaining tension between *Amato* and *Skowronski*. In the absence of a clear directive, the district courts' use of § 2M5.3 in attempt and conspiracy cases appears nearly routine at this point. That district court practice is incorrect and represents an outlier position. The circuits that have confronted the issue have adopted Mr. Redzepagic's reasoning. For example, the Ninth Circuit addressed the issue presented here and held that the district court erred in applying §2M5.3 to an attempted offense under 18 U.S.C. § 2339B. *United States v. Teausant*, 714 Fed. App'x 676, 678 (9th Cir. 2017). It did so because there is no express provision in the application notes or commentary to the guidelines that directs the sentencing court to apply § 2M5.3 to attempted offenses. *Id*. Other courts reason similarly in analogous contexts. *See United States v. Hassan*, No. 5:09-CR-216-FL-7, 2012 WL 147952, at *2 (E.D.N.C. Jan. 18, 2012), *aff'd,* 742 F.3d 104 (4th Cir. 2014) ("Case law implicitly suggests that § 2X1.1 is the correct guideline to apply for § 2339A…The court discerns no authority suggesting that § 2M5.3 should be applied instead of § 2X1.1"); *United States v. Martinez*, 342 F.3d 1203, 1207 (10th Cir. 2003) (holding section 2X1.1 applies to attempted bank

robbery, not section 2B3.1 which does not expressly cover *attempted* robberies); *United States v. Simon*, 858 F.3d 1289, 1291 (9th Cir. 2017 (en banc) (district court correctly applied §2X1.1, rather than §2B3.1 for conspiracies under the Hobbs Act); and *United States v. McKeever*, 824 F.3d 1113, 1121 (D.C. Cir. 2016) (For a Hobbs Act robbery conspiracy, a sentencing court should apply the Sentencing Guideline governing attempt, solicitation, or conspiracy not covered by a specific offense Guideline, and not the robbery Guideline).

Certiorari should be granted to provide much needed clarification to practitioners and the district courts regarding this issue.

B. This Court should grant this petition because 18 U.S.C. § 3553(a)(6) requires district courts to consider nationwide sentence disparities and there is no clear framework for how such reviews should be conducted.

By statute, a judge is obligated to consider at sentencing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.S.C. § 3553(a)(6). This has been interpreted to mean nationwide sentence disparities. *United States v. Bryant*, 976 F3d 165, 180 (2d Cir. 2020) (The Second Circuit "repeatedly made clear that section 3553(a)(6) requires a district court to consider *nationwide* sentence disparities…"

The unwarranted disparities driving this statutory concern "were not those between any two discrete cases or even between two defendants in the same case. Rather, Congress's 'objective was to eliminate unwarranted disparities nationwide.'" *United States v. Toohey*, 132 Fed. App'x at 886 (2d Cir. 2005) (citing *United States v. Joyner*, 924 F.2d 454, 460–61 (2d Cir. 1991)). "Thus, a sentencing court does not

reasonably satisfy its statutory obligation under § 3553(a)(6) when it only compares discrete cases or defendants." *Id.* at 886-87.

District courts, however, do not have clear instructions on how to conduct a nationwide disparity review. It is important to have such instruction because when courts fail to conduct an adequate nationwide review, they risk imposing disparate sentences.

From a nationwide perspective, Mr. Redzepagic's sentence was too high. Mr. Redzepagic's sentence is well above average when compared to other defendants' sentences nationwide. The United States Sentencing Commission provides nationwide sentencing data on National Defense cases. *See* U.S. Sent'g Comm'n, "Quick Facts: "National Defense Offenders;" (July, 2022).3 National defense cases include cases in which a defendant was sentenced under USSG Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction) or under other guidelines which involve criminal conduct threatening to national defense. *Id*. National defense cases also include cases in which the defendant received a sentencing enhancement under USSG §3A1.4 (Terrorism) and was found to be in criminal history category VI—an enhancement that applied in Mr. Redzepagic's case. *Id*.

For fiscal year 2017 through fiscal year 2021, 161 offenders received an enhanced sentence through application of the terrorism adjustment at USSG §3A1.4.

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3 Found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY21.pdf (last visited 10/2/2022).

Id. The average sentence for offenders who received a terrorism adjustment under USSG §3A1.4 was 152 months. Of defendants who received a variance from the guidelines like Mr. Redzepagic did, their average sentencing reduction was 50.1%. *Id*.

Mr. Redzepagic's 200-month case is much higher than the national average. Further, when the court varied downward from the 240-month applicable guideline range to 200 months, the variance, at roughly 16%, was startlingly low compared to the 50% decrease given to other defendants nationwide who have been sentenced for similar crimes in which § 3A1.4 applied. Had the district court conducted a nationwide review, it would have been alerted to this statistical difference and adjusted accordingly or, alternatively, provided a record to review about why a higher-than-average sentence was justified.

