

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETT JAMES McELDERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

The Eighth Circuit Court of Appeals and other circuit courts have instituted a rule permitting district courts to disregard a party's colorable sentencing presentation—comprised of exemplar penalties imposed upon similarly-situated defendants—aimed at demonstrating “unwarranted sentence disparities” as contemplated by 18 U.S.C. § 3553(a)(6) of the Sentencing Reform Act of 1984 (SRA). Does this circuit rule violate the SRA, as well as this Court's decisions mandating that a sentencing court meaningfully “consider all of the § 3553(a) factors” when formulating the appropriate criminal sentence?

LIST OF PARTIES

All parties appear in the caption on the cover page of this Petition.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINION BELOW.....	1
JURISDICTION.....	2
STATUTE INVOLVED.....	3
INTRODUCTION	4
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE PETITION.....	9
I. This Court should grant the Petition to review a circuit rule of federal sentencing procedure which permits a district court to disregard a colorable presentation pertinent to the mandatory “unwarranted sentence disparities” factor of 18 U.S.C. § 3553(a)(6). The circuit rule: (i) divides the federal circuits; (ii) conflicts with this Court’s decisions; and (iii) frustrates the purpose of the federal sentencing scheme.	9
A. The post- <i>Booker</i> / <i>Gall</i> scheme of federal sentencing	9
B. The circuit rule at issue divides the federal circuits.....	13
C. The circuit rule at issue conflicts with the statutory mandate and this Court’s decisions.....	15
D. The case at hand presents an excellent vehicle for this Court’s review of the Question Presented.....	18
CONCLUSION.....	21

TABLE OF CONTENTS (cont'd)

INDEX TO APPENDIX

Opinion below, (slip op.) (also reported at 875 F.3d 863)	App. A
Order denying rehearing, (order) (filed December 28, 2017)	App. B
Petitioner's principal sentencing paper, (filed August 10, 2016)	App. C
Petitioner's supplemental sentencing paper, (filed August 15, 2016)	App. D
Transcript of sentencing hearing (August 15, 2016)	App. E

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Dean v. United States</i> , 137 S. Ct. 1170 (2017).....	12
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	<i>passim</i>
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	11, 15-19
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	9, 10
<i>Pepper v. United States</i> , 562 U.S. 476 (2011)	12, 15, 16, 18
<i>United States v. Bartlett</i> , 567 F.3d 901 (7th Cir. 2009).....	13
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	<i>passim</i>
<i>United States v. Cunningham</i> , 429 F.3d 673 (7th Cir. 2005).....	17
<i>United States v. Diaz</i> , 637 F.3d 592 (5th Cir. 2011).....	13
<i>United States v. Frias</i> , 521 F.3d 229 (2d Cir. 2008)	14
<i>United States v. Gantt</i> , 679 F.3d 1240 (10th Cir. 2012).....	13
<i>United States v. Hill</i> , 643 F.3d 807 (11th Cir. 2011).....	13
<i>United States v. McElderry</i> , 875 F.3d 863 (8th Cir. 2017)	1
<i>United States v. Merced</i> , 603 F.3d 203, 222 (3d Cir. 2010)	14
<i>United States v. Pierre</i> , 870 F.3d 845 (8th Cir. 2017)	19
<i>United States v. Wallace</i> , 597 F.3d 794 (6th Cir. 2010)	14

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
 Statutes	
18 U.S.C. § 2252.....	4
18 U.S.C. § 3553.....	<i>passim</i>
28 U.S.C. § 991.....	10, 12
28 U.S.C. § 994.....	3
28 U.S.C. § 1254.....	2
Sentencing Reform Act of 1984 (SRA), Pub. L. 98-473, Ch. II (1984)	<i>passim</i>
 Rules	
S. Ct. R. 10	15, 18
 Other	
A. Siegler, <i>The Court of Appeals' Latest Anti-Booker Backlash</i> , 82 U. Chi. L. Rev. 201 (2015).....	14
S. Rep. 98-225 (1983).....	10, 17, 19

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kennett McElderry requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *United States v. McElderry*, 875 F.3d 863 (8th Cir. 2017), and the original slip opinion is reprinted in the Appendix to this Petition. (App. A). The Appendix also contains the Eighth Circuit's order denying rehearing. (App. B).

