No. 11-1203

IN THE

Supreme Court of the United States

SHOLOM RUBASHKIN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR 86 FORMER ATTORNEYS GENERAL, SENIOR DEPARTMENT OF JUSTICE OFFICIALS, UNITED STATES ATTORNEYS, AND FEDERAL JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
SUE-YUN AHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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INTEREST OF AMICI CURIAE[1]

Amici listed in the Appendix to this brief are 86 former Attorneys General, senior Department of Justice officials, United States Attorneys, and federal judges who write to express concern about aspects of the petitioner's prosecution and sentencing that conflict with the law as applied in other circuits and strongly suggest

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. This brief is principally a pro bono effort; Eli Herz, an individual unrelated to petitioner or his counsel, made a financial contribution in support of its preparation and submission. No other person other than amici or their counsel made any such monetary contribution. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

that justice was subverted in this case. In particular, evidence discovered after Mr. Rubashkin's trial showed that the presiding judge had been personally involved in the planning and execution of the immigration raid that preceded Mr. Rubashkin's prosecution to a far greater degree than the judge had previously disclosed. The available facts concerning this prior involvement raise serious questions as to whether the appearance of judicial impartiality was maintained in this case. *See* 28 U.S.C. § 455(a). The same judge nevertheless denied Mr. Rubashkin's motion for a new trial under Federal Rule of Criminal Procedure 33, and the court of appeals affirmed based on a reading of Rule 33 that—at odds with other circuits—provides no remedy for defendants who discover new evidence that does not concern guilt or innocence, but goes instead to the trial's fundamental fairness. This Court has long recognized the importance that the appearance of impartiality plays in our justice system. *See, e.g.*, *In re Murchison*, 349 U.S. 133, 136 (1955). As former prosecutors, DOJ officials, and federal judges, amici are concerned that under the court of appeals' outlier rule, substantial claims of apparent judicial bias will go unaddressed.

The need for this Court's review is particularly acute because the district court sentenced Mr. Rubashkin—a 51-year-old, first-time, nonviolent offender with deep ties to the community and a long history of charitable works—to an effective life sentence of 27 years. In doing so, the district court violated 18 U.S.C. § 3553(a) by failing to accord any weight to the exceptional mitigating circumstances Mr. Rubashkin presented and ignoring the wide disparity between this sentence and sentences imposed on similarly situated defendants. Like the question marks surrounding the district judge's partiality, this sentencing error se-

verely compromised the perception of fairness that ought to characterize all judicial proceedings. Amici share the concern this Court has shown since its decision in *United States* v. *Booker*, 543 U.S. 220 (2005), that our federal criminal sentencing regime must comprise sound and sensible rules that will produce sentences that are both procedurally and substantively reasonable and that promote public confidence in our judicial system. The sentence imposed in this case decidedly failed that standard.

STATEMENT

On May 12, 2008, Immigration and Customs Enforcement (ICE) agents conducted a raid on Agriprocessors, Inc., a kosher meatpacking plant in Postville, Iowa. Pet. App. 2, 4-5. Petitioner Sholom Rubashkin managed the Agriprocessors plant, which his father had founded. Pet. C.A. Br. 1-3. Nearly 400 employees were arrested and criminally charged with immigration violations. Pet. App. 4-5. Around the same time, Mr. Rubashkin was informed that he was being investigated for financial and immigration crimes. *Id.* at 5.

Mr. Rubashkin was first indicted on November 13, 2008 on three counts. Pet. C.A. Br. 9. Six superseding indictments followed over the next eight months, resulting eventually in a 163-count indictment. *Id.* The charges included financial crimes relating to the value of collateral underlying Agriprocessors's revolving loan, as well as immigration crimes relating to Agriprocessors's employees. Pet. App. 2-5. The district court severed the financial counts from the immigration counts and tried Mr. Rubashkin first, over his objection, on the financial counts. *Id.* at 6. A jury found him guilty of most charges. *Id.* at 7-8.

Based on various enhancements, including the alleged loss amount, the applicable sentencing guidelines yielded an absurdly high sentencing range given Mr. Rubashkin's circumstances. Indeed, the government initially recommended a life sentence for this first-time, nonviolent offender. Pet. C.A. Br. 15. In response, several former prosecutors and senior DOJ officials, including many of the undersigned amici, joined in a letter to the district court pointing out the absurdity of this guidelines recommendation. As the letter noted, in Mr. Rubashkin's case, the "many mitigating factors" and his "personal history and extraordinary family circumstances suggest[ed] that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes." *Id.* at 16. Furthermore, a lengthy sentence "would produce a gross disparity in treatment" with other similarly situated offenders. Former Prosecutors' Letter, *United States* v. *Rubashkin*, 08-CR-1324, Dkt. 912-1, at 16 (N.D. Iowa filed Apr. 30, 2010). The government ultimately retreated from its request for a life sentence, but only barely, instead recommending a 25-year sentence. Pet. C.A. Br. 16.

