NO. 17-1350

IN THE

# Supreme Court of the United States

RONEN NAHMANI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## BRIEF OF ALEPH INSTITUTE; MORE THAN A DOZEN FORMER PROMINENT JURISTS, INCLUDING A FORMER ATTORNEY GENERAL, FBI DIRECTOR, SOLICITOR GENERAL, AND VARIOUS FORMER U.S. ATTORNEYS AND JUDGES; DRUG POLICY ALLIANCE; AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## QUESTION PRESENTED

*Amici curiae* address the following issue only as set forth by the Petitioner:

Given the importance of 18 U.S.C. § 3553(a)'s requirement that the sentencing court consider the range of sentencing options available, and given that the maximum sentence should reasonably be reserved for the most culpable offenders, is a significant guideline miscalculation in the imposition of a statutory maximum sentence for a first-time offender harmless error or is reliance on an erroneous calculation in imposing a statutory maximum sentence instead an integral subject of reasonableness review?

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## INTERESTS OF THE *AMICI CURIAE*[1]

**The Aleph Institute** is a national nonprofit educational, humanitarian, and advocacy organization. It was founded in 1981 at the direction of The Lubavitcher Rebbe, Rabbi Menachem M. Schneerson, of blessed memory. Aleph provides spiritual and emotional support, as well as rehabilitation and family counseling, to thousands of individuals and their families who are enmeshed in the criminal justice and penal systems. In many cases, Aleph also provides advocacy for defendants at their sentencing hearings. Aleph's overarching mission is to bring about criminal justice outcomes that are beneficial to the sentenced individuals, their families and communities, and society as a whole, by encouraging sentencing courts to impose alternative sentences instead of incarceration when appropriate. Aleph's experience has demonstrated that alternative sentences can sufficiently punish and rehabilitate some individuals without the harmful collateral consequences that prison sentences levy on families and communities.

Aleph's systemic efforts to increase awareness and use of best practices in alternative sentencing involve the creation of an information clearinghouse

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondent with notice of intent to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of Court.

about the vast array of innovation in sentencing alternatives. Next year, we plan to follow up on our 2016 Alternative Sentencing Stakeholders Summit, which brought together hundreds of criminal law stakeholders from around the country at Georgetown Law School, with the "Rewriting the Sentence 2019" summit, during which we will further catalyze the national conversation about fair and balanced sentencing.

Aleph's direct interest in this case stems in part from the severe hardship the long sentence imposed on Mr. Nahmani is in turn wreaking on his family. Mr. Nahmani's wife, who has recently been diagnosed with breast cancer and is undergoing painful and debilitating treatments, will suffer without her partner. The couple also has five young children, in whose upbringing Mr. Nahmani has a critical role. In light of his wife's illness and his absence, these children face a diminution in their prospects for health and wellbeing. Aleph roots its work in the pursuit of fair and balanced sentencing that honors the dignity and capacity for good in all people.

Additional *amici* are **William G. Bassler**, United States District Judge, District of New Jersey (1991-2006); **Edward Cahn**, United States District Court Judge, Eastern District of Pennsylvania (1974-1998); **Robert J. Cleary**, US Attorney, DNJ, court-appointed (1999-2002), US Attorney, SDIL, AG-appointed (2002); **David Coar**, United States District Court Judge, Eastern District of Pennsylvania (1974-1998); **W.J. Michael Cody**, United States Attorney for Western District of Tennessee 1977-81, Attorney General of Tennessee

