No. 18-642

IN THE

Supreme Court of the United States

MORRIS E. ZUKERMAN,

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

BRIEF FOR AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street NW
Washington, D.C. 20036
(202) 872-8600

PETER B. SIEGAL
Counsel of Record
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W.,
Suite 1000
Washington, D.C. 20001
(202) 662-4663
peter.siegal@nortonrosefulbright.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary professional bar

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the National Association of Criminal Defense Lawyers ("NACDL"), its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both parties were timely notified more than 10 days in advance of NACDL's intent to file this brief and have consented to its filing.

association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers, and its members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. Consistent with NACDL's mission of advancing the proper, efficient, and fair administration of justice, NACDL files numerous amicus briefs each year in the United States Supreme Court and other state and federal courts, all aimed at providing assistance in cases that present issues of broad importance to criminal defendants, criminal-defense lawyers, and the criminal justice system as a whole.

This is one such case. As the petition explains, the questions presented raise two recurring and important criminal sentencing issues that have made the Second Circuit a glaring outlier among the courts of appeals. As to the first, the Second Circuit (and only the Second Circuit) has adopted a partial-remand-without-vacatur procedure that routinely results in the affirmance, based on a district court's hindsight explanations, of sentences imposed contrary to law. The "*Jacobson* remand," as the court of appeals calls it, effectively eliminates the statutory mandate that a district court explain its reasons "at the time of sentencing." 18 U.S.C. § 3553(c). For that reason alone, the procedure demands this Court's attention: The rule that a district court must state its reasons in real time is one of the few checks on sentencing discretion, *see, e.g.*, *Rita* v. *United States*,

551 U.S. 338, 356-57 (2007), and depriving it of substance has repeatedly led the Second Circuit to affirm sentences that would be vacated by any other court of appeals.

The Second Circuit's substantive review of criminal sentences has wandered astray, as well, and the effect is no less far-reaching. As the petition explains (with respect to the second question presented), the court of appeals has inexplicably departed from the consensus understanding, mandated by this Court's "pellucidly clear" case law, that appellate review of a criminal sentence's substantive reasonableness "must" take place under "the familiar abuse-of-discretion standard." *E.g.*, *Gall* v. *United States*, 552 U.S. 38, 46 (2007). In lieu of that standard, the court of appeals has for nearly ten years applied a "shocks the conscience" test borrowed from the unrelated context of determining whether an intentional tort committed by a state actor violates substantive due process. That inapposite inquiry imposes a far greater burden than abuse-of-discretion review, generally requiring culpable misconduct by the district court before a sentence may be deemed unreasonable. And, like the *Jacobson* procedure, it has developed into a core feature of sentencing law within the Second Circuit, inevitably resulting in the approval of extraordinary sentences (such as the petitioner's) that would not be affirmed in any other court.

This case presents an opportunity to root out two entrenched legal errors that, if left in place, will continue to affect virtually every sentencing appeal in the Second Circuit. The petition should be granted.

REASONS FOR GRANTING CERTIORARI

I. *JACOBSON* REMANDS HAVE EVISCERATED THE SECOND CIRCUIT'S REVIEW OF SENTENCING PROCEDURE.

As the petition explains, the Second Circuit's *Jacobson* remand procedure is inconsistent with the sentencing statutes and "out of step with the practice of other Circuits." *Cf. Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1906 (2018). In the rest of the country, the remedy for an unlawful sentence is a remand for resentencing—not a request for a better explanation. That distinction matters: The *Jacobson* procedure locks district courts into earlier, unlawfully imposed sentences, creating an unavoidable temptation to generate *post hoc* justifications that have never been subjected to adversarial testing.

This case amply demonstrates the sway of that temptation and the unfairness that results. *See* Pet. 23-28. But although the petitioner's sentence is extraordinary, *id.* at 9-12, the procedures employed to affirm it are quickly becoming routine. The Second Circuit regularly employs *Jacobson* remands to "patch[] up" the district court record after the fact, *cf. United States* v. *Reed*, 859 F.3d 468, 475 (7th Cir. 2017) (Wood, C.J., concurring in part and dissenting in part), time and again turning deeply flawed sentences into easy affirmances. In recent years, the court of appeals has done so more and more, with the result that, in the Second Circuit, the requirement that a district court "state in open court," "at the time of sentencing," "the reasons for its imposition of the particular sentence," § 3553(c), has been sapped of force.