JURISDICTION

Petitioner was charged by indictment filed in the United States District Court for the District of Minnesota, alleging federal crimes relating to contraband child-pornographic materials. After having reached a plea agreement, Petitioner entered a guilty plea and the matter proceeded to the sentencing phase. After briefing and argument on this latter topic—the details of which are at issue in this Petition—the district court imposed a 130-month prison term. The Eighth Circuit Court of Appeals affirmed by published opinion filed on November 16, 2017. (App. A). Petitioner timely filed a motion for rehearing on November 16, 2017, which was denied by order dated December 28, 2017. (App. B). Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the Court of Appeals.

STATUTE INVOLVED

This Petition involves provisions of the United States Code, particularly—

* * *

18 U.S.C. § 3553

Imposition of a sentence

(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 . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code . . . ;

(5) any pertinent policy statement . . . issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code . . . ;

(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.

* * *

INTRODUCTION

Petitioner asks this Court to review a circuit rule of federal sentencing procedure that permits district courts to disregard a colorable presentation pertinent to the mandatory “unwarranted sentence disparities” factor of 18 U.S.C. § 3553(a)(6). *See supra* Question Presented. As explained throughout this Petition, this Court should review the circuit rule at issue because it: (i) divides the federal circuits; (ii) conflicts with this Court’s decisions; and (iii) frustrates the purpose of the federal sentencing scheme.

STATEMENT OF THE CASE

1. Petitioner was charged by indictment alleging federal crimes relating to contraband child-pornographic materials. After pretrial motions and proceedings, Petitioner reached an agreement by which he would enter a guilty plea to one violation of 18 U.S.C. § 2252(a)(2), unlawful distribution of such contraband. Petitioner then changed his plea accordingly, and the matter proceeded to sentencing.

2. The district court’s probation office assembled a Presentence Investigation Report, which included suggested findings pertinent to the United States Sentencing Guidelines (USSG). Specifically, the probation office made recommendations as to the appropriate criminal history category, offense level, and sentencing range under the Guidelines. The district court adopted these determinations without alteration, and determined an advisory Guidelines sentencing range.

3. Petitioner’s counsel submitted a detailed sentencing position paper, (App. C), highlighting a number points bearing upon the statutorily-mandated sentencing factors, 18 U.S.C. § 3553(a), including—

- (a). Petitioner’s criminal history was largely comprised of non-violent offenses relating to substance addiction (*e.g.*, impaired driving, possession of marijuana, *et cetera*), and notably contained no suggestion that he had committed or would commit physical sexual abuse of any kind.
- (b). Numerous courts and commentators have rejected the applicable Sentencing Guideline as empirically unsupported, disproportionately severe, and incapable of distinguishing gradients of culpability.
- (c). The sentencing factors set out in 18 U.S.C. § 3553(a)—particularly the imperative to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”—all pointed to the conclusion that the statutory minimum sentence of 60 months of imprisonment was the most appropriate penalty.

4. Petitioner’s counsel also presented detailed evidence to support the above thesis, such as—

- (a). Petitioner has always maintained good relationships with supportive family members, including his minor daughter. While on pretrial release, Petitioner maintained these relationships, and social services

agencies permitted him to continue having contact with his daughter as he was determined to be no danger to her or any other minor.

- (b). While on pretrial release, Petitioner had made excellent progress in treating his addiction disorders, indisputably the principal factor in his criminal history. In addition, Petitioner continued to make good progress in treating psychological problems, such as trauma experienced after having witnessed his close friend's suicide. And Petitioner was receiving ongoing therapy to address his apparent psychosocial impulse to view the contraband images at issue.
- (c). Petitioner had no history of sexual abuse toward minors. Nor anyone else. Nor any apparent risk of such behavior, as mentioned above.

(App. C).

5. Last—and particularly relevant here—Petitioner's counsel presented exemplars of penalties imposed upon a number of similarly-situated defendants by judicial officers sitting in the District of Minnesota, *i.e.*, the same federal judicial district slated to impose a penalty upon Petitioner. That is to say, Petitioner supplied the results of a number of cases involving similar: (a) offense conduct; (b) relevant non-offense conduct; (c) statutes of conviction; and (d) Sentencing Guidelines advisory ranges. These exemplar intra-district cases resulted in imprisonment penalties ranging from 27 months to 90 months, with many examples hovering around the statutory minimum 60 months. (App. C). Later, Petitioner's counsel supplemented this offering with numerous intra-district cases showing similarly-situated defendants receiving prison terms around that same range. (App. D).

