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

REPLY BRIEF FOR PETITIONER

NATHAN LEWIN
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
1775 Eye Street NW
Suite 850
Washington, DC 20006
(202) 828-1000

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

Counsel for Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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Respondent's opposition brief is remarkable for what it does *not* argue. Respondent does not even *attempt* to defend the Eighth Circuit's emphatic but disquieting construction of Rule 33 that precludes consideration of newly discovered evidence that does not pertain to factual innocence no matter how clearly the new evidence undermines the integrity of the proceedings. Nor does respondent deny that the Eighth Circuit's rule squarely conflicts with the law in other circuits. And respondent *concedes* that the district court did not consider or explain its basis for rejecting petitioner's disparity-based argument for a below-Guidelines sentence, which would have resulted in vacatur of his extraordinary 27-year sentence in other circuits.

Respondent instead dedicates much of its brief to a discussion of the merits of the disqualification issue, which is precisely what the Eighth Circuit's anomalous rule precluded. There will be time enough to discuss the merits if this Court grants certiorari. Respondent's failure to defend the Eighth Circuit's Rule 33 holding or deny the existence of a split in the circuits only underscores the importance of this Court's review, which an extraordinary bipartisan array of *amici*—including former Attorneys General, United States Attorneys, and federal judges; leading criminal law, legal ethics, and sentencing scholars; and four national organizations—urge as well. As it stands now, petitioner's wholly disproportional 27-year sentence was affirmed without appellate consideration of either the disparate sentence or the new evidence strongly suggesting the trial judge should have

never sat on the case. That is an injustice that should not be allowed to stand.

I. THE COURT SHOULD GRANT REVIEW OF THE FIRST QUESTION PRESENTED AND THE EIGHTH CIRCUIT'S RULE 33 HOLDING, WHICH RESPONDENT POINTEDLY DOES NOT DEFEND.

1. Respondent makes *no* effort to defend the Eighth Circuit's unique limiting construction of Rule 33. Respondent does not dispute that the Eighth Circuit's rule "*requires* that the newly discovered evidence 'probably will result in an acquittal,'" and forecloses motions for a new trial based on newly discovered evidence demonstrating a trial's unfairness. App. 13. Nor could it; the Eighth Circuit could not have been more emphatic that its rule is "clear and binding." *Id.* Respondent likewise makes no attempt to defend the Eighth Circuit's approach as consistent with the "interest of justice" language of Rule 33 or the law of at least seven other circuits. These are reasons enough for the Court to grant certiorari.

Respondent instead suggests that there is a distinction between new evidence demonstrating actual bias—which it must concede has caused other circuits to grant new trials—and new evidence demonstrating an appearance of bias. This invented distinction has no grounding in the ruling below, which forecloses consideration of new evidence concerning trial unfairness no matter how dramatically it demonstrates actual or apparent bias. The Eighth Circuit certainly did not rely on this supposed distinction in its holding. Rather, it

flatly rejected petitioner's argument that it makes no sense to require a "showing of probable acquittal" when the new evidence goes to the integrity of the proceedings, rather than factual innocence. The Eighth Circuit made crystal clear that it had only one standard for new evidence—probable acquittal—and its rule was "clear and binding."

Nor have other circuits drawn this distinction. Most circuits simply permit Rule 33 motions premised on newly discovered evidence directed at a trial's unfairness. *See United States v. Elso*, 364 F. App'x 595 (11th Cir. 2010); *United States v. McCarthy*, 54 F.3d 51 (2d Cir. 1995); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980) (Kennedy, J.); *Horton v. United States*, 256 F.2d 138 (6th Cir. 1958); *Rubenstein v. United States*, 227 F.2d 638 (10th Cir. 1955). The Fourth and Fifth Circuits have likewise permitted new trial motions to consider claims that bear upon the "integrity of the jury's verdict" or "integrity of the earlier trial," *Holmes v. United States*, 284 F.2d 716, 720 (4th Cir. 1960), or "afford reasonable grounds to question the integrity of the verdict," *United States v. Williams*, 613 F.2d 573 (5th Cir. 1980). But neither court remotely suggested that only claims of actual, as opposed to apparent, bias implicate the integrity of the proceedings. With good reason: any suggestion that appearance-of-bias claims do not implicate the integrity of judicial proceedings would be contrary to well-settled law.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "Fairness of course requires an

