No. 18-759

IN THE

Supreme Court of the United States

MATTHEW D. SAMPLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, NATIONAL CRIME VICTIM LAW INSTITUTE, AND ARIZONA VOICE FOR CRIME VICTIMS, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

National Organization for Victim Assistance (NOVA) is the oldest victims' rights and services organization in the world. Operating since 1975, NOVA

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least ten days before its due date. The parties have consented to the filing of this brief.

promotes training for victim-advocates, provides direct services to victims, and seeks to educate legislative, political, law enforcement, and community leaders on issues associated with victimization so that appropriate and effective policies can be implemented.

As one of its services, NOVA provides a nationwide toll-free number (800-TRY-NOVA) for victims to call directly for referrals, resources, and information to enhance their awareness for making choices while seeking justice, remedy, and recovery. In addition to the physical and emotional impact of crimes, victims commonly suffer significant financial harms. These harms create urgent monetary needs for them and their loved ones. NOVA accordingly has been actively involved in efforts to expand restitution for crime victims.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and litigating as amicus curiae issues of national importance regarding crime victims' rights in cases nationwide.

Arizona Voice for Crime Victims, Inc. (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal

education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system which (1) provides crime victims with resources and information to help them seek immediate crisis intervention, (2) informs crime victims of their rights under the laws of the United States and Arizona, (3) ensures that crime victims fully understand those rights, and (4) promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation. A key part of AVCV's mission is working to give the judiciary information and policy insights that may be helpful in the determination of victims' rights issues. AVCV regularly seeks restitution on behalf of crime victims who have suffered an economic loss as a result of a criminal offense. Additionally, AVCV has litigated issues related to restitution.

Amici are participating in this case because of the important issues it raises regarding whether crime victims' rights, including the rights to be heard and secure restitution, are meaningfully weighed in the sentencing process.

SUMMARY OF ARGUMENT

Congress has established a robust regime to afford and protect victims' rights in the federal criminal justice system. Central to that regime is a set of statutes that provide that victims have a right to be participate at sentencing, and that courts are mandated to enter restitution orders where a defendant's offense of conviction has resulted in compensable harm to a victim. The central promise of those statutes—that victims' voices are heard in the sentencing process and their rights and interests are considered as part of the administration of justice—is empty if courts are preclud-

ed from considering as part of sentencing whether and how defendants will be able to make good on their restitutionary obligations.

As this Court has repeatedly confirmed, sentencing courts retain discretion to weigh the factors enumerated in the Sentencing Reform Act in fashioning an appropriate punishment. Among those factors is "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). Congress thus has made clear its direction to sentencing courts to consider not only the award of restitution but also the actual provision of that restitution. In appropriate cases, the sentencing court retains full discretion to consider the interests of the victims, and their statutory entitlement to restitution, in sentencing defendants. This case presents a critical question as to the viability of Congress' statutory and sentencing scheme.

ARGUMENT

I. CONGRESS HAS CLEARLY EXPRESSED ITS INTENT THAT CRIME VICTIMS BE MADE FINANCIALLY WHOLE THROUGH RESTITUTION

Through a series of enactments dating back more than thirty years, Congress has expressed its intent that victims' voices—including their requests for restitution—be meaningfully incorporated as elements of criminal sentencing.

This is perhaps most clear in Congress' passage in 1996 of the Mandatory Victims Restitution Act (MVRA). By requiring that "the court may order … that the defendant make restitution to the victim of [the] offense," 18 U.S.C. § 3663A(a)(1), the MVRA marked a strengthening of previous statutory directives that left the entry of restitution orders up to the

discretion of the sentencing judge. *See Dolan* v. *United States*, 560 U.S. 605, 612 (2010). "The MVRA's overriding purpose is 'to compensate victims for their losses.'" *United States* v. *Robers*, 698 F.3d 937, 943 (7th Cir. 2012) (quoting *United States* v. *Pescatore*, 637 F.3d 128, 138 (2d Cir. 2011)), *aff'd*, 572 U.S. 639 (2013). "And because the MVRA mandates that restitution be ordered to crime victims for the 'full amount' of losses caused by a defendant's criminal conduct, *see* 18 U.S.C. § 3664(f)(1)(A), it can fairly be said that the primary and overarching purpose of the MVRA is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *Id.* (quoting *United States* v. *Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006)) (cleaned up).

In 2004, backed by near universal congressional support for a "broad and encompassing" statutory victims' bill of rights, 150 Cong. Rec. 7294, 7295 (2004) (statement of Sen. Feinstein), Congress enacted the Crime Victims' Rights Act (CVRA). The CVRA gives victims "the right to participate in the system." *Id.* at 7297 (statement of Sen. Feinstein). Of particular relevance to this case, the CVRA gives victims "[t]he right to be reasonably protected from the accused," *see*, *e.g.*, 18 U.S.C. § 3771(a)(1); "[t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused," *id.* § 3771(a)(2); "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding," *id.* § 3771(a)(4); and "[t]he right to full and timely restitution as provided in law," *id.* § 3771(a)(6).