6. Petitioner’s counsel distilled all of these arguments during the sentencing hearing. (App. E at 3-9). But the district judge did not address any of them. Instead, the district court imposed a 130-month prison term, which it justified with a rote statement that the “sentence imposed is appropriate and reasonable” in light of the considerations set forth in 18 U.S.C. § 3553(a). (App. E at 14, 20). Petitioner’s counsel then took the extraordinary step of requesting a sidebar to highlight the announced sentence was far higher than received by similarly-situated defendants within the district, and instead was on par with that normally imposed upon sex-offense recidivists and/or those with histories of physical-contact sex offenses. (App. E at 22-24). Again, the district court did not directly address the topic, but rather said the pronounced sentence was based upon “the mixture of things involved, especially with the sentencing guidelines.” (App. E at 22). Put differently, the district court declined to address the disparities its pronounced sentence would create amongst similarly-situated defendants.

7. Petitioner appealed to the Eighth Circuit Court of Appeals, challenging the district court’s sentencing procedure. In particular, Petitioner pointed to the district court’s refusal to grapple with the mandatory consideration of “unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” set out in 18 U.S.C. § 3553(a)(6).

8. The Court of Appeals affirmed the district court’s sentencing procedure. (App. A). The appellate court “decline[d] to impose a procedural requirement that a district judge must compare and contrast the defendant under consideration with a similar offender who has been sentenced by another federal judge,” re-characterizing

such data as nothing more than “a disagreement with the weighing of the § 3553(a) factors.” (App. A at 3).

9. The Court of Appeals did acknowledge Petitioner’s citation to another line of circuit precedent requiring full consideration of the § 3553(a)(6) “unwarranted sentence disparities” factor upon a showing of “two similarly situated co-conspirators [who] were given extremely disparate sentences by different district court judges.” (App. A. at 3). But the Court of Appeals said that line of circuit precedent was limited to the particular “unusual circumstances” just described, and thus did not apply to the vast majority of cases where a defendant’s only possible means to substantiate a § 3553(a)(6) presentation would be exemplar results of unrelated cases, involving similarly-situated defendants. (App. A at 3). Moreover, the Court of Appeals did not explain why a district court would be required to give full consideration to a § 3553(a)(6) presentation in the case of co-conspirators, but not in any other case. (App. A at 3).

10. Petitioner pointed out these matters via a motion for rehearing, but the Court of Appeals declined the invitation to re-hear the matter. (App. B). As explained below, Petitioner now requests that this Court review the circuit rule permitting the district court to disregard Petitioner’s § 3553(a)(6) presentation, resulting in a prison term far more severe than that levied upon similarly-situated defendants.

REASONS FOR GRANTING THE PETITION

- I. This Court should grant the Petition to review a circuit rule of federal sentencing procedure which permits a district court to disregard a colorable presentation pertinent to the mandatory “unwarranted sentence disparities” factor of 18 U.S.C. § 3553(a)(6). The circuit rule: (i) divides the federal circuits; (ii) conflicts with this Court’s decisions; and (iii) frustrates the purpose of the federal sentencing scheme.**

By way of the Question Presented, *supra*, Petitioner asks this Court to consider a rule of sentencing procedure instituted by some (but not all) federal circuits, *i.e.*, a circuit rule that a district court has no obligation to consider a colorable presentation indicating that a particular defendant should receive a sentence in line with similarly-situated defendants. The trouble with the circuit rule at issue is that it runs counter to the Sentencing Reform Act of 1984 (SRA), Pub. L. 98-473, Ch. II (1984), as modified by this Court’s decisions in *United States v. Booker*, 543 U.S. 220 (2005) and *Gall v. United States*, 552 U.S. 38 (2007). To see why this is so, the discussion will begin with a short contextual background of the post-*Booker*/*Gall* SRA, which leads into circuit rule at issue and the reasons why this Court should address the Question Presented.