A. The *Jacobson* Procedure Violates The Sentencing Laws And Conflicts With Otherwise-Uniform Nationwide Practices.

Pursuant to 18 U.S.C. § 3742(f)(1), a court of appeals that "determines that [a] sentence was imposed in violation of law * * * *shall remand the case for further sentencing proceedings*." (emphasis added). Upon such a remand, "[a] district court * * * *shall resentence* a defendant in accordance with section 3553," *id.* § 3742(g), which means stating "in open court," "at the time of sentencing," "the reasons for its imposition of the particular sentence," *id.* § 3553(c).

The Second Circuit has all but admitted that the *Jacobson* procedure violates those requirements. In *Jacobson* itself, the court acknowledged that the procedure is not "a formal remand." *United States* v. *Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994) (process can be accomplished "while retaining jurisdiction, without a mandate issuing or the need for a new notice of appeal"). And, although the law unambiguously requires "resentenc[ing]" on remand, §§ 3553(c), 3742(g), the Second Circuit has made clear that the "basic * * * difference" setting *Jacobson* apart from "an ordinary remand" is that no resentencing is permitted. *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* v. *Pemex-Exploración y Producción*, 832 F.3d 92, 104 n.8 (2d Cir. 2016) (*Jacobson* generally prohibits "reconsideration of the outcome"). On a typical *Jacobson* remand, therefore, the district court can honor the mandate or the statute, but it cannot honor both.[2]

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[2] As is set forth in more detail below, the resulting statutory violation is profoundly consequential, both for individual

No surprise, then, that the other Circuits have declined to adopt *Jacobson*. In those Circuits, it is black-letter law that "procedural error * * * necessitat[es] * * * resentencing." *See, e.g.*, *United States* v. *Beckley*, 515 F. App'x 373, 377 (6th Cir. 2013); *see also* Pet. 22-23 (collecting cases). The result of the Second Circuit's departure from that otherwise-unanimous view is that appeals (such as the petitioner's) that would be successful in any other federal court routinely result in affirmance in the Second Circuit.

B. *Jacobson* Remands Are An Entrenched And Pernicious Feature Of Second Circuit Criminal Practice.

The petition ably explains the unfairness that resulted from the *Jacobson* remand in this case, which led to the affirmance of an extraordinary sentence on transparently *post hoc* grounds. Pet. 23-28. But virtually none of that unfairness is confined to this case. To the contrary, the Second Circuit has repeatedly turned to *Jacobson* to affirm suspect sentences, and has done so with increasing frequency in recent years.

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defendants and for the system as a whole. *See* Part III, *infra*. Defendants in *Jacobson* cases lose the opportunity to persuade district courts to impose lower sentences on remand. And, by fostering the impression that the reasons given at the time of sentencing are irrelevant, *Jacobson* undermines confidence that criminal sentences are the product of reasoned decisionmaking in the first place. *See generally, e.g.*, *United States* v. *Merced*, 603 F.3d 203, 215 (3d Cir. 2010) ("[I]t is not enough for the district court to carefully analyze the sentencing factors. A separate and equally important procedural requirement is *demonstrating that it has done so*.").

1. The *Jacobson* remand dates to a 1994 case in which a defendant convicted of drug and wire-fraud conspiracies appealed his sentence, arguing that the district court had violated due process by relying on his national origin and naturalization status to impose a harsher sentence than it gave his co-conspirators. *See, e.g.*, *Jacobson*, 15 F.3d at 20-21.[3] That argument was based principally on the following comments, which constituted the entirety of the district court's statement of reasons for his sentence:

> [You] come to this country from behind what was then the [Iron] Curtain * * * . You come here and one thing you have going for you is brains * * * . You have brains, you have an opportunity given to you by the new country. The one that you left certainly would never give you anything like this opportunity * * * . Maybe it is a failing in the generation from which I came. We always believed that if we got something, we were obligated to give something back, something of value. You don't seem to believe that. You got all kinds of things, you got freedom, you got an opportunity to use your brains, you had a damned good life; and for peanuts you were willing to screw it up without regard to the people whose lives you might be smashing. You had as much feeling for them as

[3] The defendant received "twelve months' imprisonment, three years' supervised release, and a $10,000 fine following his guilty plea to one count of conspiracy to receive misbranded and adulterated drugs in interstate commerce and to commit wire fraud." *Id.* at 20. His co-conspirators, two of whom "the government considered more culpable" than the defendant, received sentences between four and eight months and associated punishment. *Id.* at 21.