As courts have recognized in implementing the CVRA, the combination of victims' procedural rights and their right to restitution were meant to powerfully vindicate not only their interests in being heard and in being made whole, but also "to allow the victim 'to regain a sense of dignity and respect rather than feeling powerless and ashamed'" and "to force the defendant to confront the human cost of his crime." *Kenna* v. *United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006) (quoting Barnard, *Allocution for Victims of Economic Crimes*, 77 Notre Dame L. Rev. 39, 41 (2001)).

Recognizing that statutory rights to "full and timely restitution" are illusory without effective enforcement and collection, Congress enacted the Justice for All Reauthorization Act of 2016. Among other things, the Act amended the restitution statutes to improve the collectability of restitution awards, *see* Pub. L. No. 114-324, § 2, 130 Stat. 1948, 1949 (2016) (Crime Victims' Rights amendments). It also directed the Government Accountability Office (GAO) to assist Congress in its efforts to vindicate victims' rights and to secure restitution, by "conduct[ing] a study to determine whether enhancing the restitution provisions … to provide courts broader authority to award restitution for Federal offenses would be beneficial to crime victims and what other factors Congress should consider in weighing such changes." *See id.*, 130 Stat. 1948, 1948-1949.

The GAO has issued a number of reports pursuant to its statutory mandate, including most recently in February 2018, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved*, GAO-18-203 (2018). The report starts by observing that "[t]he impact of crime on victims often has significant emotional, psychological,

physical, financial, and social consequences," and that "[o]ne of the goals of federal criminal restitution is to restore victims of federal crimes to the position they occupied before the crime was committed" by providing compensation. *Id.* at 1. It goes on to explain that "[t]he collection of federal criminal restitution has been a longstanding challenge," *id.* at 2, owing, in large part, to the fact that some "offenders have little ability to pay the debt," *id.* at 26.

In short, Congress's aspiration to make crime victims whole financially, and its consistent efforts to ensure that a victim's right to restitution is meaningful, all run to ground when a criminal defendant lacks the capacity to pay. In cases where a defendant *does* have the capacity to pay and a victim does seek restitution for compensable harms, Congress's intent is best served by allowing the sentencing judge to devise a sentence that meaningfully integrates the victim's rights by facilitating recovery of whatever restitution is appropriate under the circumstances.

II. SENTENCING COURTS RETAIN DISCRETION TO FAVOR, IN APPROPRIATE CASES, THE VICTIM'S RIGHT TO RESTITUTION OVER THE NEED FOR AN IMMEDIATE CUSTODIAL SENTENCE

As this Court has explained, the Sentencing Reform Act "channel[s] judges' discretion by establishing a framework to govern their consideration and imposition of sentences." *Tapia* v. *United States*, 564 U.S. 319, 325 (2011). Under the Act, "a judge sentencing a federal offender must impose at least one of the following sanctions: imprisonment (often followed by supervised release), probation, or a fine." *Id.* The MVRA and CVRA separately require imposition of a restitution order in appropriate cases. The Sentencing Re-

form Act accommodates those restitution orders by ensuring that, in fashioning an appropriate sentence—including any sentence of imprisonment—the court "consider[s]," among other things, "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7); *see also id.* § 3582(a). In other words, the Sentencing Reform Act explicitly requires sentencing courts to consider the victim's right to restitution, and the defendant's ability to pay it, in formulating an appropriate complement of sanctions.

The Tenth Circuit in the decision below adopted a rule that categorically precludes a sentencing court from considering the need to facilitate a victim's right to restitution when analyzing the propriety of a custodial sentence. Such a rule is contrary to statute, eviscerates the court's independent duty to "ensure that the crime victim is afforded the rights described in [the CVRA]," 18 U.S.C. § 3771(b), and constrains the court's ability to consider whether the victim's interests in restitution in a particular case counsel against incarceration (or in favor of a shorter period of incarceration). *See United States* v. *Roper*, 462 F.3d 336, 339 (4th Cir. 2006) ("[T]he district court must consider the need to provide restitution because, all else being equal, the defendant will be less likely to acquire the means to comply with a restitution order while incarcerated than while working outside of prison. If the need to provide restitution is great, this fact may weigh on the side of continuing supervised release.").