A. The post-*Booker*/*Gall* scheme of federal sentencing.

The SRA instituted the modern federal scheme of criminal sentencing procedure by, *e.g.*, (i) creating the federal Sentencing Commission; (ii) contemplating the United States Sentencing Guidelines; and (iii) promulgating the factors that federal district courts must take into account when imposing a criminal penalty. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 363-70 (1989) (discussing SRA and its legislative history).

The overriding purpose of the SRA was to assure “certainty and fairness” in the federal sentencing process, and in particular to “avoid unwarranted sentencing disparities among defendants with similar records.” *Mistretta*, 488 U.S. at 374 (quoting 28 U.S.C. § 991(b)(1)); *accord*, e.g., S. Rep. 98-225 at 52 (1983) (“A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.”). As already mentioned, the Act aimed to accomplish this purpose by calling for the creation of federal Sentencing Guidelines that would generate a “defined range” of criminal penalties in each case. *Mistretta*, 488 U.S. at 368. And to further assure the reduction or elimination of unwarranted disparities in federal sentencing, the SRA provided that the Guidelines would be mandatory and “binding on the courts.” *Id.* at 367.

And that is precisely how the federal sentencing regime worked until 2005, when this Court held that the SRA contained a serious flaw placing it at odds with the Sixth Amendment, *i.e.*, the statutory scheme permitted a judicial officer to make factual determinations—above and beyond any facts that a jury had necessarily found upon rendering a guilty verdict—that effectively increased the defendant’s maximum penalty. *United States v. Booker*, 543 U.S. 220, 230-44 (2005). After contemplating a number of options to remedy the scheme, this Court settled on the seemingly least-intrusive solution of excising the few statutory provisions which made the Sentencing Guidelines mandatory and binding upon sentencing judges. *Id.* at 259-60. And though this Court expressly invited Congress to re-formulate the statute, *id.* at 265, the Legislative Branch has thus far signaled its approval of this Court’s solution by declining to do so (for well over a decade as of this writing).

Nonetheless, in this post-*Booker* era lower courts have sometimes found it difficult to settle on the appropriate sentencing procedures to balance the now-advisory federal Sentencing Guidelines, with the now-mandatory sentencing considerations set out in 18 U.S.C. § 3553(a)—the statute at issue in the Question Presented and reproduced *supra*, Statute Involved. *See Booker*, 543 U.S. at 259-60.

Hence, this Court has been called upon to supply guidance from time to time. Perhaps most prominently, in *Gall v. United States*, 552 U.S. 38, 49 (2007) this Court instructed that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range” to serve as an “initial benchmark.” That decision went on to explain that the parties must then be granted an opportunity to argue for the sentence they deem most appropriate, after which sentencing judge is obliged to “consider all of the § 3553(a) factors to determine whether they support the sentence requested.” *Id.* at 49-50 (emphasis added).

Still, lower courts have sometimes established circuit rules that ultimately fail as contrary to post-*Booker/Gall* SRA sentencing procedures. For example, in the initial *Gall* decision this Court invalidated a circuit rule which required a district judge to find “extraordinary circumstances” to vary below a Guidelines sentencing range. *Id.* at 47. Later, this Court has overturned a number of other circuit rules which curtailed a sentencing court’s consideration of information pertinent to mandatory § 3553(a) factors, instead holding that a sentencing court may consider:

- (i). Any policy disagreement with the applicable federal Sentencing Guideline.

Kimbrough v. United States, 552 U.S. 85, 93 & 108-12 (2007).

(ii). Any post-sentencing rehabilitation evinced by the defendant. *Pepper v. United States*, 562 U.S. 476, 486-87 & 504-05 (2011).

(iii). Any statutory minimum sentence associated with other counts of conviction. *Dean v. United States*, 137 S. Ct. 1170, 1175 & 1178 (2017).

Add to this list the circuit rule that drove this outcome in the case at hand, *i.e.*, the holding that a federal sentencing judge needn't bother to "compare and contrast the defendant under consideration with a similar offender who has been sentenced by another federal judge"—even when (as here) the defendant makes a colorable and detailed presentation of sentences imposed upon similarly-situated defendants within the same federal district. (App. A at 3).

This despite this Court's *Booker/Gall* mandate that a sentencing court is to "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Gall*, 552 U.S. at 49-50 (emphasis added). And despite the clear SRA mandate that a sentencing court "shall consider" all of those same statutory factors, including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a) & (a)(6) (emphasis added); *see also* 28 U.S.C. § 991(b)(1)(B).