Mr. Rubashkin sought a downward variance from the guideline range based on his exceptional mitigating circumstances and the gross disparity between his guideline range and sentences imposed on similarly situated offenders. Pet. 5. The district court nonetheless sentenced 51-year-old Mr. Rubashkin to 27 years—two years more than the government had requested and effectively a life sentence. Pet. App. 134. In imposing that sentence, the court barely considered Mr. Rubashkin's mitigating circumstances, instead dismissing them as inconsequential. *Id.* at 130-131. And it failed entirely to consider the gross sentencing dispar-

ity compared to similarly situated offenders or explain why Mr. Rubashkin's sentence should be on par with that of defendants whose financial frauds affected countless individuals and resulted in exponentially higher losses. Pet. C.A. Br. 91-92.

After sentencing, Mr. Rubashkin received documents in response to a FOIA suit he had filed before trial. Pet. 6. The documents showed extensive personal involvement by the district judge who presided over Mr. Rubashkin's case with ICE agents and prosecutors in the planning for the May 2008 raid on Agriprocessors. Some hint of collaboration between prosecutors and court personnel had been revealed earlier in a motion filed in another case by Martin De La Rosa-Loera, an Agriprocessors employee, seeking recusal of the same judge. Pet. App. 6. In denying that motion, the district judge dismissed her prior involvement as "logistical cooperation" "limited … to [her] role as Chief Judge." *Id.* The FOIA documents, however, revealed much more extensive involvement and personal investment by the judge in the preparations for the raid, and suggested coordination between the judge and the prosecution not just on logistical matters, but on strategy and other substance.

For example, the documents showed that meetings between the judge and the prosecution had begun as early as October 2007 for the eventual May 2008 raid, with the prosecution "brief[ing] [the judge] regarding the ongoing investigation." Pet. App. 140. The judge "indicated full support for the initiative." *Id.* Subsequent meetings included the judge and, at her request, the clerk of court and representatives from the U.S. Marshal's Service, U.S. Probation and Pretrial Services, U.S. Attorney's Office, and ICE. At the meeting, "[t]he court made it clear that they are willing to sup-

port the operation in any way possible, to include staffing and scheduling." *Id.* at 141. Discussions included, among other things, "'an overview of charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the … investigation and operation.'" *Id.* Email messages described how the judge "'want[ed] a final game plan'" and had "'requested a briefing on how the operation will be conducted.'" *Id.* at 142-143. Another email described the district judge as a "'stakeholder'" in the operation. *Id.* at 9. And although neither the judge nor the prosecution have ever disclosed the total number of meetings, another email described "a weekly operations/planning meeting" with the judge, ICE, the U.S. Attorney's Office, and the U.S. Marshal's Service. *Id.* at 143.

These documents revealed close collaboration between the judge and the prosecution that raises reasonable questions about the judge's impartiality. *See* 28 U.S.C. § 455(a) ("Any … judge … shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). That was the conclusion of Mark I. Harrison, an expert in judicial ethics who had previously served as the Chair of the ABA Commission to Revise the Model Code of Judicial Conduct and who submitted an affidavit in Mr. Rubashkin's case opining that the district judge's conduct had violated § 455(a) and several provisions of the Code of Conduct. Pet. App. 153-154. But neither the judge nor the prosecution informed Mr. Rubashkin before trial of the judge's involvement. Mr. Rubashkin learned of the conduct only through his FOIA request.

Based on this newly discovered evidence, Mr. Rubashkin filed a motion for a new trial under Federal Rule of Criminal Procedure 33. Despite the serious question

that had arisen regarding the appearance of judicial bias, the district judge refused to authorize discovery or to refer the motion to another judge. Pet. App. 67. Instead, the court denied the motion, holding that the evidence was not newly discovered because it was based on De La Rosa-Loera's earlier recusal motion. *Id.* at 54-57. On the merits, the district judge stated simply that her prior involvement was limited to that of a "Chief Judge of a district court [who] must perform certain duties to ensure that court proceedings are efficient and afford all constitutional guarantees to defendants." *Id.* at 64. While emphasizing the importance of "fair reading" and "context" for the FOIA documents, *Id.* at 55-56, the district judge declined to provide any further information regarding the substance and extent of the collaboration.

The U.S. Court of Appeals for the Eighth Circuit affirmed on the ground that Mr. Rubashkin could not show that "the newly discovered evidence … probably will result in an acquittal upon retrial." Pet. App. 12. That rigid standard for Rule 33 motions, however, is inconsistent with the law as applied in other circuits, and effectively denies any remedy whenever newly discovered evidence does not go to the question of guilt or innocence, but reveals fundamental unfairness at trial.