A majority of the circuits to address the issue have agreed. *See United States* v. *Musgrave*, 647 F. App'x 529, 536 (6th Cir. 2016) (approving the district court's statement that "the goal of obtaining restitution for the victims is best served by a non-incarcerated and employed defendant" as relevant to its consideration of

the § 3553(a) factors); *United States* v. *Cole*, 765 F.3d 884, 886 (8th Cir. 2014) (rejecting argument that "the district court improperly based the sentence on Cole's socioeconomic status, her restitution obligations, and her loss of criminally derived income"); *United States* v. *Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006) (en banc) (noting that "the district court's goal of obtaining restitution for the victims of Defendant's offense, 18 U.S.C. § 3553(a)(7), is better served by a non-incarcerated and employed defendant"). Though longer prison terms neither should nor may be substitutes for monetary penalties or an inability to pay restitution, "[a] sentencing court is empowered to consider whether the victims will receive restitution from the defendant in varying from the Sentencing Guidelines based on § 3553(a) factors." *United States* v. *Rangel*, 697 F.3d 795, 803 (9th Cir. 2012).[2]

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[2] Courts appropriately take account of a defendant's efforts to make restitution in numerous ways that affect their sentence. For example, the Eleventh Circuit agreed with the Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits that a defendant's extraordinary efforts to make restitution was a permissible basis for a downward departure. *See United States* v. *Kim*, 364 F.3d 1235, 1240 (11th Cir. 2004) (collecting cases). Similarly, in *United States* v. *Tomko*, 562 F.3d 558, 570 (3d. Cir. 2009) (en banc), the Third Circuit rejected the government's argument that by varying downward based on factors including the defendant's employment record and extensive charitable contributions, the sentencing judge "permitted [the defendant] to buy his way out of prison." The court affirmed the district court's conclusion that the defendant's restitution (and relatedly, the percentage of restitution paid) and charitable contributions were appropriate considerations at sentencing, rejecting the dissent's analogy to cases where courts rejected sentences that took account of the need to make restitution as "nurtur[ing] the unfortunate practice of disparate sentencing based on socio-economic status." *Id.* at 588 (Fisher, J., dissenting).

Contrary to the court of appeals' professed concern that accounting for restitution at sentencing would necessarily discriminate against defendants on the basis of socioeconomic status, all defendants have some earning capacity to pay back their victims. What matters for purposes of sentencing is the need for immediate incarceration in a particular case as compared with the victim's asserted right to restitution to recover from the victimization. While courts are required to ensure that their sentences do not yield disparities in "socioeconomic status," 28 U.S.C. § 994(d), they are likewise required to attend to the "need" to make restitution to defendants' victims, 18 U.S.C. § 3553(a)(7). That requires, when a victim asserts a right to restitution, consideration of the degree of privation suffered by victims, not just the theoretical possibility that defendants with some earning capacity—whether rich or poor—might serve a noncustodial sentence.

The district court's objective determination of Sample's ability to repay—in order to actually provide restitution to his victims—refutes the Tenth Circuit's characterization of Sample's salary as a proxy for his socioeconomic status. The restitution determination made by the sentencing judge was driven not by Sample's wealth, but by his ability to pay back his victims (there was comparatively little discussion of his overall economic position at sentencing, simply his ability to earn a high income). The district court appropriately ordered "restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." *See* 18 U.S.C. § 3664(f)(1)(A). Whatever Sample's overall economic circumstances—whether he was born into poverty or wealth, whether he had assets or was indigent—the sentencing judge was correct

to consider his earning potential in crafting her decision as "the potential for repayment cannot be based on mere chance." *United States* v. *McIlvain*, 967 F.2d 1479, 1481 (10th Cir. 1992). Rather, as even the Tenth Circuit has recognized, the "court must consider a defendant's ability to pay in determining what restitution to grant victims." *United States* v. *Copus*, 110 F.3d 1529, 1537 (10th Cir. 1997).

Not only is it appropriate to consider a defendant's ability to pay restitution when fashioning a sentence, but a sentencing judge also has significant discretion with which to weigh that ability in favor of a noncustodial sentence. In *Gall* v. *United States*, 552 U.S. 38 (2007), this Court explained the need for, and discretion of, sentencing judges to balance the factors listed in the Sentencing Reform Act and fashion an appropriate sentence. Because "'every case [is] a unique study,'" *id.* at 52 (quoting *Koon* v. *United States*, 518 U.S. 81, 113 (1996)), while sentencing judges should "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party," this Court tasked sentencing judges to "make an individualized assessment based on the facts presented." *Id.* at 49-50; *see also Pepper* v. *United States*, 562 U.S. 476, 487-488 (2011) (noting "the principle that 'the punishment should fit the offender and not merely the crime'"). Sentencing judges have significant discretion to do so, and appellate courts must "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51. While the extent of a departure from the Guidelines may be considered, an appellate court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* This significant discretion stems from

the fact that "'[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.'" *Id.* at 51-52 (quoting *Rita* v. *United States*, 551 U.S. 338, 357-358 (2007)). Therefore, so long as the permissible factors have been considered and reasonably balanced, a sentence should be held substantively reasonable.[3]