absence of actual bias," but "to perform its high function in the best way, justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted); *see also Siefert v. Alexander*, 608 F.3d 974, 985 (7th Cir. 2010) ("Due process requires both fairness and the appearance of fairness in the tribunal."); *accord Rhoades v. Henry*, 598 F.3d 511, 519 (9th Cir. 2010); *United States v. Nickl*, 427 F.3d 1286, 1298 (10th Cir. 2005). Thus, respondent is flatly wrong to suggest that the wall of circuit precedent is distinguishable because the new evidence here suggests apparent, not actual, bias and the former has no "effect on the integrity of the verdict," Opp. 17. Rather, "an improper § 455(a) denial" is "an error that affects the integrity of the *whole judicial process*." *United States v. Brinkworth*, 68 F.3d 633, 638 (2d Cir. 1995) (emphasis added).

It is thus unsurprising that numerous courts of appeals have addressed appearance-of-bias claims under Rule 33. Respondent's assertion that these cases "are most naturally read as involving claims that trial judges were *actually* biased, not simply that they appeared to be biased," Opp. 15, is a gross mischaracterization. The decisions do not support that distinction or offer any reason to slice the bologna so thinly. They simply analyze the strength of the new evidence on the merits—precisely what the Eighth Circuit's rule precludes. In *Conforte*, for example, the defendants asserted a 28 U.S.C. § 455(a) appearance-of-bias claim and the court discussed the relationship between § 455(a) and (b) before holding that the new evidence did not establish "the appearance … of bias or prejudice." 624 F.2d at 880-81. In *United States v. Agnew*, 147

F. App'x 347 (4th Cir. 2005), the court *only* addressed a § 455(a) claim, concluding that even given the new evidence "a reasonable person … would not question the judge's impartiality." *Id.* at 354. In *Elso*, the defendant alleged that the judge's bias "was reasonably brought into question," and the court reviewed the standard for assessing § 455(a) claims. 364 F. App'x at 597-98. Respondent is also incorrect to suggest that all such cases have "denied relief," Opp. 16. *See, e.g.*, *United States v. Arnpriester*, 37 F.3d 466, 467-68 (9th Cir. 1994) (reversing denial of new trial motion premised on "newly-discovered evidence showing that the trial judge should have recused himself" under § 455(a)).

2. Respondent's contention (at 20) that petitioner "cannot satisfy other accepted prerequisites for obtaining a new trial" likewise is unrelated to the Eighth Circuit's *ratio decidendi* and in all events lacks merit. Respondent asserts that petitioner fails to identify any new evidence that he "did not know or could not have known" during his trial, citing petitioner's awareness of a separately charged defendant's recusal motion. Opp. 20-21. But that motion relied solely on publicly available documents, and in denying it, the trial judge stated that her pretrial coordination with prosecutors and federal agents was minor and ministerial. Pet. 3. The redacted ICE documents disclosed via petitioner's FOIA lawsuit revealed far deeper and more troubling involvement than the judge had initially let on, including regular "operational/planning meeting[s]," discussions of "charging strategies, numbers of anticipated arrests and prosecutions, … and other issues related to the

… investigation and operation," and expressions of support "in any way possible" by the judge—who was deemed a "stakeholder" in the operation. *Id.* at 21-22.

There is an obvious difference between minor and ministerial logistical contact and months-long interaction in which the judge becomes a "stakeholder" in a raid. A suggestion of the former is radically different from knowledge of the latter, and the latter was only revealed via FOIA. Indeed, petitioner's trial lawyers swore in affidavits that had they known what the FOIA documents disclosed, they would have moved for recusal notwithstanding the judge's earlier ruling. *See* 2:08-cf-1324 Doc. No. 942-2, 942-3. Respondent's suggestion (Opp. 21) that petitioner should have "asked the court for details about its involvement" is folly; petitioner had no good-faith basis for doubting the judge's description of her role as "logistical." Seeking ICE documents, moreover, was far *less* intrusive and *more* respectful of "judicial resources," and given that ICE did not provide documents until *after* sentencing, petitioner's Rule 33 motion was hardly "strategic behavior." *Id.*

Respondent's argument that the FOIA evidence "does not show … that the trial judge probably should have recused herself" (Opp. 21) is doubly problematic. First, the Eighth Circuit's construction of Rule 33 precludes precisely this inquiry. Even if the FOIA documents would give the judge no choice but to recuse, petitioner could not obtain relief in the Eighth Circuit.