On appeal, Mr. Redzepagic argued that national statistics are an important part of disparity review. Reviewing those statistics and meaningfully examining the similar cases that make up those statistics, seem to be the best method of discharging a sentencing judge's duty to avoid sentencing disparities pursuant to 18 U.S.C. § 3553(a)(6).

Other district courts have used Mr. Redzepagic's suggested methods in conducting a nationwide disparity review. For example, in *United States v. Bell*, the sentencing court conducted a thorough disparity review by: (1) tapping into resources at the U.S. Sentencing Commission; and (2) examining similar cases on their facts to root out similarities and differences. *United States v. Bell*, 81 F. Supp. 3d 1301, 1321

(M.D. Fla. 2015). The court wrote:

> The Court begins, though, with the general information provided directly by the Sentencing Commission on cases where the only count of conviction was § 2339A, like this case. From Fiscal Year 2009 through 2013, twelve cases nationwide fit that description. Of those twelve cases, the average sentence was 116 months, and the median sentence was 114 months. This information, though interesting, is only useful to a point. Thus, the Court has endeavored to gather as much information as it could about these cases and the others cited by the parties.

Id. Instead of relying on one case, or some small number of within-circuit cases, the district court in *Bell* reviewed nationwide data provided by the Sentencing Commission and then gathered more information regarding those cases on its own, and with the help of the parties, to arrive at an "apples to apples" comparison. The *Bell* framework for nationwide disparity review is sound because it does not rely solely on statistics (which do not reveal underlying case facts) or cases submitted to it by the parties alone (which may represent factually dissimilar and/or cherry-picked outliers that support the parties' respective sentencing recommendations). Instead, it reviews both and conducts its own research as well. *Bell* noted:

> The Government has directed the Court to published and unpublished cases involving charges of supporting terrorism. In reviewing these cases, the Court has learned that it should not just treat any case with a terrorism component as a valid comparator; instead, the Court must try to compare "apples to apples" and "not draw comparisons to cases involving defendants who were convicted of less serious offenses," went through trial, "lacked extensive criminal histories," or where the government sought, for instance, the death penalty. *Jayyousi,* 657 F.3d at 1118; *see United States v. Matthews,* 517 Fed.Appx. 871, 872–73 (11th Cir.2013). Still, some of these cases provide useful guidance and are worth review.

Bell, 81 F. Supp. 3d at 1321. Other district courts use similar methods:

> Understanding that the Sentencing Guidelines are not useful for avoiding sentencing disparities in terrorism-related cases, I ordered the parties and the Probation Office to submit summaries of previous cases in which a defendant has been convicted under 18 U.S.C. § 2339B. I have reviewed their submissions along with the relevant cases listed in the Sentencing Compilation Matrix prepared by the defense in *United States v. Ahmad*. While the material support statutes, 18 U.S.C. §§ 2339A and 2339B, have been among the most frequently prosecuted federal anti-terrorism statutes, there are only a few cases that bear enough likeness to Mr. Jumaev's to be worthy of comparison, and even these are readily distinguishable. The following material support cases are similar to this case in that they all involve financial contributions, but as is apparent, each of the defendants engaged in substantially more culpable conduct than Mr. Jumaev, such as participating in intricate conspiracy networks, contributing considerable sums of money, providing support on a recurrent basis, joining in recruitment efforts, plotting against the United States, and so on.

United States v. Jumaev, No. 12-CR-00033-JLK, 2018 WL 3490886, at *17 (D. Colo. July 18, 2018), *aff'd,* 20 F.4th 518 (10th Cir. 2021).

In Mr. Redzepagic's case, the district court stated it considered all of the relevant 3553(a) factors but the record related to § 3553(a)(6) is silent. Nonetheless, as mentioned above, the district court cited one case, *Ceasar*, as "the same" as Mr. Redzepagic's crime at his sentencing. This single case, prosecuted in the Eastern District of New York, did not amount to a review of nationwide sentencing disparities as required by §3553(a)(6).

Ceasar, however, involved a defendant with much higher guidelines, much more egregious conduct, and multiple charges. In *Ceasar*, the defendant was initially charged with conspiring to provide material support to ISIS in violation of 18 U.S.C.

2339B(a) when she encouraged others to join ISIS abroad through social media and messaging tools. She also helped individuals in the United States contact ISIS members overseas. Overseas ISIS members then helped ISIS supporters from the United States travel to ISIS-controlled territory. Ceasar herself was arrested when she intended to travel to ISIS territory by way of Sweden to marry another ISIS supporter.