> the Romanian secret police might have for people who are enemies of society—nothing whatsoever.

Id. at 21.

Based on those statements, the Government conceded on appeal that the district court had given "no basis other than [the defendant's status as a naturalized citizen] for [the] sentence." *Jacobson*, 15 F.3d at 21. It also agreed that the defendant's naturalization "status * * * was not a valid basis for a disparity in sentences." *Ibid.* Yet, rather than vacate and remand on the basis of those concessions, the court of appeals merely "entered an order requesting [the district court] to supplement the record * * * regarding [its] reasons for [the] sentence." *Ibid.* The sentence itself remained undisturbed. *Ibid.*

In the ensuing proceedings, the district court "questioned the basis" for the court of appeals' procedural maneuver, but nevertheless provided a new "elaborat[ion]" of its "reasons for the sentencing disparity." *Jacobson*, 15 F.3d at 21. Unsurprisingly, now that all had agreed the national-origin rationale was impermissible, the district court disclaimed it. *Ibid.* In its place, the court provided a new and cleaner explanation: the disparity had been based on the defendant's "intelligence," and his failure to display a "sufficient degree of remorse." *Ibid.* (quoting district court).

The case then returned to the court of appeals. On the merits, the court concluded without explanation that the district court's "clarification" was "persua[sive]." *Jacobson*, 15 F.3d at 23. Based on that unquestioning acceptance, and reasoning that "intelligence" and "lack of remorse" were "individual, distinctive factor[s]" that were well within the district

court's discretion to weigh, the court easily affirmed. *Ibid.*[4] The Government's concession that the sentence was based only on a single, unlawful rationale had been rendered irrelevant.

2. In the period since *Jacobson*, and with increasing frequency in the last two years, the Second Circuit has continued to invoke that precedent to seek—and then to credulously approve—dubious, *post hoc* explanations for criminal sentences.

In some instances, the court has used *Jacobson* to affirm sentences that were based on acknowledged errors of fact. The recent case of *United States* v. *Casas-Melendez*, 684 F. App'x 18 (2d Cir. 2017), provides such an example. There, the appellant presented only a single argument: that the district court had plainly erred by basing his sentence on the erroneous "view that, contrary to his claim of reforming his life after robbing someone in 2001, he had 'turned a blind eye to crimes that were being committed within his own home.'" Br. for Appellant 3, 6, *United States* v. *Casas-Melendez*, No. 15-3511 (2d Cir. Mar. 24, 2016), ECF No. 25 ("*Casas* Br."). As the Government conceded on appeal, that rationale was unsupportable, because the appellant had been

[4] With respect to the district court's procedural discomfort, the panel explained its authority "to seek supplementation of the record while retaining jurisdiction." *Id.* at 21-22. The court of appeals did not address—and, despite many *Jacobson* remands, has never expressly considered—the propriety of employing that practice in the sentencing context, where after-the-fact supplementation has long been recognized as improper. *See, e.g.*, *United States* v. *Lambert*, 984 F.2d 658, 663 (5th Cir. 1993) (*en banc*) (in order to affirm, "the appellate court must be able to ascertain *from the reasons given for the sentence selected*, * * * the legitimate basis" for a chosen sentence) (emphasis added).

incarcerated during the period in question. Remand Order, *Casas-Melendez*, No. 15-3511 (2d Cir. July 13, 2016), ECF No. 53 ("*Casas* Remand Order"), at 1.

The appellant's argument that the error was material—another point the Government conceded—turned on extensive remarks the court had made at sentencing:

> While perhaps you may have been busy working at your construction jobs and trying to help raise the family and give them guidance, *you were living with the mother of your children, with your wife, who was herself engaged in significant felony federal violations of money laundering [laws] and defrauding the United States. You had to be aware of what she was doing*. And as I understand from the presentence report and the write-up, it was activity that involved millions of dollars, and for that she's being deported. So, for however you say you were here to be law-abiding, at the minimum, *you turned a blind eye to crimes that were being committed within your own home*.

Casas Br., at 5 (emphasis added).