1984-88; **Paul Coggins**, United States Attorney, Northern District of Texas (1993-2001); **William B. Cummings**, U.S. Attorney, Eastern District of VA 1975-1979; **W. Thomas Dillard**, AUSA Eastern District of Tennessee, 1967-1976; 1978-1982, US Magistrate Judge, Eastern District of Tennessee, 1976-1978, US Attorney, Northern District of Florida, 1983-1986; **Lawrence D. Finder**, United States Attorney, Southern District of Texas (1993); **Louis Freeh**, Director of the Federal Bureau of Investigation (1993-2001, United States District Court Judge (1991-1993); **Nancy Gertner**, United States District Judge, District of Massachusetts (1994-2011); **John Gleeson**, United States District Judge, Eastern District of New York (1994-2016); **Richard J. Holwell**, United States District Judge, Southern District of New York (2002-2016); **Salvatore Martoche**, United States Attorney, Western District of New York (1982-1986); **A. Melvin McDonald**, United States Attorney, District of Arizona (1981-1985); **Michael B. Mukasey**, Attorney General of the United States (2007-2009), United States District Court Judge, Southern District of New York (1987-2006); **Robert O'Connor, Jr.**, Former United States District Judge, Southern District of Texas (1975-1985); **Stephen M. Orlofsky**, United States District Judge, District of New Jersey (1996-2003); **Richard J. Pocker**, United States Attorney, District of Nevada (1989-1990); **James H. Reynolds**, United States Attorney, Northern District of Iowa (1977-1982); **Kevin V. Ryan**, United States Attorney, Northern District of California (2002-2007); Seth Waxman, Solicitor General of the United States (1997-2001); and **Alfred Wolin**, United States District Judge, District of New Jersey (1987-2004);

**The Drug Policy Alliance**; and **The National Association of Criminal Defense Lawyers**.

The Drug Policy Alliance ("DPA") leads the nation in promoting drug policies that are grounded in science, compassion, health, and human rights. DPA is a nonprofit organization governed by a board of directors who bring a wealth of public health, science, civil liberties, social justice, and criminal justice experience to the drug policy reform movement. DPA actively participates in the legislative process and seeks to roll back the excesses of the drug war, block harmful new initiatives, and promote sensible drug policy reforms.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal

defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amici collectively have a professional interest in ensuring that federal sentencing statutes are interpreted and applied in a manner that coherently advances their purposes and is consistent with longstanding jurisprudential principles and with contemporary function in the criminal law.

Amici submit this brief not only to highlight flaws in the Petitioner's sentence, but also to stress the urgent need for this Court to provide crucial guidance to lower federal courts on proper sentencing decision-making and reasonableness review in the wake of *United States v. Booker*, 543 U.S. 220 (2005).

## SUMMARY OF ARGUMENT

Congress has instructed district courts to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of the Sentencing Reform Act (SRA), 18 U.S.C. § 3553(a), and the factors in § 3553(a) are to "guide appellate courts... in determining whether a sentence is unreasonable" on appeal. *United States v. Booker*, 543 U.S. 220, 261-63 (2005). This Court in *Booker* indicated appellate review should help "iron out sentencing differences" in district courts' application of the "numerous [statutory] factors that guide sentencing," and that reasonableness review requires appellate courts to ensure district courts are mindful of their statutory sentencing obligations and impose terms that comply with the substantive provisions of § 3553(a). *Id.* at 261-63; *see also Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007). In *Rita*, this Court held that circuit courts could adopt a "presumption of reasonableness" for within-Guidelines sentences, but stressed that district courts may ***not*** apply "a legal presumption that the Guidelines sentence should apply." 551 U.S. at 351.

Problematically, in the decade since this Court's rulings in *Rita*, *Gall*, and *Kimbrough v. United States*, 552 U.S. 85 (2007), the circuit courts have developed inconsistent and constitutionally questionable approaches to reasonableness review. A few circuits often reverse sentences as procedurally unreasonable; others almost never do. A few circuits engage with the factors of § 3553(a) when reviewing for substantive reasonableness; most never do. Consequently, reasonableness review

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

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

The sentencing decision-making in this case that led to the imposition and affirmance of a statutory-maximum 20-year prison sentence showcases the problematic results of dysfunctional reasonableness review. The "presumption of reasonableness" functionally elevates the Guidelines

to an edict and all other § 3553(a) factors are downgraded and their effect practically excised. Here, (1) the district court imposed a statutory-maximum 20-year prison sentence on a first-time offender who presented significant mitigating considerations by relying on suspect Guideline calculations, and (2) the Eleventh Circuit affirmed this statutory maximum 20-year prison sentence simply by claiming any error in the Guideline calculation was clearly harmless because even a properly calculated Guideline range would have been above the applicable statutory maximum 20-year prison sentence. Reflecting the Guidelines-centric approach to sentencing that still takes place in too many lower courts, neither the district court nor the Eleventh Circuit gave even lip service to any of the relevant § 3553(a) factors other than the Guidelines.