SUMMARY OF ARGUMENT

In affirming the denial of Mr. Rubashkin's Rule 33 motion, the court of appeals applied a standard—requiring a showing of "probable acquittal"—that conflicts with the approach of other courts and makes no sense in cases where the movant seeks a new trial based on newly discovered evidence that goes to the fundamental fairness of the trial-court proceedings. The consequence of applying that outlier standard here

was to deny any remedy for a serious claim of judicial bias. FOIA documents disclosed after trial revealed extensive personal involvement and investment by the district judge with the prosecutors and ICE officials in planning for the immigration raid on Mr. Rubashkin's plant. These contacts raise troubling questions about the judge's impartiality. At a minimum, they compromised the *appearance* of impartiality on which our justice system depends.

The profound unreasonableness of Mr. Rubashkin's sentence, too, represents a troubling miscarriage of justice. Mr. Rubashkin presented a compelling case for leniency in light of his charitable and civic activities, family situation, and other exceptional mitigating factors. Yet the district court barely paused to consider those factors. Instead, the court imposed a sentence even longer than the government had recommended, akin to the sentences imposed on defendants convicted of massive, far-reaching frauds that bear no resemblance to this case. And the court ignored completely the resulting gross disparity between Mr. Rubashkin's sentence and those of similarly situated defendants. Imposing such an unreasonable sentence without adequate explanation violated 18 U.S.C. § 3553(a) and, like the appearance of judicial bias, can only undermine public confidence in our judicial system.

This Court should grant review as to both of these issues, to resolve the conflict among the circuits and to ensure that justice is done in this case in both appearance and substance.

ARGUMENT

I. THE ERRONEOUS DECISION BELOW DENYING THE RULE 33 MOTION CONFLICTS WITH DECISIONS OF OTHER COURTS AND LEAVES A SERIOUS CLAIM OF JUDICIAL BIAS UNREMEDIED

Mr. Rubashkin's Rule 33 motion presented a serious claim that the district judge's impartiality could reasonably be questioned based on her extensive and undisclosed personal involvement with the case. Rule 33 permits a court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. While a defendant must ordinarily file a Rule 33 motion within 14 days after judgment, the defendant has three years in which to file if the motion is "grounded on newly discovered evidence." *Id.* Under the Eighth Circuit's restrictive view of Rule 33, however, Rule 33 is unavailable when the newly discovered evidence goes to the trial's fundamental fairness rather than the question of guilt or innocence. That erroneous view conflicts with the decisions of several other courts and foreclosed consideration of a significant claim of judicial bias in this case.

A. The Eighth Circuit's Holding That Rule 33 Requires A Showing Of "Probable Acquittal" Conflicts With Decisions Of Other Courts

Following circuit precedent, the Eighth Circuit read Rule 33 to require all movants seeking a new trial based on newly discovered evidence to show that:

> (1) the evidence [was] unknown or unavailable to the defendant at the time of trial;
>
> (2) the defendant [was] duly diligent in attempting to uncover it;

> (3) the newly discovered evidence [is] material; and
>
> (4) the newly discovered evidence … probably will result in an acquittal upon retrial.

Pet. App. 12 (alterations in original). The court declined to depart from the "probable acquittal" requirement even though Mr. Rubashkin's newly discovered evidence impugned the fairness of the trial court's proceedings. It affirmed the district court's denial of Mr. Rubashkin's motion because, as Mr. Rubashkin conceded, evidence of the district judge's appearance of partiality would not materially affect the proof in any retrial. *See id.* at 13.

The Eighth Circuit's "probable acquittal" requirement has no place in a Rule 33 motion seeking a new trial based on a trial's fairness, as opposed to guilt or innocence. Other circuits recognize this distinction. In *Holmes* v. *United States*, for example, the Fourth Circuit considered a new trial motion based on prejudicial statements a court official made to the jury. 284 F.2d 716, 718 (4th Cir. 1960). The court acknowledged that, generally, Rule 33 motions require a showing of likely acquittal. *Id.* at 719. In that case, however, where the improper statements were "entirely irrelevant on a subsequent trial of these defendants" but highly relevant to the fairness of the first proceeding, the court concluded that "a different set of standards" should apply and granted a new trial. *Id.* at 719-720.

Similarly, in considering a motion for new trial based on *ex parte* communication between the court and a juror, the Fifth Circuit replaced the probable-acquittal requirement with the more appropriate requirement that "the newly discovered evidence would 'afford reasonable grounds to question … the integrity

of the verdict.'" *United States* v. *Williams*, 613 F.2d 573, 575 (5th Cir. 1980). Other courts have likewise substituted fairness inquiries for the probable-acquittal requirement where the motion does not rest on evidence going to guilt or innocence. *See, e.g.*, *United States* v. *McCarthy*, 54 F.3d 51, 55 (2d Cir. 1995) (competency to stand trial); *Rubenstein* v. *United States*, 227 F.2d 638, 642 (10th Cir. 1955) (jury intimidation).