In appropriate cases, the balancing of statutory considerations that a sentencing judge must undertake may result in a noncustodial sentence to allow for payment of restitution along with other terms. That is fully consistent with Congress's design and this Court's case law elucidating the contours of a sentencing judge's discretion. A judge may, when exercising his or her discretion through "'find[ing] facts and judg[ing] their import under § 3553(a)," *Gall*, 552 U.S. at 52-53 (citation omitted), determine that, balanced against other factors, the "need to provide restitution" favors a

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[3] Sentencing judges routinely, and properly, consider defendants' ability to pay restitution in sentencing in an exercise of their discretion under § 3553(a), whether or not noncustodial sentences are ultimately imposed. *See, e.g.*, *United States* v. *Goss*, 325 F. Supp. 3d 932, 936 (E.D. Wisc. 2018) (noting that "a prison sentence would harm the victim by causing defendant to lose her job and thus her ability to pay restitution, a significant concern under § 3553(a)(7)" when sentencing the defendant); *United States* v. *Tilga*, 2012 WL 1192526, at *3 (D.N.M. Apr. 5, 2012) (noting that the court "does not discount the restitution that she paid" but "does not believe that such restitution justifies a downward departure"); *United States* v. *Diambrosio*, 2008 WL 732031, at *5 (E.D. Pa. Mar. 13, 2008) (considering how "[a] non-incarcerative sentence will enable Defendant to continue making payments on his $2.1 million restitution obligation"); *United States* v. *Norton*, 218 F. Supp. 2d 1014, 1021-1022 (E.D. Wisc. 2002) ("Defendant owes a substantial amount of restitution, which she will more easily be able to pay while on probation rather than in prison.").

noncustodial sentence in a particular case. *See id.* at 56-57 (holding that the district court did not err in placing great weight on one factor where the factor was of "critical relevance" and distinguished the defendant from the vast majority of similarly situated defendants).

Sample's case is exemplary. At sentencing, the district court deliberately reviewed the factors enumerated in § 3553(a) and made a sentencing determination unique to the facts of this case. *See* Pet. App. 45a (noting "other cases would be different"). The court acknowledged the need to "promote respect for the law" and to ensure that the sentence "reflect[s] the seriousness of the offense." Pet. App. 53a. It also cited Congress's express explicit direction to consider "the need to provide restitution to any victims of the offense." Pet. App. 53a-55a, 59a-60a (citing 18 U.S.C. § 3553(a)). Viewing restitution as "a major motivator in [its] decision," the court ultimately concluded that "this is a case where probation would give [Sample] the opportunity to keep working at [his] current job and get these victims some measure of justice." Pet. App. 45a, 59a; *see also* Pet. App. 33a ("I want you to keep your job, because I want you to have a good job to pay these victims back."). That approach was fully consistent with this Court's case law prescribing the appropriate methodology for reviewing the § 3553(a) factors and imposing a reasonable sentence in light of Congress's intent. Importantly, that approach also honored Congress's intention to provide "full and timely restitution" to crime victims.

The Tenth Circuit reversed, disparaging the district court's considered view that the needs of the defendant, his victims, and society were best served by a noncustodial sentence that allowed Sample to more

timely make restitution to his victims. The court of appeals relied heavily on its conclusion that Sample's noncustodial sentence did not properly reflect the seriousness of his crimes. That reasoning displaced the rights and interest of Sample's victims—which Congress had rightly recognized through the MVRA and CVRA—and failed to heed the sentencing judge's recognition that making restitution was an appropriate way to force Sample to confront, daily, the seriousness of his offense and the grave consequences for his victims—a central purpose of Congress's victim restitution statutes. *See supra* 18 U.S.C. §§ 3663, 3771. The $1 million loss that Sample's victims suffered came exclusively from retirees and middle-class workers—people who, in the sentencing judge's view, "really needed the money." *See* Pet. App. 36a-37a. Nothing about a noncustodial sentence for the express purpose of allowing Sample to make these victims whole derogates the seriousness of his crime. To the contrary, such a sentence is manifestly appropriate because the victims' need for restitution is particularly weighty.

Noncustodial sentences entered for the purpose of facilitating restitution—like Sample's—can be highly restrictive and reflect a crime's seriousness while simultaneously giving victims an opportunity to be made financially whole as quickly and completely as possible. In fact, this Court in *Gall* recognized that stringent probationary sentences can be severely restrictive and adequate. *Gall*, 552 U.S. at 48.

Moreover, a restrictive probationary sentence satisfies the statutory requirement for just punishment in this case. Punishment in the form of a stringent noncustodial sentence is just in Sample's case because it curtails his freedom while still allowing him to compensate his victims through restitution payments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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