On the basis of those remarks, the Government agreed that vacatur and remand for resentencing were the appropriate next steps. Indeed, it was the United States, not the appellant, that "move[d] to vacate the Appellant's sentence and to remand for resentencing," acknowledging that "the district court committed plain error by relying on a clearly erroneous factual finding * * * when determining an appropriate sentence." *Casas* Remand Order, at 1.

Yet here, as in *Jacobson*, the court of appeals would not give up so fast. Declining to grant the Government's unopposed request for vacatur, it

instead issued a *Jacobson* order, asking the district court to "state, on the record, whether the erroneous factual finding affected the sentence imposed." *Ibid.* As in *Jacobson*, the result was predictable: Conducting a harmless-error review of its own mistaken judgment, the district court asserted without adornment that the "finding" (which it did not even acknowledge was erroneous) "did not affect the sentence previously imposed." Minute Entry, *United States* v. *Casas-Melendez*, No. 1:15-cr-19 (E.D.N.Y. Sept. 6, 2016). Again, that was good enough for the court of appeals, which, having shored up another sentence the Government could not defend, accepted without analysis the district court's statement and easily affirmed. *See Casas-Melendez*, 684 F. App'x at 18-19.[5]

The Second Circuit has also deployed *Jacobson* to affirm sentences reflecting clear *legal* errors. Another 2017 case, *United States* v. *Simpson*, 678 F. App'x 53, exemplifies the practice. There, the defendant appealed an order denying his motion for a sentence reduction. He argued that the denial improperly turned on the fact that, at his original sentencing, the court had disagreed with the Probation Department's calculation of his offense level and proceeded based on

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[5] In *Casas-Melendez*, as in *Jacobson*, the Second Circuit evaded the question of whether *Jacobson* remands are permissible in the sentencing context. The appellant squarely raised that question in the second round of appellate briefing. Supp. Br. for Appellant 1, *Casas-Melendez*, No. 15-3511 (2d Cir. Nov. 7, 2016), ECF No. 65 (procedure improper to fix "mistake of fact" embedded in sentence). Yet the court deemed the argument waived "by fail[ure] to raise it in the initial appeal," *Casas-Melendez*, 684 F. App'x at 19, even though the issue had not arisen until the panel *ended* the "initial appeal" by ordering a *Jacobson* remand *sua sponte*.

its own, lower calculation. *Id.* at 55. To prove it, he pointed to the following, seemingly clear statement the court had made in the course of denying his motion:

> At sentencing, the Court applied a total offense level of 32, reducing by five levels the total offense level calculated by the United States Probation Department * * * . *Considering the reductions already granted, this Court finds that no further alterations in sentence are warranted at this stage.*

Br. For Appellant 10, *United States* v. *Simpson*, No. 16-849 (2d Cir. July 13, 2016), ECF No. 20 (emphasis added).

On appeal, the Second Circuit agreed that the law prohibits reliance on an earlier, unchallenged (and presumably accurate) recalculation of the defendant's offense level to deny a reduction. *Simpson*, 678 F. App'x at 55. And, in the face of the Government's argument to the contrary, the court of appeals also found that the district court had done just that: "[T]he specific language used in the order suggests that the district court was not referring to [any other factor], but rather to the earlier adjustments it had made to Simpson's guidelines calculation." *Ibid.*

Yet even then—upon finding that the district court *had in fact relied on* a ground *the court of appeals agreed* was unlawful—the Second Circuit *still* did not vacate. Nor did it even consider it. Instead, it employed *Jacobson*, "directing the district court to clarify by order whether, without considering the effect of the adjustments it made in determining Simpson's guidelines range at his original sentencing, it would have reached the same decision." *Simpson*, 678 F. App'x at 55. In short order, the district court,

like so many others before it, "clarified" that its error was harmless, and the court of appeals affirmed. *United States* v. *Simpson*, 695 F. App'x 17, 18 (2d Cir. 2017).[6]

3. In this case, the Second Circuit invoked *Jacobson* to salvage a (particularly extreme) sentence issued without *any* explanation, erroneous or otherwise, that could support it. That result clearly offends the relevant statutes, *see supra*, at 5-6, but in the Second Circuit, it is far from unique.