B. Application Of The Eighth Circuit's Improper Rule 33 Standard Resulted In The Failure To Consider Or Remedy A Serious Claim Of Judicial Bias

This Court should grant review to resolve the circuit split and reverse the Eighth Circuit's erroneous decision. Mr. Rubashkin's case exemplifies the unjust result that follows from application of the Eighth Circuit's rigid rule: a failure even to consider a serious claim of possible judicial bias striking at the very basic guarantee of a fair trial. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). Under the Eighth Circuit's view, newly discovered evidence that undermines the fundamental fairness of a trial—the impartiality of the presiding judge—cannot provide the basis for a new trial. A court that properly considered Mr. Rubashkin's new trial motion, however, would likely have found that the district judge should have recused herself.

This Court has long recognized the fundamental importance of an impartial adjudicator. *See, e.g.*, *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617-618 (1993) (need for "'neutral and detached judge'"); *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927) (judge cannot have "di-

rect, personal, substantial pecuniary interest"). This essential element of trial fairness requires more than a judge who is free from actual bias. It precludes as well the *appearance* of bias, for "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136 (citation omitted). Congress thus rightly requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). As this Court has held, "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988); *see also id.* at 869-870 ("'The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.'"). Accordingly, in *Liljeberg*, this Court affirmed the grant of a motion to vacate a judgment under Federal Rule of Civil Procedure 60(b) where the district judge failed to recuse himself due to his service on the board of an interested party. Underscoring the importance of the *appearance* of impartiality, the Court found a violation of § 455(a) even though the judge was not aware of the conflict, on the ground that the public might reasonably have believed that the judge knew and accordingly questioned his impartiality. *See id.* at 859-860.

In this case, the district judge's numerous *ex parte* contacts and personal involvement with the prosecution prior to the raid, together with the judge's failure to disclose the extent of that collaboration, seriously undermined that appearance of impartiality. The FOIA documents suggest that the district judge was intimately involved with the planning of the Agriprocessors raid. ICE memos and emails show repeated

"brief[ings]" and meetings over a period of eight months, where the court was made aware of strategic and substantive issues and pledged her full support. *See* Pet. App. 140 (discussions included, among other things, "an overview of charging strategies, … logistics, … and other issues related to the … investigation and operations"); *id.* (judge "indicated full support for the initiative"); *id.* at 141 (court "made … clear that they are willing to support the operation in any way possible, to include staffing and scheduling"). The documents describe the district judge as a "stakeholder," *id.* at 9, who initiated and participated in meetings with the prosecution and other executive officials to aid in the investigation and imminent prosecution, *id.* at 141.

While the full story remains unknown, those facts that have emerged paint a deeply troubling picture that seriously compromises the appearance of impartiality. Indeed, reasonable people have directly questioned the district court's impartiality, including Mark I. Harrison, former Chair of the ABA Commission to Revise the Model Code of Judicial Conduct. *See* Pet. App. 136-154. In a sworn affidavit submitted in the district court, Mr. Harrison concluded that the judge violated § 455(a) by: "initiating and/or authorizing and participating in numerous *ex parte* meetings with prosecutors and other law enforcement personnel in connection with an impending matter"; "failing to require the preparation of a complete record" of those *ex parte* meetings; "failing to disclose the nature, substance and extent of the *ex parte* communications to all parties"; and finally, "failing to recuse herself from presiding over the trial of the principal individual who was responsible for managing the business that was the subject of the *ex parte* meetings." Pet. App. 153-154. Based on those facts that have been revealed, amici similarly question the dis-

trict court's conduct in this case and believe that the appearance of impartiality was not maintained.

Nothing about the earlier recusal motion filed in the *De La Rosa-Loera* case undermines Mr. Rubashkin's claim or cures the troubling appearance created by the district court's prior involvement in the case. *See* Order, *United States* v. *De La Rosa-Loera*, 08-CR-1313, Dkt. 60 (N.D. Iowa filed Sept. 29, 2008) ("*De La Rosa-Loera* Op."). The documents supporting De La Rosa-Loera's motion only hinted at the level of collaboration between the district judge and the prosecution. Just as the district court characterized them in denying De La Rosa-Loera's motion, those documents showed only that the district judge was involved in logistical aspects of the Agriprocessors raid, which led to the subsequent accelerated plea process for the immigrants arrested in the raid. Based on that accelerated plea process, De La Rosa-Loera's motion speculated that improper *ex parte* contact between the court and the prosecution may have occurred before the raid, but the district court rejected that suggestion, stating without qualification that De La Rosa-Loera had "repeatedly confuse[d] logistical cooperation with collusion or involvement in the executive function of pursuing prosecution." *De La Rosa-Loera* Op. 5.

The FOIA documents Mr. Rubashkin received after trial, on the other hand, directly indicate the close involvement between the district judge and the prosecution throughout the planning process, and include affirmative expressions of support and investment by the district court. While the court had admonished in *De La Rosa-Loera* that "one should not believe everything that is written in newspapers, press releases, [and] letters or accept as true the misinformed speculation of those who lack personal knowledge of all the facts," Op.