The Eleventh Circuit's affinity for reflexively affirming within-Guidelines sentences led the district court to approach the sentencing of Mr. Nahmani as if only the Guidelines mattered; in turn, the Eleventh Circuit affirmed an extreme prison sentence for a nonviolent first offender using a rubber-stamp approach to reasonableness review it has adopted only for within-Guidelines sentences. This case thus highlights how some (but not all) district courts are still disregarding the statutory instructions of § 3553(a) that *Booker* made central to federal sentencing, and how some (but not all) circuit courts are disregarding this Court's instructions for reasonableness review set forth in *Rita*, *Gall,* and *Kimbrough*.

Absent this Court's intervention, the rulings below will stand as another problematic

demonstration that district and circuit courts can treat *Booker* and its progeny as merely a lengthy "tale told by [the Justices], full of sound and fury, signifying nothing." William Shakespeare, *The Tragedy of Macbeth*, Act V, Scene 5.

## ARGUMENT

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

Appellate review has been a central component of the modern federal sentencing system since the passage of the SRA, and Congress has long indicated that it considers such review to be integral to the SRA's goals "to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing." S. Rep. No. 98-225, p. 150 (1983). Recognizing the continued importance of appellate review to achieve the goals of modern sentencing reform, this Court in *United States v. Booker* preserved a key role for Courts of Appeals in the review of sentences for reasonableness. *See* 543 U.S. at 261-64. To reinforce and ensure continued attentiveness to the statutory sentencing factors Congress established in 18 U.S.C. § 3553(a), *Booker* explained that those factors are now to "guide appellate courts... in determining whether a sentence is unreasonable." *Id.*

Since *Booker*, however, the federal appellate courts have struggled to determine just how reasonableness review should operate, both formally and functionally. In a set of 2007 rulings, this Court

explained that reasonableness review was akin to an abuse-of-discretion standard embodying procedural and substantive protections that require circuit courts to ensure that district courts (1) approach the sentencing *process* with a proper understanding of their statutory obligations, and (2) reach sentencing *outcomes* that comply with the substantive provisions of § 3553(a). *See Gall*, 552 U.S. at 49 (stressing need to "consider all of the § 3553(a) factors"); *Kimbrough*, 552 U.S. at 109-11 (conducting reasonableness review to ensure sentence would "achieve § 3553(a)'s purposes"); *Rita*, 551 U.S. at 351 (stressing consideration of whether a "Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). Unfortunately, despite additional guidance on the structure and substance of appellate review provided by these cases, circuit splits have emerged over the past decade as the Courts of Appeals have proven unable on their own to develop consistent and constitutionally sound approaches to reasonableness review. *See, e.g.*, Carrie Leonettia, De Facto *Mandatory: A Quantitative Assessment Of Reasonableness Review After* Booker, 66 DePaul L. Rev. 51 (2016) (lamenting disparate circuit approaches to reasonableness review creating a "patchwork of guideline sentencing in which defendants' sentences are dictated more by the happenstance of geography than by the Supreme Court's jurisprudence"); Note, *More Than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 Harv. L. Rev. 951 (2014) (discussing a "number of notable circuit splits" concerning reasonableness review); D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 Duq. L. Rev. 641, 649-61 (2011) (noting

that "the courts of appeals have differed over how to apply the [reasonableness] standard" and "have split on several important legal questions").