In *United States* v. *Evans*, 293 F. App'x 63, 68-69 (2d Cir. 2008), the defendant appealed his sentence on the ground that the district court had offered a contradictory, nonsensical explanation: it had calculated his guidelines range "in accordance with his status as a career offender," but had then "departed downward based on the fact that [he] was not considered a career offender." The result of that incoherence was that the court of appeals could determine neither what Guidelines provision the district court had relied upon nor why it had done so.

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[6] *See also, e.g.*, *United States* v. *Wallace*, 2018 WL 5920405, at *1 (2d Cir. Nov. 13, 2018) (affirming sentence, despite district court's express reliance on "impermissible factor," after district court "clarified" that "it would have reached the same decision"); *United States* v. *Tejada*, 364 F. App'x 714, 715 (2d Cir. 2010) ("[W]e hereby remand the case for the district judge to clarify whether he would have sentenced [the defendant] to a shorter term of imprisonment had he understood that he was permitted to do so."). *Compare United States* v. *Breynin*, 563 F. App'x 78, 78-79 (2d Cir. 2014) (*Jacobson* remand to avoid deciding "close" question by instead "solicit[ing] the district court's view as to whether it is confident that it would impose the same sentence regardless") *with United States* v. *Breynin*, 578 F. App'x 25, 26 (2d Cir. 2014) (affirming, after district court's assurance that "the issue did not make a difference").

Id. at 69. But even then, the court refused to act "without first requesting clarification from the district court." *Ibid.* The ensuing request did not permit the district court to reach a new result, *ibid.* (employing *Jacobson* "for the limited purpose of supplementing the record"), and, upon receiving the district court's response, the court of appeals affirmed without analysis, *United States* v. *Evans*, 309 F. App'x 460, 461 (2d Cir. 2009). This time, the fact pattern struck the Second Circuit as so unobjectionable that it permitted the appellant's counsel to withdraw. *Ibid.* ("In light of the district court's clarification of the record, we agree * * * that there are no non-frivolous issues that could be raised on appeal."). *See also, e.g.*, *United States* v. *Smith*, 617 F. App'x 21, 21-22 (2d Cir. 2015) (*Jacobson* remand for district court to clarify which of two sentences it had imposed and, if the above-Guidelines option, to provide the "statement of reasons" it had entirely omitted at sentencing).[7]

The acknowledged procedural errors in each of these cases would have required resentencing in any other court of appeals. This Court's intervention is needed.

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[7] Under the pre-*Booker* regime, invocation of new reasons in support of a departure was impermissible even at a valid resentencing. *See* 18 U.S.C. § 3742(g)(2), *invalidated by Pepper* v. *United States*, 562 U.S. 476, 480-81 (2011). By now failing even to require resentencing—and instead permitting new reasons to be invoked in support of the original, unlawful sentence—the Second Circuit has ventured far from Congress's vision, in clear violation of sections 3553 and 3742.

II. THE SECOND CIRCUIT'S ESTABLISHED STANDARD FOR REVIEWING SUBSTANTIVE REASONABLENESS VIOLATES THIS COURT'S PRECEDENT.

The second question presented is "[w]hether * * * a court of appeals may review a sentence for substantive unreasonableness under a 'shocks-the-conscience' standard." Pet. ii. The answer is clearly no. As the petition explains (at 29-37), this Court's cases "ma[k]e it pellucidly clear that the familiar abuse-of-discretion standard * * * applies to appellate review of sentencing decisions." *Gall*, 552 U.S. at 46. The "shocks the conscience" test is incompatible with that rule. *Cf. Rosales-Mireles*, 138 S. Ct. at 1906-07.

Considered alone, the Second Circuit's chronic application of the wrong standard warrants certiorari because it creates a circuit split and results in routine misapplication of this Court's precedents on an issue that arises constantly. Yet, when viewed in combination with the Second Circuit's refusal to enforce *procedure*, *see supra*, at 5-14, the consistent application of a toothless *substantive* standard becomes exponentially worse. *See, e.g.*, *Gall*, 552 U.S. at 50-51 (appellate courts "must review" criminal sentences, and review must be "meaningful"). This Court's review is necessary.

A. The Second Circuit Has Employed The "Shocks The Conscience" Standard For Nearly A Decade.

Like the *Jacobson* remand, the "shocks the conscience" test has become a core feature of sentencing law in the Second Circuit, with the result that appeals in that court are routinely subjected to a profoundly anomalous rule of decision.