As the remainder of this discussion will show, the circuit rule at issue: (i) divides the federal circuits; (ii) contravenes this Court's instructions concerning the requisite post-*Booker/Gall* SRA sentencing procedures; and (iii) generates federal criminal penalties at odds with the SRA's principal goal of reducing or eliminating unwarranted disparities in federal criminal sentencing. All of which are compelling reasons for this Court to intervene, and answer the Question Presented above.

B. The circuit rule at issue divides the federal circuits.

As already mentioned, the circuit rule articulated in the Question Presented authorizes a sentencing court to entirely discount a defendant's colorable presentation indicating that the defendant's penalty should fall within the same proximity of exemplar cases, so as to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

As demonstrated by the opinion below, (App. A), the Eighth Circuit has adopted such a circuit rule. And it is joined by a number of other federal circuits that have adopted the same or similar rules, permitting disregard of like presentations pertinent to a mandatory SRA sentencing factor. *E.g.*, *United States v. Diaz*, 637 F.3d 592, 604 (5th Cir. 2011) ("[A]voiding unwarranted general sentencing disparities is not a factor that we grant significant weight where the sentence is within the Guidelines range."); *United States v. Bartlett*, 567 F.3d 901, 908 (7th Cir. 2009) ("The best way to curtail unwarranted disparities is to follow the Guidelines, which are designed to treat similar offenses and offenders similarly. . . . A sentence within a Guideline range necessarily complies with § 3553(a)(6).") (internal punctuation omitted); *United States v. Gantt*, 679 F.3d 1240, 1249 (10th Cir. 2012) ("Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities."); *United States v. Hill*, 643 F.3d 807, 885 (11th Cir. 2011) (same). As noted in the above parentheticals, these courts reason that there is no utility in considering sentences imposed by other district judges in similar cases.

Rather, this camp rejects any need to consider such presentation as obviated by a correctly-calculated Guidelines range. *See, e.g., id.* Or, as in the opinion below, the Eighth Circuit characterizes any such presentation as “at base a disagreement with the weighing of the § 3553(a) factors.” (App. A at 3).

Other circuits take the opposite position, however. For example, the Third Circuit holds that when a party makes a “colorable argument” going to the § 3553(a)(6) unwarranted-disparities factor—such as pointing out sentences imposed upon similarly-situated defendants ensnared in the same investigation—then the district court is obliged “respond to that argument as part of its meaningful consideration of the relevant statutory factors.” *United States v. Merced*, 603 F.3d 203, 222 (3d Cir. 2010). Still other circuits have imposed an obligation to give meaningful consideration to this same factor and any related presentation. *See, e.g., United States v. Frias*, 521 F.3d 229, 236 (2d Cir. 2008) (“We have held that section 3553(a)(6) requires a district court to consider nationwide sentence disparities”); *United States v. Wallace*, 597 F.3d 794, 803 (6th Cir. 2010) (noting a “sentencing judge’s obligation to address sentencing disparities under § 3553(a)(6)” and holding that “when a defendant raises a particular non-frivolous argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant’s argument and that the judge explained the basis for rejecting it”) (internal punctuation omitted). *Accord* A. Siegler, *The Court of Appeals’ Latest Anti-Booker Backlash*, 82 U. Chi. L. Rev. 201 (2015) (discussing split of authority).

The circuit rule at issue has thus generated a conflict of authority amongst the federal circuits, which on its own counsels in favor of granting this Petition to resolve

the Question Presented. S. Ct. R. 10(a). Beyond that, the disputed rule conflicts with this Court’s prior decisions and statutory mandates, *see id.* R. 10(c), the next topic for discussion.

C. The circuit rule at issue conflicts with the statutory mandate and this Court’s decisions.

In construing the post-*Booker/Gall* SRA, this Court has made clear that sentencing courts are not free to pick and choose which § 3553(a) sentencing factors to consider when imposing a prison term. Rather, this Court has said that a district court is to “consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Gall*, 552 U.S. at 49-50 (emphasis added). And with respect to the § 3553(a)(6) “unwarranted sentence disparities” factor at issue here, this Court has expressly said that a district court “must take account of sentencing practices in other courts,” after which “these disparities must be weighed against the other § 3553(a) factors.” *Kimbrough*, 552 U.S. at 108

Moreover, this Court has flatly rejected any proposed construction of the SRA which would have effect of “elevat[ing] [one or more] § 3553(a) factors above all others.” *Pepper*, 562 U.S. at 504. All these conclusions conform to the SRA’s text and purpose, as the language commands that, in “determining the particular sentence to be imposed,” a sentencing court “shall consider” the sentencing factors listed in the Statute Involved, reproduced earlier. 18 U.S.C. § 3553(a) (emphasis added).