Notably, expressions of concern about disparate approaches to reasonableness review have been voiced by both the U.S. Sentencing Commission and the U.S. Department of Justice. At a hearing before a House Judiciary Subcommittee in October 2011, the Chair of the U.S. Sentencing Commission urged Congress to make statutory amendments to the SRA to resolve circuit splits over the interpretation and application of this Court's rulings in *Rita*, *Gall*, and *Kimbrough*. *See* Prepared Testimony of Judge Patti B. Saris Before the House Judiciary Subcommittee on Crime Terrorism, and Homeland Security (Oct. 12, 2011), at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf. In her written testimony, the Commission Chair adumbrated various factors serving to "limit the effectiveness of appeals in alleviating sentencing differences" and noted that many judges have "voiced concerns regarding the courts' inability to apply a consistent standard of reasonableness review." *Id.* at 12, 14. In urging Congress to make statutory amendments to the appellate review provisions of the SRA, the Commission not only suggested that circuit splits over reasonableness review have become intractable, but also revealed that the Commission believes it is effectively powerless to harmonize the disparate circuit jurisprudence concerning appellate review of federal sentencing determinations. *Cf. Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (suggesting certiorari review may be especially

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

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

Reasonableness review seems to be especially troublesome in those circuits like the Eleventh Circuit that have adopted a so-called "presumption of reasonableness" for reviewing within-Guidelines sentences. As a practical matter, many of the presumption circuits treat within-Guidelines

sentences as *per se* reasonable; this approach not only disregards this Court's instructions in *Rita* and Congress's instructions in § 3553(a), but also rekindles concerns about the kind of unconstitutional judicial fact-finding that spawned the *Booker* ruling. As one commentator has explained based on an empirical review of a decade of post-*Booker* sentencings, those circuits that "employ a *de jure* presumption of reasonableness for in-guideline sentences and a *de facto* presumption of unreasonableness for variant sentences… have created a circuit-wide *de facto* mandatory guideline regime, in violation of the Fifth and Sixth Amendments and *Booker*." Leonettia, De Facto *Mandatory*, 66 DePaul L. Rev. at 93-94; *see also* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Pa. L. Rev. 1631, 1734-35 (2012) (explaining how misapplication of a presumption of reasonableness "would clearly be unconstitutional"); Scott Michelman & Jay Rorty, *Doing* Kimbrough *Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 Suffolk U. L. Rev. 1083, 1097 (2012) (explaining constitutional problems when functional "presumption of unreasonableness for sentences outside the Guidelines creat[e a] *de facto* mandatory system.")

This Court's approval and account of a "presumption of reasonableness" in *Rita* should have prompted the Courts of Appeals to begin developing a thorough and thoughtful jurisprudence concerning whether and how this "presumption" can be rebutted in certain settings based on particular § 3553(a) sentencing factors. *Cf. Pepper v. United States*, 562 U.S. 476, 487-93 (2011) (explaining how "evidence of postsentencing rehabilitation may be highly relevant

to several of the § 3553(a) factors" and why contrary Guidelines provision rests on "wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted"); *Kimbrough*, 552 U.S. at 109-11 (conducting reasonableness review with emphasis on "Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)").

A robust appellate jurisprudence about when the "presumption of reasonableness" can be rebutted on appeal and the consequences of such a rebuttal would help ensure, as *Rita* envisioned, that sentencing judges actively consult and engage all the § 3553(a) factors—even when deciding to impose a within-Guidelines sentence, and that circuit judges adequately assess the reasonableness of the resulting sentences. *Cf. Pepper*, 562 U.S. at 512-13 (Breyer, J., concurring) (explaining that "in applying reasonableness standards, the appellate courts should take account of sentencing policy as embodied in the statutes and Guidelines, as well as of the comparative expertise of trial and appellate courts").

Unfortunately, the presumption circuits have not embraced and applied a true "presumption of reasonableness" as this Court outlined in *Rita*; instead, circuit courts have utilized the "presumption of reasonableness" as a means to convert the Guidelines into a sentencing safe harbor for district courts so that *any* within-Guidelines sentence is essentially immune from substantive review. Despite circuit courts' assertions that they are applying only the "presumption" approved in *Rita*, the fact that there have been no significant appellate rulings in the last decade that seriously