6, the FOIA documents Mr. Rubashkin obtained were prepared by ICE representatives who participated in and had personal knowledge of the coordination with the district judge that occurred before the raid and prosecutions and revealed far more than the "logistical" involvement exposed by the *De La Rosa-Loera* motion.

The full extent of the judge's involvement, such as the total number of meetings that occurred—the FOIA documents show at least six, but also refer to "weekly meetings," Pet. App. 143—and the full content of those meetings remain unknown. The judge has never disclosed the extent of her involvement. Instead, when confronted with this evidence, the judge minimized her involvement and denied having expressed personal support for or agreement with the prosecution's plans. *See id.* at 66.[2] But the record belies this contention. To the extent contact between the prosecution and the court was necessary for "logistical" reasons, legal ethics expert Stephen Gillers has explained that the prosecution[3] and the judge could have easily avoided any ap-

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[2] The fast-track judicial proceedings that accompanied the Agriprocessors raid, which were made possible by the judge's cooperation, were troubling even to another judge who presided over some of the prosecutions. U.S. District Judge Mark Bennett, who sentenced 57 of the 389 workers arrested in the Agriprocessors raid, later called the proceedings "a travesty" and stated that he was "embarrassed to be a United States District Court judge that day." T. Leys, *Postville Documentary Criticizes Sentencings*, Des Moines Register, Feb. 6, 2011, at B1.

[3] While amici limit their focus to the need for the district judge's recusal based on her involvement with the prosecution, Professor Gillers's affidavit makes clear that the prosecutors similarly failed in their independent duty to avoid inappropriate *ex parte* contact. Pet. App. 160-164. Indeed, in its aggressive prosecution of Mr. Rubashkin, the government not only failed to inform

pearance of impropriety: (1) such contact should not have involved "strategies" or the investigations; (2) such contact should have been conducted between the prosecution and "court administrative personnel only or with other enforcement agencies …, not with the Chief Judge personally"; (3) "[a] detailed record should have been made of all communications with the Chief Judge," including by transcription; and (4) Mr. Rubashkin's lawyers should have been informed of these contacts following his indictment. *Id.* at 165-166; *see also Liljeberg*, 486 U.S. at 866 ("A full disclosure [before trial] would have completely removed any basis for questioning the judge's impartiality and would have made it possible for a different judge to decide whether the interests—and appearance—of justice would have been served by a retrial."). The court took none of those precautions here. And while it criticized Mr. Rubashkin's motion as misstating the evidence or taking it out of context, Pet. App. 56, the court thwarted Mr. Rubashkin's attempts to obtain that full context by denying his request to refer the motion to another judge for discovery, *id.* at 67.

To be sure, the court of appeals found no evidence of actual bias on the district judge's part, and amici would be reluctant to challenge that conclusion based on the limited available evidence. Pet. App. 15. Section 455(a), however, seeks to uphold the *appearance* of impartiality, and an appearance of bias can be created

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Mr. Rubashkin of these *ex parte* contacts, but also took the step in the court of appeals—unprecedented in amici's experience—of opposing the filing of amicus briefs in support of Mr. Rubashkin, one of which made issue of those very contacts. The government later withdrew its opposition.

"'even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.'" *Liljeberg*, 486 U.S. at 860. To satisfy the appearance of justice, "'this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Concrete Pipe*, 508 U.S. at 618 (alteration in original). Thus, it is of no moment that the district judge concluded that she "did faithfully and impartially discharge and perform all of the duties that are incumbent upon her as the Chief Judge." Pet. App. 67. Section 455(a) does not serve to impugn the integrity of any judge, but seeks only "to promote public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 860.

Here, the district court's extensive and undisclosed involvement in the proceedings leading to Mr. Rubashkin's prosecution, as revealed in the FOIA documents, would cause, and has caused, reasonable people—including amici—to question the integrity of the proceedings in this case. Despite those grave concerns, the Eighth Circuit applied an outlier standard that makes no sense when applied to issues of trial fairness to foreclose consideration of Mr. Rubashkin's substantial claim. Had this issue arisen in another circuit, the result would have been different. This Court should grant review to resolve that split and prevent similar injustices by preserving defendants' ability to obtain a remedy when new evidence casts doubt on the trial's fundamental fairness.

II. THIS COURT SHOULD REVIEW MR. RUBASHKIN'S UNREASONABLE SENTENCE

The Court should also grant the petition for certiorari because Mr. Rubashkin received a profoundly unreasonable sentence that fails to satisfy the sentencing considerations set forth in 18 U.S.C. § 3553(a). Section 3553 contains "an 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, 101 (2007) (quoting § 3553(a)). In *Gall* v. *United States*, this Court elaborated that a sentencing court must consider "all of the § 3553(a) factors to determine whether they support the sentence requested by a party." 552 U.S. 38, 49-50 (2007). In doing so, the sentencing court "may not presume that the Guidelines range is reasonable." *Id.* at 50. Moreover, after selecting the appropriate sentence, the judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.*

In imposing a 27-year sentence on Mr. Rubashkin—a 51-year-old, first-time, nonviolent offender—the district court failed to consider the appropriate sentencing factors, even though the need to do so was acute. The guidelines range in Mr. Rubashkin's case was absurdly inflated due to the increased loss calculations and overlapping enhancements that can often arise in financial fraud cases. As former prosecutors and DOJ officials—including several amici—cautioned in their letter to the district court, "the fraud and money laundering guidelines, because they have numerous overlapping enhancements and give undue significance to the sometime-amorphous concept of loss, can often produce advisory sentencing ranges that are indisputably far

'greater than necessary' and lack any common sentencing wisdom." Former Prosecutors' Letter 14.