Thus, for example, a sentencing court is obliged to study a presentence investigation report directly pertinent to the sentencing factor of the “nature and circumstances of the offense” as well as the “history and characteristics of the

defendant.” *Id.* § 3553(a)(1). And a sentencing court is required to correctly determine the advisory sentencing range generated by the United State Sentencing Guidelines, as this directly informs the sentencing factor involving the “sentencing range . . . as set forth in the guidelines . . . issued by the Sentencing Commission.” *Id.* § 3553(a)(4).

The main trouble with the circuit rule at issue here is that it gives a sentencing court license to entirely ignore an offered presentation that informs a coordinate and equal sentencing factor, *i.e.*, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” *Id.* § 3553(a)(6). The circuit rule is thus akin to one that would permit a sentencing court to disregard the contents of a presentence investigation report. *See id.* § 3553(a)(1). Or ignore the sentencing range suggested by the Guidelines. *See id.* § 3553(a)(4).

Neither this Court’s decisions nor the plain language of the SRA grant any such license. Quite the opposite, as pointed out above. A sentencing court must consider all the SRA sentencing factors. *Id.* § 3553(a); *Gall*, 552 U.S. at 49-50. And specifically, “Section 3553(a)(6) directs district courts to consider the need to avoid unwarranted disparities” in federal criminal sentencing. *Kimbrough*, 552 U.S. at 108.

This necessarily means that a district court must give due consideration to any colorable presentation that bears upon any or all of those same SRA sentencing factors. *See, e.g., Pepper*, 562 U.S. at 491-92 & 504-05 (observing that evidence of defendant’s post-sentencing rehabilitation is “clearly relevant” to “history and characteristics” sentencing factor of § 3553(a)(1), and reversing a circuit rule precluding consideration of such information on re-sentencing); *United States v.*

Cunningham, 429 F.3d 673, 678 & 679-80 (7th Cir. 2005) (remand required when sentencing judge declined to address proffered evidence of defendant's psychiatric problems and substance abuse and offered as relevant to several § 3553(a) factors). Of particular relevance here, this Court has explicitly said that when a party marks a proposed sentence as potentially incongruous with the "unwarranted sentence disparities" factor of § 3553(a)(6), then a district court "must take account of sentencing practices in other courts," after which "these disparities must be weighed against the other § 3553(a) factors." *Kimbrough*, 552 U.S. at 108.

The circuit rule at issue here contradicts all of these mandates. And the circuit rule is especially problematic given the main purpose of the SRA, which is to reduce or eliminate unwarranted disparities in the penalties imposed upon similarly-situated defendants. S. Rep. 98-225 at 52 (1983) ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity."). The SRA's legislative history demonstrates that Congress was particularly concerned with ameliorating such unwarranted disparities, whether "handed down by judges in the same district" or "judges from different districts and circuits in the federal system." *Id.* at 41. And yet the circuit rule encapsulated by the Question Presented permits a sentencing court to ignore evidence bearing upon this crucial and mandatory sentencing factor.

As mentioned in the prior subsection, the courts adopting the circuit rule at issue have justified the choice by claiming that unwarranted sentencing disparities are fully encapsulated by the Guidelines range, or the total mix of § 3553(a) factors. *Supra* § I.B & App. A. But this reasoning must fail when one considers this Court's mandate that that a sentencing court account for "all" the § 3553(a) factors, *Gall*, 552

U.S. at 49-50, specifically including the § 3553(a)(6) “unwarranted sentence disparities” factor, *Kimbrough*, 552 U.S. at 108.

Moreover, any suggestion that the Guidelines range fully accounts for unwarranted sentence disparities renders § 3553(a)(6) a nullity, entirely abrogated by the § 3553(a)(4) factor involving the Guidelines. Or perhaps by the mix of other § 3553(a) factors. But any such claim runs headlong into this Court’s rule which rejects any attempt to “elevate” certain § 3553(a) factor above others. *Pepper*, 562 U.S. at 504.