explore or even expressly discuss when and how the presumption can be rebutted by an appellant and what might be the legal consequences of any such (phantom) rebuttal give the lie to those assertions. Such excessive deference to within-Guidelines sentences and the persistent lack of engagement with the § 3553(a) factors on appeal in within-Guidelines cases contravenes this Court's explanation that § 3553(a) is intended to "guide appellate courts... in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261-63. In addition, as already suggested, failure to affirmatively engage the § 3553(a) factors raises constitutional concerns in light of this Court's Sixth Amendment jurisprudence in *Booker* and its progeny. Both Justice Scalia's concurring opinion and Justice Souter's dissenting opinion in *Rita* exposed the potential for constitutional difficulties if the "presumption of reasonableness" were to be misapplied by the Courts of Appeals. *See Rita*, 551 U.S. at 368-81 (Scalia, J., concurring); *Rita*, 551 U.S. at 388-91 (Souter, J., dissenting). Indeed, Justice Souter's dissent in *Rita* was based on his fear that "a presumption of Guidelines reasonableness" could prompt sentencing judges to treat the Guidelines "as persuasive or presumptively appropriate," and then "the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right [thereby] . . . undermining *Apprendi* itself." *Rita*, 551 U.S. at 388-91 (Souter, J., dissenting).

When deciding *Rita* in 2007, it was understandable and perhaps wise for this Court to assume that circuits would not come to apply the "presumption of reasonableness" in a manner that

would ultimately vindicate Justice Souter's stated fears. But, a decade later, it is evident that many circuits that have adopted the "presumption of reasonableness" have only perpetuated Guidelines-centric doctrines and practices that ultimately encourage just the sort of rote, mechanistic reliance on the Guidelines and judicial fact-finding that this Court deemed unconstitutional in *Booker*. *See generally* Alison Siegler, *Rebellion: The Courts of Appeals' Latest Anti-*Booker *Backlash*, 82 U. Chi. L. Rev. 201 (2015) (detailing how "appellate courts continue to act as they did during the era of mandatory Guidelines … even though the Supreme Court has time and again emphasized that this is not their role" and urging this Court to "step in—as it did in *Gall*, *Kimbrough*, *Nelson*, and *Pepper*—and stop this latest rebellion").

In addition to being constitutionally suspect, the circuit courts' persistently unsophisticated application of the presumption of reasonableness conflicts with the nuanced sentencing instructions of 18 U.S.C. § 3553(a). As this Court stressed in *Pepper*, the Guidelines are just one factor in § 3553(a)'s detailed list of "seven sentencing factors that courts must consider in imposing sentence," and it is inappropriate for courts to "elevate [certain] § 3553(a) factors above all others" given the "sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)." *Pepper*, 562 U.S. at 487-93. The practice of some circuits to apply crudely a blanket presumption of reasonableness for all within-Guidelines sentences ignores the fact that the Sentencing Commission has itself indicated that the

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

The presumption circuits' conceptually bankrupt approach to substantive reasonableness review is most misguided and harmful in those cases involving Guidelines widely recognized to be unduly severe, such as in crack cocaine cases (before recent statutory reforms) and other cases in which quantities unnecessarily drive Guideline ranges. In cases with quantity calculations, the implications can be starkest for nonviolent first offenders like Mr. Nahmani. *See infra* Part II (noting problems with Guideline applicable to Mr. Nahmani). These sorts of rulings vividly illustrate that, as now applied by some circuit courts, the presumption of reasonableness essentially enables some district and circuit judges to completely ignore Congress's detailed statutory sentencing instructions in 18 U.S.C. § 3553(a) and instead to impermissibly "elevate [the Guidelines] above all other [§ 3553(a) factors]," despite the statutory text which makes it a "sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)." *Pepper*, 562 U.S. at 487-93.

## II. THE GOALS OF THE SENTENCING REFORM ACT COMMEND REVIEW OF

**THE STATUTORY MAXIMUM SENTENCE IMPOSED IN THIS CASE**

The district court's decision to impose a statutory maximum sentence on Mr. Nahmani, as well as the Eleventh Circuit's subsequent affirmance, bring into sharp focus the troubling potential for disparity resulting from divergent approaches to reasonableness review. Some (but not all) circuits have wisely subjected sentences approaching statutory maximums to particular scrutiny on appeal, properly recognizing that the § 3553(a) factors call for extreme sentences to be reserved for the worst of the worst offenders within a statutory class. But in this case, neither the district court nor the Eleventh Circuit gave any substantive attention to the special significance of imposing a statutory maximum sentence on a first-time offender who presented many mitigating considerations at sentencing and whose elevated Guideline range rested on a Guideline suspect in both design and application.