In the face of this inflated guideline range, Mr. Rubashkin presented an exceptional case for leniency. The evidence revealed a lifetime of charitable and civic activities and accomplishments, contributions to the community, and mitigating family circumstances. Numerous letters submitted on his behalf described his generosity and kindness, both to charitable causes and to individuals. Pet. C.A. Br. 94-96. Mr. Rubashkin is married with ten children, including an autistic son who depends on him heavily. *Id.* at 96-97. His crimes were motivated not by personal greed, but a desire to continue his father's business of ensuring an adequate supply of kosher foods. *Id.* at 88-89.

These mitigating factors should have been a central consideration in the district court's sentencing decision, which was required to take account of "the history and characteristics of the defendant" under 18 U.S.C. § 3553(a)(1). Instead, the court gave them virtually no weight, barely even engaging in any analysis of their significance. For example, the court dismissed Mr. Rubashkin's charitable and civic involvement as an inadequate basis for downward variance with the facile assumption that "most human beings" exhibited both "good traits and bad traits," and that Mr. Rubashkin's character must be no different. Pet. App. 130. But the evidence before the court showed otherwise, and the court violated § 3553(a)(1) by failing to address Mr. Rubashkin's substantial showing.

The resulting 27-year sentence—effectively a life sentence, and two years longer than even the prosecution had ultimately sought—is especially troubling when compared to the sentences of similarly situated

offenders. Under § 3553(a)(6), the district court should have considered "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." But Mr. Rubashkin's sentence dwarfed the sentences of other financial-fraud defendants with similar loss amounts, such as the two defendants Mr. Rubashkin pointed out in his sentencing memorandum who had received sentences of only nine years and one year respectively. *See* Pet. Sentencing Mem. 49, *United States* v. *Rubashkin*, 08-CR-1324, Dkt. 895 (N.D. Iowa filed Apr. 21, 2010). Instead, Mr. Rubashkin's sentence puts him in the company of defendants convicted of massive and far-reaching frauds entailing significantly higher loss amounts and harming countless individuals. *Id.* at 48-49.[4]

The highly disproportionate sentence in this case underscores the importance of ensuring that district courts consider all the § 3553(a) factors, as this Court instructed in *Gall*. *See* 552 U.S. at 50. Careful consideration of those factors is required precisely because mechanistic application of the guidelines range can so radically inflate a sentence beyond what is reasonable

[4] For example, Jeffrey Skilling, who was instrumental in Enron's financial collapse, received a 24-year sentence, and may yet receive a reduced sentence. *See United States* v. *Skilling*, 554 F.3d 529, 591-594 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010). Marc Drier, who defrauded investors of $700 million, was sentenced to 20 years, despite the government's request for 145 years. *See* B. Weiser, *Lawyer Sentenced to 20 Years for $700 Million Fraud*, N.Y. Times, July 14, 2009, at A20. And Bernard Ebbers, the former CEO of WorldCom charged for his role in a fraud leading to losses of $11 billion, was sentenced to 25 years. *See* C. Johnson, *Ebbers Gets 25-Year Sentence for Role in WorldCom Fraud*, Wash. Post, July 14, 2005, at A01.

in the particular case. Where that occurs, as in this case, justice demands that the court carefully consider any factors that counsel in favor of a below-guidelines sentence and explain why those factors do not warrant a downward variance. *See Rita* v. *United States*, 551 U.S. 338, 357 (2007) ("Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence … the judge will normally go further and explain why he has rejected those arguments."). Other sentencing courts routinely follow this principle and, as a result, "'virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high.'" Former Prosecutors' Letter 16 (quoting F. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 Fed. Sent'g Rep. 167, 169 (Feb. 2008)). Here, however, the district court failed to take account of significant § 3553(a) factors, resulting in a serious miscarriage of justice.