1. The Second Circuit's reliance on the "shocks the conscience" test traces to its 2009 decision in *United States v. Rigas*, 583 F.3d 108. That case came well after this Court had erased all doubt that "the familiar abuse-of-discretion standard" should be used in reasonableness review. *Gall*, 552 U.S. at 46 (citing *United States v. Booker*, 543 U.S. 220, 260-62 (2005)). But in *Rigas,* the Second Circuit bemoaned a supposed lack of guidance in the case law, observing that prior decisions "ha[d] focused more on the process of sentencing than on actually defining the boundaries of substantive reasonableness," and had therefore failed to provide a workable standard. *Ibid.* The closest those cases had come, the court lamented, was an "obviously circular" rule that "defined as 'unreasonable' a sentence that * * * 'cannot be located within the range of permissible decisions.'" *Ibid.*

Seeking a better definition—and apparently unsatisfied by the "familiar abuse-of-discretion standard," *Gall*, 552 U.S. at 46—the court turned to "other areas of the law." *Rigas*, 583 F.3d at 122. In those areas, it observed, "we employ various concepts that seek to capture the same idea represented in the phrase 'substantive reasonableness.'" *Ibid.* Among those "concepts," it went on, are the "manifestly unjust" standard employed "in considering a motion for a new trial in a criminal case following a jury verdict," and the "similarly imprecise 'shocks-the-conscience' standard" employed to "examine intentional torts by state actors." *Ibid.*

The court then weighed "[t]he manifest-injustice, shocks-the-conscience, and substantive unreasonableness standards" against one another, hoping to determine whether the application of each could inform the others' substantive content. *Rigas*,

583 F.3d at 123. In doing so, however, it made little mention of any standard's substantive characteristics. Instead, it concluded that the tests "seek to capture the same idea" merely because each is characterized by a facts-and-circumstances analysis that can be difficult to satisfy. *Ibid.* (finding that the standards "are deferential to district courts," are "highly contextual," and are "dependent on the informed intuition of the appellate panel"). That vague resemblance, the court declared, meant that the three tests could be employed together to "provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Ibid.* Without any further mention of the abuse-of-discretion standard, the court of appeals then applied that "backstop" and affirmed the sentences on review. *Id.* at 123-24.

2. In the nearly ten years since *Rigas*, the Second Circuit has routinely rejected substantive reasonableness challenges on the ground that the sentences imposed did not shock the conscience.[8] The

[8] *See, e.g.*, *United States* v. *Spoor*, 904 F.3d 141, 156 (2d Cir. 2018) ("[W]e will reverse the district court's decision only if the sentence imposed amounts to a manifest injustice or shocks the conscience."), *petition for cert. docketed*, No 18-7007 (Dec. 13, 2018); *United States* v. *Diaz*, 675 F. App'x 19, 21 (2d Cir. 2017) ("The disparity between the sentences does not shock the conscience * * * and it was therefore substantively reasonable."); *see also, e.g.*, *United States* v. *Nikomarova*, 667 F. App'x 330, 330 (2d Cir. 2016); *United States* v. *Solomon-Eaton*, 627 F. App'x 47, 49 (2d Cir. 2016); *United States* v. *Nguyen*, 622 F. App'x 89, 91 (2d Cir. 2015); *United States* v. *Aldeen*, 792 F.3d 247, 255 (2d Cir. 2015); *United States* v. *Wahl*, 563 F. App'x 45, 52-53 (2d Cir. 2014); *United States* v. *Diggins*, 547 F. App'x 57, 60 (2d Cir.

court often does not even mention the abuse-of-discretion standard. Even where it does—as it did in the petitioner's case—it regularly pivots to employ the "shocks the conscience" test as its rule of decision. Indeed, as the petition observes, the Government's own briefs have recognized "shocks the conscience" as the governing test in the Second Circuit, *see, e.g.*, U.S. Br. 29, *United States* v. *Jaramillo*, No. 17-3133 (2d Cir. July 20, 2018), ECF No. 46, and the Government urged that standard in the petitioner's case, C.A. Oral Argument at 22:26-:32.

B. The "Shocks The Conscience" Standard Is Incompatible With Substantive Reasonableness Review.

Though often invoked, *Rigas*'s observation that the "shocks the conscience" standard "seek[s] to capture the same idea" as substantive reasonableness, 583 F.3d at 122, is not even close to correct. As the petition explains, the Second Circuit's rule is a dramatic departure that conflicts with this Court's precedents and the practice of every other court of appeals.