The Second and Seventh Circuits have been particularly mindful of the significance of the statutory maximum sentences and particularly concerned with district judges blindly following Guidelines recommendations that push sentences toward the statutory extreme. *See, e.g.*, *United States v. Jenkins*, 854 F.3d 181, 192–93 (2d Cir. 2017) ("District courts should generally reserve sentences at or near the statutory maximum for the worst offenders"); *United States v. Lister*, 432 F.3d 754, 762 (7th Cir. 2005) (noting that a "sentence [that] nearly reaches the statutory maximum... leaves little room for the proportional sentencing");

*United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) (faulting Guidelines for "concentrating all offenders at or near the statutory maximum [because it] eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider 'the nature and circumstances of the offense and the history and characteristics of the defendant'"); *United States v. Newsom*, 402 F.3d 780, 785-86 (7th Cir. 2005) (noting that "the harshest sentences should be reserved for the most culpable behavior"). These circuits properly discuss and recognize the myriad concerns with statutory maximum sentences in light of the provision of 18 U.S.C. § 3553(a). As they note, a statutory maximum sentence justifies close examination not only given § 3553(a)'s "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing," *Kimbrough v. United States*, 552 U.S. 85, 90 (2007), but also because such a sentence creates a unique risk of unwarranted sentence disparity violating § 3553(a)(6) whenever less serious offenders are sentenced identically to the worst of the worst offenders within a statutory class.

But in the Eleventh Circuit, by contrast, it seems that statutory maximum sentences (and perhaps all distinctly harsh sentences) are not subjected to careful—or even proper—appellate scrutiny under § 3553(a). Writing separately in a recent case, Eleventh Circuit Judge Charles Wilson lamented that his Circuit has "never vacated a sentence because it was too high" and thus seemed to be "grading harshness and lenience on different scales" so that the "message that we are sending to the district courts by this precedent is that they

enjoy virtually unfettered sentencing discretion, so long as they sentence harshly." *United States v. Rosales-Bruno*, 789 F.3d 1249, 1287 (11th Cir. 2015) (Wilson, J., dissenting). This case stands as another example of what Judge Wilson describes as "reading a 'severity principle' into sentencing that should not be there": the Eleventh Circuit, through its cursory review in the course of affirming a statutory maximum sentence, signals to its district courts that they can continue to disregard the statutory instructions of § 3553(a) that *Booker* made central to federal sentencing and just lean on extreme Guidelines calculations even when they suggest sentences that exceed applicable statutory maximums for a nonviolent first offender who presented significant mitigating evidence at sentencing.

More broadly, the record below suggests that the district court largely ignored this Court's repeated admonition that a district court may not presume reasonable a sentence within the calculated Guidelines range. By giving no weight or even on-the-record consideration to many presented mitigating facts and § 3553(a) factors justifying a below-Guidelines-and-statutory-maximum sentence for Mr. Nahmani, the district court disregarded this Court's clear instruction to treat the Guidelines as just "one factor among several courts *must* consider in determining an appropriate sentence" as part of "§ 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough v. United States*, 552 U.S. 85, 111 (2007) (emphasis supplied). In the record below, the district court's extended concern with its

Guidelines calculation in its sentencing decision-making appears in sharp contrast to its silence concerning the mitigating evidence and § 3553(a) arguments put forth by the defendant in the sentencing proceedings to justify a sentence below the applicable statutory maximum. The district court, by barely acknowledging *any* of the § 3553(a) factors Mr. Nahmani stressed at sentencing, functionally and improperly treated the Guidelines as the only relevant and important sentencing factor, rather than as one factor among several, which is required by this Court.