This Court should grant review not only to correct the injustice in Mr. Rubashkin's case, but to serve the broader judicial policy of promoting fairness and public confidence in the sentencing system. Since this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), courts have strived to develop an appropriate approach to accommodate competing considerations in sentencing, and this Court has appropriately taken an active role in that process. The manner in which our courts mete out criminal punishment is one of the most visible measures the public has to determine whether our justice system indeed "satisfies the appearance of justice." By imposing without explanation an effective life sentence that ignores compelling grounds for leniency and the interest in treating similar defendants similarly, the district court reached an unreasonable result that could

not fail to undermine the perception of fairness on which our system depends.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
SUE-YUN AHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

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APPENDIX

AMICI CURIAE FORMER ATTORNEYS GENERAL, SENIOR DEPARTMENT OF JUSTICE OFFICIALS, UNITED STATES ATTORNEYS, AND FEDERAL JUDGES

Kent B. Alexander	United States Attorney, Northern District of Georgia (1994-1997)
Hon. Lourdes G. Baird	United States District Judge, Central District of California (1992-2005)
	United States Attorney, Central District of California (1990-1992)
Hon. Bob Barr	U.S. House of Representatives, 7th District of Georgia (1995-2003)
	United States Attorney. Northern District of Georgia (1986-1990)
Hon. William G. Bassler	United States District Judge, District of New Jersey (1991-2006)
Donald L. Beckner	United States Attorney, Middle District of Louisiana (1977-1981)
Hon. John W. Bissell	United States District Judge, District of New Jersey (1982-2005) (Chief Judge (2001-2005))

Michael R. Bromwich	Inspector General, Department of Justice (1994-1999)
	Associate Counsel, Office of Independent Counsel for Iran-Contra (1987-1989)
J.R. Brooks	United States Attorney, Northern District of Alabama (1977-1981)
Mary Beth Buchanan	United States Attorney, Western District of Pennsylvania (2001-2009)
A. Bates Butler III	United States Attorney, District of Arizona (1980-1981)
J.A. "Tony" Canales	United States Attorney, Southern District of Texas (1977-1980)
Hon. Robert J. Cindrich	United States District Judge, Western District of Pennsylvania (1994-2004)
	United States Attorney, Western District of Pennsylvania (1978-1981)
Robert J. Cleary	United States Attorney, Southern District of Illinois (2002)
	United States Attorney, District of New Jersey (1999-2002)

Hon. U.W. Clemon	United States District Judge, Northern District of Alabama (1980-2006) (Chief Judge (1999-2006))
Kendall Coffey	United States Attorney, Southern District of Florida (1993-1996)
Paul Coggins	United States Attorney, Northern District of Texas (1993-2001)
Marvin L. Collins	United States Attorney, Northern District of Texas (1985-1993)
James F. Companion	United States Attorney, Northern District of West Virginia (1973-1976)
Robert J. Del Tufo	United States Attorney, District of New Jersey (1977-1980)
W. Thomas Dillard	United States Attorney, Northern District of Florida (1983-1987)
	United States Attorney, Eastern District of Tennessee (1981)
Harry D. "Donnie" Dixon, Jr.	United States Attorney, Southern District of Georgia (1994-2001)

Edward L. Dowd, Jr.	Deputy Special Counsel, Waco Investigation, Department of Justice (1999-2000)
	United States Attorney, Eastern District of Missouri (1993-1999)
Hon. Richard Eagleton	Judge, Illinois Tenth Judicial Circuit (1970-1990)
	United States Attorney, Southern District of Illinois (now known as Central District of Illinois) (1965-1969)
Ronald F. Ederer	United States Attorney, Western District of Texas (1989-1993)
Bruce J. Einhorn	Federal Immigration Judge (1990-2007)
	Prosecutor and Chief of Litigation, Office of Special Investigations, Department of Justice (1979-1990)
Robert B. Fiske, Jr.	United States Attorney, Southern District of New York (1976-1980)
Hon. Louis Freeh	Director, Federal Bureau of Investigation (1993-2001)
	United States District Judge, Southern District of New York (1991-1993)

Daniel J. French	United States Attorney, Northern District of New York (1999-2001)
Hon. John J. Gibbons	United States Circuit Judge, Court of Appeals for the Third Circuit (1970-1990) (Chief Judge (1987-1990))
Jamie Gorelick	Deputy Attorney General of the United States (1994-1997)
Rodger A. Heaton	United States Attorney, Central District of Illinois (2005-2009)
Philip B. Heymann	Deputy Attorney General of the United States (1993-1994)
	Assistant Attorney General in charge of Criminal Division, Department of Justice (1978-1981)
Hon. Richard J. Holwell	United States District Judge, Southern District of New York (2003-2012)
Hon. W. Asa Hutchinson	U.S. House of Representatives, 3rd District of Arkansas (1997-2001)
	United States Attorney, Western District of Arkansas (1982-1985)

G. Douglas Jones	United States Attorney, Northern District of Alabama (1997-2001)
Hon. Nathaniel R. Jones	United States Circuit Judge, Court of Appeals for the Sixth Circuit (1979-2002)
Hon. John C. Lifland	United States District Judge, District of New Jersey (1988-2007)
Gregory G. Lockhart	United States Attorney, Southern District of Ohio (2001-2009)
Hon. Eugene F. Lynch	United States District Judge, Northern District of California (1982-1997)
Robert G. McCampbell	United States Attorney, Western District of Oklahoma (2001-2005)
Hon. A. Melvin McDonald	United States Attorney, District of Arizona (1981-1985)
	Superior Court Judge, Maricopa County (1974-1981)
Hon. Frank H. McFadden	United States District Judge, Northern District of Alabama (1969-1982) (Chief Judge (1973-1982))
Michael D. McKay	United States Attorney, Western District of Washington (1989-1993)