1. This Court has made clear that the "shocks the conscience" standard imposes a surpassingly high bar. *Cty. of Sacramento* v. *Lewis*, 523 U.S. 833, 836 (1998). In *County of Sacramento*, the Court held that the standard could not be met by a police officer's "deliberate or reckless *indifference to life*" in *causing death* in a high-speed automobile chase. *Ibid.* (emphasis added). In order to truly "shock[] the conscience," the Court said, government action must generally be accompanied by an actual "*purpose* to

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2013); *United States* v. *Freeman*, 447 F. App'x 280, 281-82 (2d Cir. 2012).

cause harm" in a manner "unrelated to" legitimate government objectives. *Ibid.* (emphasis added).

The Court reinforced that holding in *Rosales-Mireles*. That case involved the Fifth Circuit's importation of a "shocks the conscience" standard to guide its discretion on plain-error review. 138 S. Ct. at 1906. In that context, the Court found the standard too "restrictive" to employ as a tool to evaluate district courts' work, because it would generally not permit reversal unless the court's "conduct was 'intended to injure.'" *Ibid.* (quoting *Cty. of Sacramento*, 523 U.S. at 849-50).

2. That reasoning applies *a fortiori* here. Like the (more demanding) plain-error standard, neither reasonableness review nor the abuse-of-discretion standard requires a court of appeals to find that a district court intended to injure the appellant before vacating a sentence. Indeed, as the petition explains, it has been clear since *County of Sacramento* that government conduct may violate a "reasonableness" standard without coming close to "shock[ing] the conscience." 523 U.S. at 855 ("Regardless whether [the officer's] behavior offended the reasonableness [standard] * * * , it does not shock the conscience."). And, of course, this Court has routinely applied the abuse-of-discretion standard without considering whether the district court intended to do harm. *See, e.g.*, *Gall*, 552 U.S. at 51 (abuses of discretion include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence"); *cf. Rosales-Mireles*, at 138 S. Ct. at 1906-07 (rejecting "shocks the conscience" in plain-error analysis

because "this Court has applied the plain-error doctrine" without reference to district courts' *mentes reae*). The Second Circuit's conflation of reasonableness and "shocks the conscience" cannot be reconciled with that practice.

3. As the petition explains (at 31-32), no other court of appeals has joined in the Second Circuit's error. Although one case from outside that Circuit briefly adverted to a "shocks the conscience" standard,[9] the court that decided it has consistently applied the correct test in subsequent appeals, *e.g.*, *United States* v. *Cruz-Mendez*, 811 F.3d 1172, 1175 (9th Cir. 2016). Thus, on this constantly recurring issue, the Second Circuit stands alone. This Court's review is necessary to restore uniformity.

III. THE SECOND CIRCUIT'S ERRORS UNDERMINE FEDERAL SENTENCING LAW'S MOST IMPORTANT GOALS.

As this case illustrates, *Jacobson* and the "shocks the conscience" test routinely turn unlawful sentences into easy affirmances, at the expense of procedural fairness, nationwide uniformity, and public trust in the sentencing process.

1. The statutory mandate that district courts publicly connect the sentences they impose to the reasons they impose them is critical to the image of courts as reasoned decisionmakers. *E.g.*, *Rita*, 551 U.S. at 356 ("Confidence in a judge's use of reason underlies the public's trust in the judicial institution."); *see also United States* v. *Faulks*, 201 F.3d 208, 209 (3d Cir. 2000) ("[T]he notion that the sentencing court must 'eyeball' the defendant at the

[9] *United States* v. *Ressam*, 679 F.3d 1069, 1087-88 (9th Cir. 2012) (*en banc*).

instant it exercises its most important judicial responsibility, * * * is the embodiment of a value deeply embedded in our polity (and our jurisprudence)."). That is one reason why, in stark contrast to appeals in most other areas, sentencing appeals require scrutiny of the district court's actual, stated reasons, and not just the bottom-line result. *Gall*, 552 U.S. at 50 (connection between reasons and results is critical "to allow for meaningful appellate review and to promote the perception of fair sentencing"); *United States* v. *Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (*en banc*) (reasonableness must be evaluated by reference to "the reasons the district court provided"); *United States* v. *Cirilo-Muñoz*, 504 F.3d 106, 132 (1st Cir. 2007) (Lipez, J., concurring in judgment) ("In short, we cannot do our job of appellate review if we must guess at the reasons underlying the district court's sentence.").