The cavalier treatment given to Mr. Nahmani's § 3553(a) arguments in the courts below is especially troubling given that the drugs involved in his offense, synthetic cannabinoids, have been unlisted in the Guidelines and have required judges to determine an applicable Guidelines range through a marijuana-equivalency ratio that is marked by, in the words of one commentator, a "lack of scientific and empirical support." Brad Gershel, *Sentencing Synthetic Cannabinoid Offenders: "No Cognizable Basis,"* 54 Am. Crim. L. Rev. Online 50, 54 (2017). Tellingly, just this month, the U.S. Sentencing Commission responded to controversies over the Guidelines applicable in this kind of case by adopting a new proposed guideline that includes express departure provisions in recognition that synthetic cannabinoids can vary greatly in potency. *See* U.S. Sentencing Commission, Press Release, *U.S. Sentencing Commission Unanimously Adopts 2018 Guideline Amendments* (April 12, 2018), at https://www.ussc.gov/about/news/press-releases/april-12-2018. The new proposed Guideline makes express what judges and commentators have

already been stating, namely that the Guidelines as applied to Mr. Nahmani can often suggest sentencing ranges that are much "greater than necessary" to serve the punishment purposes of 18 U.S.C. § 3553(a)(2). *See United States v. Hurley*, 842 F.3d 170, 174 (1st Cir. 2016) (lamenting the "anomaly" and "severity" of how the Guidelines operate in this context, which "may harm both uniformity and fairness"); *United States v. Hossain*, No. 15CR14034, 2016 WL 70583, at *7 (S.D. Fla. Jan. 5, 2016) (holding "the goals of sentencing, particularly punishment and deterrence, are not achieved by sentencing Hossain to [a long Guidelines sentence] for dealing in a substance that was intended to mimic marijuana"); *see also* Gershel, *supra*, at 50 (describing how Guidelines here produce "distinct but familiar inequities in the criminal justice system… calling to mind the crack-to-cocaine disparity").

In short, because the Guidelines applied here can produce potentially disproportionate sentences calculated using a formula that lacks appropriate scientific or evidentiary basis, it is distinctly problematic for the courts below to have leaned so heavily on Guidelines calculations that suggested sentences higher than applicable statutory maximums. The courts, instead, should thoughtfully engage, as this Court's precedents require, with all the statutory sentencing factors to determine a sentence sufficient, but not greater than necessary, to comply with the purposes of the SRA. Here, the district court, barely giving lip service to the governing sentencing rules after *Booker*, essentially disregarded the statutory command in 18 U.S.C. § 3553(a) that Mr. Nahmani's sentence be "not

greater than necessary" in light of the purposes of sentencing Congress set forth in the Sentencing Reform Act. For its part, the Eleventh Circuit perpetuated the harm by affirming a suspect sentencing process that produced a substantively unreasonable statutory maximum result. Unfortunately, this case, while egregious, is not an isolated example of lower courts failing to heed the dictates of *Booker* and its progeny. Fortunately, this Court can remedy the problems in this case and others by granting certiorari.

Amici's work in the criminal justice arena for several decades has reinforced the reality that family separation can be a particularly harrowing and cruel collateral condition of incarceration and should be an integral consideration in the § 3553(a) analysis. This case provides an opportunity to correct the injustice resulting from the district court's failure to consider not only whether a statutory maximum punishment fits the culpability of the defendant, but also how a compelling family situation can impact various § 3553(a) factors.

Mr. Nahmani did not intend to harm anyone, and his Presentence Investigation Report confirmed that his offense had no victims. Far from the worst of the worst, Mr. Nahmani used no violence or sharp tactics, did not resist arrest, and did not seek to break laws. He had never been arrested before, and has always been a loving and deeply devoted and involved father to his five children still under 12. Mr. Nahmani's wife, Szilvia, has been diagnosed with breast cancer since his imprisonment. Mr. Nahmani's family is suffering in his absence, and the most painful part of his punishment is knowing they

are struggling and he cannot be there for them. This Court can and should see this case as a fitting and just opportunity to remind lower courts that statutory maximum sentences should not be applied casually, and should in no event be reserved only for the worst of the worst defendants, and be applied to a nonviolent first offender like Mr. Nahmani.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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