Hon. Edwin Meese III	Attorney General of the United States (1985-1988)
Kenneth J. Mighell	United States Attorney, Northern District of Texas (1977-1981)
Jan Paul Miller	United States Attorney, Central District of Illinois (2002-2005)
Hon. Carlos R. Moreno	Associate Justice (Ret.), California Supreme Court (2001-2011)
	United States District Judge, Central District of California (1998-2001)
Hon. Joseph W. Morris	United States District Judge, Eastern District of Oklahoma (1974-1978)
Cono R. Namorato	Deputy Assistant Attorney General of the United States (1977-1978)
	Chief, Criminal Section, Tax Division, Department of Justice (1975-1977)
George O'Connell	United States Attorney, Eastern District of California (1991-1993)
Eileen J. O'Connor	Assistant Attorney General of the United States (2001-2007)

Hon. Robert O'Conor, Jr.	United States District Judge, Southern District of Texas (1975-1984)
Hon. Stephen M. Orlofsky	United States District Judge, District of New Jersey (1996-2003)
Hon. Layn R. Phillips	United States District Judge, Western District of Oklahoma (1987-1991)
	United States Attorney, Northern District of Oklahoma (1983-1987)
H. James Pickerstein	United States Attorney, District of Connecticut (1974)
Redding Pitt	United States Attorney, Middle District of Alabama (1994-2001)
John Raley	United States Attorney, Eastern District of Oklahoma (1990-1997)
Ira H. Raphaelson	Special Counsel, Financial Institutions, Department of Justice (1991-1993)
	United States Attorney, Northern District of Illinois (1989-1990)

Hon. Charles B. Renfrew	Deputy Attorney General of the United States (1980-1981)
	United States District Judge, Northern District of California (1972-1980)
James H. Reynolds	United States Attorney, Northern District of Iowa (1977-1982)
Benito Romano	United States Attorney, Southern District of New York (1989)
Richard A. Rossman	United States Attorney, Eastern District of Michigan (1980-1981)
Joe Russoniello	United States Attorney, Northern District of California (1982-1990, 2008-2010)
Hon. William S. Sessions	Director, Federal Bureau of Investigation (1987-1993)
	United States District Judge, Western District of Texas (1974-1987) (Chief Judge (1980 -1987))
	United States Attorney, Western District of Texas (1971-1974)
Earl J. Silbert	United States Attorney, District of Columbia (1974-1979)

J. Ronald Sim	United States Attorney, Western District of Washington (1976-1977)
Hon. Fern M. Smith	United States District Judge, Northern District of California (1988-2005)
Hon. Abraham D. Sofaer	United States District Judge, Southern District of New York (1979-1985)
Henry L. Solano	United States Attorney, District of Colorado (1994-1999)
Mary C. Spearing	Chief, Fraud Section, Criminal Division, Department of Justice (1994-1998)
Hon. Stanley Sporkin	United States District Judge, District of Columbia (1985-2000)
Hon. Kenneth W. Starr	Solicitor General of the United States (1989-1993)
	United States Circuit Judge, District of Columbia Circuit (1983-1989)
Donald K. Stern	United States Attorney, District of Massachusetts (1993-2001)

Hon. Herbert J. Stern	United States District Judge, District of New Jersey (1974-1987)
	United States Attorney, District of New Jersey (1971-1974)
Thomas L. Strickland	United States Attorney, District of Colorado (1999-2001)
Larry D. Thompson	Deputy Attorney General of the United States (2001-2003)
	United States Attorney, Northern District of Georgia (1982-1986)
Hon. Dick Thornburgh	Attorney General of the United States (1988-1991)
	United States Attorney, Western District of Pennsylvania (1969-1975)
Brett Tolman	United States Attorney, District of Utah (2006-2009)
Stanley A. Twardy Jr.	United States Attorney, District of Connecticut (1985-1991)

Atlee W. Wampler III	United States Attorney, Southern District of Florida (1980-1982) Former Miami Strike Force, Attorney-In-Charge, Organized Crime & Racketeering Section, Department of Justice (1975-1980)
Edward G. Warin	United States Attorney, District of Nebraska (1977-1981)
Donald W. Washington	United States Attorney, Western District of Louisiana (2001-2010)
Dan K. Webb	United States Attorney, Northern District of Illinois (1981-1985)
James J. West	United States Attorney, Middle District of Pennsylvania (1985-1993)
Daniel E. Wherry	United States Attorney, District of Nebraska (1975-1978)
Hon. Alfred Wolin	United States District Judge, District of New Jersey (1987-2004)