Jacobson undermines the view that criminal sentences reflect reasoned decisionmaking. In *Jacobson* cases, district courts—with the Second Circuit's open encouragement—too often disclaim the original reasons they chose to state in open court, either decrying them as irrelevant or adopting *post hoc* explanations more likely to yield affirmance. And because the "shocks the conscience" standard then precludes meaningful scrutiny of whether the explanations given on *Jacobson* remand accurately explain the district court's decisionmaking process (which, in this case, they obviously did not, Pet. 25-26), the impression left is that the reasons given "in open court," "at the time of sentencing," § 3553(c), bear little connection to substantive outcomes. *See, e.g.*, *Casas-Melendez*, 684 F. App'x at 18-19; *Simpson*, 695 F. App'x at 18.

That impression is not merely unsavory, *cf., e.g.*, *Rita*, 551 U.S. at 356, it is false. Experience in other Circuits teaches that it is not uncommon for district courts to impose new sentences after being instructed that their original rationales did not support their work. *See, e.g.*, *United States* v. *Muhammad*, 478 F.3d 247, 250-51 (4th Cir. 2007) (reversing, on plain error, where district court denied defendant opportunity to argue for lower sentence post-*Booker*, because, even though original sentence was "at the top of the guideline range," defendant "could have acknowledged his wrongdoing and expressed deep regret" on resentencing or "emphasized the changes in his personal circumstances since his original sentencing"); *see also, e.g.*, *United States* v. *Jackson*, 901 F.3d 706, 708 (6th Cir. 2018). *Compare United States* v. *Aguilar-Rodriguez*, 288 F. App'x 918, 919 (5th Cir. 2008) (vacating 18-month sentence for inadequate explanation) *with* Order, *United States* v. *Aguilar-Rodriguez*, Crim. No. 07-276 (E.D. La. Aug. 21, 2008), ECF No. 36 (resentencing to roughly 12 months' time served).[10] If district courts within the Second Circuit were afforded the same opportunity (as the relevant statutes clearly require), they would likely do the same.

2. The practices the petition challenges also undermine uniformity. *See Rita*, 551 U.S. at 349 (discussing importance of uniformity); *see also, e.g.*, § 3553(a)(6) (sentencing statutes reflect "the need to avoid unwarranted sentence disparities"). Sentencing

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[10] Even in the Second Circuit, district courts have on rare occasions withstood the pressure that *Jacobson* remands exert. *See United States* v. *Olea*, 236 F. App'x 728, 730 (2d Cir. 2007) (vacating sentence where district court admitted on *Jacobson* remand that error was not harmless).

law seeks to achieve that important goal in part by encouraging district courts' good-faith reliance on permissible factors that are employed nationwide. *E.g.*, *Rita*, 551 U.S. at 357-58; *see also Merced*, 603 F.3d at 215 ("These procedural requirements exist to guide the district court's exercise of discretion."). Yet, under Second Circuit practice (and as this case further reveals), sentences need not *actually* be based on those factors; they may instead be imposed arbitrarily, as long as some after-the-fact rationale can be conjured to support them. Worse still, the "shocks the conscience" standard, under which the Second Circuit has effectively abdicated its responsibility to ensure uniformity and fairness, serves as a rubber stamp on the increased disparities that result. *See, e.g.*, Carrie Leonetti, *De Facto Mandatory: A Quantitative Assessment of Reasonableness Review After Booker*, 66 DePaul L. Rev. 51, 59-60 (2016) (noting widespread recognition that "weak appellate review increases unwarranted sentencing disparities"); *see also Merced*, 603 F.3d at 214 ("[T]he broad substantive discretion afforded district courts * * * makes adherence to procedural sentencing requirements all the more important."). The Second Circuit's sentencing practices call out for this Court's review.

CONCLUSION

The Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

PETER B. SIEGAL
Counsel of Record
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-4663
peter.siegal@
nortonrosefulbright.com

JEFFREY T. GREEN
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L Street NW
Washington, D.C. 20036
(202) 872-8600

Counsel for Amicus Curiae

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