Hence, the circuit rule at issue here generates discordant rules of law amongst the federal circuits, contradicts this Court’s prior decisions, and frustrates a primary purpose of the SRA, which is to reduce or eliminate unwarranted disparities in the criminal penalties imposed upon similarly-situated defendants. The Question Presented thus meets numerous criteria for this Court’s discretionary review. S. Ct. R. 10. This well summarizes the reasons for this Court to grant the Petition, but before closing the discussion should circle back to the case at hand to demonstrate why the Court should select this particular case to resolve the Question Presented.

D. The case at hand presents an excellent vehicle by which to review the Question Presented.

As discussed earlier, *supra* Statement of the Case, in this case Petitioner pleaded guilty to a federal offense. And the particular offense at issue is one that commonly results in below-Guidelines variant sentences—very often far below the advisory Guidelines range. Aware of this, Petitioner’s counsel supplied the sentencing

court with a compendium of penalties recently imposed upon similarly-situated defendants in the same federal judicial district.¹ (App. C & D).

The point of the presentation was that defendants like Petitioner—who used a computer to view and distribute contraband child-pornographic images but who showed no history or risk of actual physical assault upon minors—most commonly received prison sentences in the realm of 60 months (results varied, but Petitioner’s counsel cited cases resulting in prison terms of 27 months, 60 months, 72 months, 85 months, and many others in close proximity to these). (App. C & D). Petitioner’s counsel made clear that this presentation was meant to demonstrate unwarranted sentence disparities that would result, should the district court select a materially higher sentence. (App. D at 1 & App. E at 22-25).

And yet the district court imposed a 130-month prison term, declining to address § 3553(a)(6) presentation at all. (App. E at 14 & 22-26). The Court of Appeals decision—in accordance with a number of other circuits specified earlier—explicitly permitted the district court to ignore the offering in this way. (App. A).

¹ A number of circuit courts—including the Eighth Circuit Court of Appeals—have said that the 18 U.S.C. § 3553(a)(6) factor “refers to national disparities.” *E.g.*, *United States v. Pierre*, 870 F.3d 845, 850 (8th Cir. 2017). This has led federal prosecutors to argue that a § 3553(a)(6) presentation of intra-district penalties imposed upon similarly-situated defendants is inapposite, since such presentations demonstrate sentencing practices within a particular district and not nationwide. But as Petitioner pointed out to the courts below, intra-district exemplars do constitute a sample of national sentence disparities. And the SRA’s legislative history demonstrates that Congress was concerned with remedying all unwarranted sentence disparities, both intra-district and inter-district. *See* S. Rep. 98-225 at 41 (stating that sentencing reform is aimed at ameliorating unwarranted sentencing disparities imposed upon similarly situated defendants, whether the disparate sentences are “handed down by judges in the same district” or “by judges from different districts and circuits in the federal system”). Moreover, this Court has instructed that § 3553(a)(6) requires that a district court “must take account of sentencing practices in other courts” without limiting the relevant information to nationwide statistics or the like. *Kimbrough*, 552 U.S. at 108. Hence, a § 3553(a)(6) presentation involving intra-district exemplars is entirely appropriate and apposite.

The case at hand thus supplies an archetype of all the issues already discussed. Certainly, it fits into the inter-circuit split of authority described above. But beyond that, it provides a stark illustration of the problematic results of the circuit rule at issue. That is to say, the SRA and this Court's decisions seek to assure fair and just punishment, including minimization of unwarranted disparities amongst similarly-situated defendants. But here, Petitioner is serving a sentence of 130 months, approximately double the penalty imposed upon similarly-situated defendants in the applicable judicial district. At a minimum, a district court should take such disparities into account when imposing a sentence. But the circuit rule at issue permits and even encourages a district court to ignore this mandatory sentencing factor altogether.

In sum, this case well illustrates all the legal concepts discussed above, and thus constitutes an excellent vehicle for this Court's discretionary review of the Question Presented.

CONCLUSION

For all these reasons, Petitioner asks the Court to grant this Petition for a Writ of Certiorari.

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Respectfully submitted,

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