After Ceasar's arrest, she entered into a cooperation agreement with the government and was granted presentence release. While on presentence release, however, Ceasar breached her agreement by reoffending. Thereafter, Ceasar pleaded guilty to an additional charge of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1). Her Sentencing Guidelines range was 360 to 600 months' imprisonment in her case.

From a factual standpoint, Ceasar's case bears little resemblance to Mr. Redzepagic's circumstances. But, at sentencing, the district court believed that Ceasar was "basically accused of the same crime" as Mr. Redzepagic. A98.48 Reading *Ceasar* as basically "the same" as Mr. Redzepagic's crime demonstrates that the district court really conducted no meaningful disparity review at all.

In *Ceasar* itself, it is notable that the Second Circuit confined its sentencing disparity review to mainly four offenders, all of whom were sentenced to the statutory maximum, and three were sentenced within this Circuit. *Ceasar*, 10 F.4th 66 at 86. ("[T]he significant differences between the sentences imposed on Naji, Saidakhmetov, Juraboev, and Young, on the one hand, and Ceasar on the other, reflect a troubling

and unwarranted disparity "among defendants with similar records who have been found guilty of similar conduct.").

Had *Ceasar* conducted a broader disparity review, it would have noticed that the average sentence in the Second Circuit is 230 months. *See* U.S. Sent'g Comm'n, *Interactive Data Analyzer*, (filtering for Sentencing Outcome, Sentence Length, Primary Guideline §§ 2M5.3 and 2X1.1, 2015-2021, Second Circuit, Crime Type National Defense crimes, CHC VI).4 *Id*. At 230 months, it appears that district courts within this Circuit routinely impose sentences that are at least 34% higher than the national average for offenders who received a terrorism adjustment under USSG §3A1.4 nationwide. All of which suggests that a single case, or even a microcosm of cases reviewed by a district court, are insufficient to alert it to the potential for unwarranted sentencing disparities.

The district court's sentence here, and its reference to *Ceasar* as "the same" did not eliminate an unwarranted disparity in sentencing. And as *Ceasar* itself demonstrates, there is little guidance on how to conduct to disparity review.

In the absence of a framework for nationwide sentencing review, defendants like Mr. Redzepagic are far too easily lumped in with defendants whose conduct is dissimilar. As noted by the district court in *United States v. Muhtorov*,

> Instead of blindly grouping Muhtorov with defendants who received 30 years, as the government asks, I am guided by other cases with similar facts. Sentencing is not an exercise in shooting

4 This information was obtained through the U.S. Sentencing Commission's Interactive Data Analyzer found at https://ida.ussc.gov/analytics/saw.dll?Dashboard (last viewed October 2, 2022).

> an arrow into the air. To avoid disparate sentences, a defendant must be placed properly on the continuum of like cases. Although material support travel cases remain relatively few in number and Muhtorov's circumstances are unique, the following cases generate a reliable scale.

United States v. Muhtorov, 329 F. Supp. 3d 1289, 1307 (D. Colo. 2018). As the district court in *Jumaev* recognized, "The circumstances of individuals convicted of crimes of terrorism ... differ greatly, and sentencing them without crediting those differences results in disproportionate sentences and disparities in sentencing." *Jumaev*, 2018 WL 3490886 at *11.

Had the Second Circuit insisted that the district court conduct a proper nationwide review, it would have been alerted to the statistical differences, done an apples-to-apples comparison, and adjusted accordingly. *See e.g.*, *United States v. Williams*, 21-cr-00099, Western District of Washington, Doc. 40 (Nov. 29, 2022) (imposing 48 months incarceration for self-radicalized but mentally ill defendant for having attempted to provide material support in violation of 18 U.S.C. § 2339B(a)(1)).

Finally, Mr. Redzepagic's high sentence and the lack of meaningful disparity review reflects a failure to appreciate the "[g]rowing concern exists about the fairness of the exceedingly high sentencing enhancements on 'material support' of terrorism crimes, particularly where the support is nonviolent." *See United States v. Kourani*, 6 F.4th 345, 360 (2d Cir. 2021) (J.Pooler concurring in part, dissenting in part). Mr. Redzepagic's conduct in this case was non-violent. Mr. Redzepagic's sentence reflects the troubling trend that sentencing pursuant to the terrorism statutes tend to be far higher than those that are not. *See* Laura Rovner & Jeanne Theoharis, Preferring

Order to Justice, 61 AM. U. L. REV. 1331, 1348-49 & n.72 (2012) (explaining that sentences subject to the terrorism enhancement tend to be 7.8 times longer than those that are not); James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financia Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 57-58 (2010) (explaining how the terrorism enhancement results in sentences "often disproportionate to the conduct of conviction" (footnote omitted)). This trend underscores the importance of providing clear instruction to the federal courts about how to conduct nationwide disparity review at sentencing.

III.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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