Second, respondent's self-serving explanation of the documents, which remain redacted and in all events do not tell the entire story, is no substitute for the fair hearing before a different judge that petitioner sought but was denied. A far better barometer for the strength of petitioner's claims are the views of independent ethics experts, *see* Pet. 22, and the bipartisan array of former attorneys general, federal prosecutors, federal judges, and others who have weighed in as *amici*. But even respondent's own account does not hold water. For example, while the documents state that the judge, prosecution, and agents discussed "charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the … investigation and operation," respondent reduces all of the foregoing to "logistics." Opp. 22-23. While these documents may not have been written with the precision of statutes—and warrant an evidentiary hearing to explore the nuances and true facts—it is simply implausible to suggest that months of wide-ranging meetings produced little more than a suggestion that detainees take showers and wear appropriate clothing. *Id.* Indeed, despite its lengthy detour into the kind of inquiry that the Eighth Circuit forecloses, respondent has no explanation for documents describing the judge as a "stakeholder" and noting regular "operational/planning meetings."

3. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), supports petitioner's entitlement to a new trial. The first *Liljeberg* factor addresses the "risk of injustice to the parties in the particular case." *Id.* at 864. That risk to petitioner

is plain: a judge described as a "stakeholder" in the very raid that precipitated his arrest oversaw his trial and imposed his massive sentence. The same judge conducted regular "operational/planning meeting[s]" with prosecutors and agents yet rejected petitioner's new trial motion, denied further discovery and an evidentiary hearing concerning those meetings, and refused to refer his request to another judge. *See Arnpriester*, 37 F.3d at 468 ("The process was irreparably flawed when a judge who would reasonably be believed to be biased was the judge who ruled on the motion."). By contrast, the United States' stated interest is that its citizens receive justice in its courts.

The second *Liljeberg* factor—the "risk that the denial of relief will produce injustice in other cases"—likewise favors petitioner. Enforcing petitioner's claim "may prevent a substantive injustice in some future case by encouraging a judge … to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." 486 U.S. at 864, 868. This is plainly not a case where the judge "inadvertently overlook[ed] a disqualifying circumstance." *Id.* at 862.

Finally, the third factor—the "risk of undermining the public's confidence in the judicial process," *id.* at 864—is clearly satisfied. Independent experts and scores of *amici* have attested to the damage that the trial judge's actions and Eighth Circuit's ruling have had upon perceptions of a fair criminal justice system. Here, "there is a greater risk of unfairness in upholding" petitioner's conviction "than there is in allowing a

new judge to take a fresh look at the issues." *Id.* at 868. Yet the Eighth Circuit's anomalous rule forecloses that possibility entirely, underscoring the need for this Court's review.

II. THE COURT SHOULD GRANT REVIEW OF THE SENTENCING QUESTION.

The extraordinary 27-year sentence imposed on petitioner was unreasonable. Neither the district court nor Eighth Circuit provided a reasoned explanation for the gross disparity in petitioner's sentence when compared with other offenders. What would be reversible error in other circuits was endorsed by the Eighth Circuit, warranting this Court's review.

1. Respondent concedes that the district court "did not specifically address petitioner's argument" that the 25-year sentence urged by the government would result in an improperly disparate sentence, thereby violating 18 U.S.C. § 3553(a)(6). Opp. 28; *id.* at 24 (court "failed explicitly to address" disparity argument). That concession confirms that petitioner's sentence would have been vacated as procedurally unreasonable in the Third, Sixth, and Seventh Circuits, rendering this case an ideal vehicle for resolving the circuit conflict. *See* Pet. 27-30.

Respondent's assertion (at 30) that "in particular cases, on the basis of the facts before them," these circuits have held that "additional explanation was necessary" is unavailing. In *United States v. Gapinski*, 561 F.3d 467 (6th Cir. 2009), the Sixth Circuit clearly stated: "[F]or a sentence to be procedurally reasonable, when a defendant raises a

particular, nonfrivolous argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." *Id.* at 474 (brackets, citations, and internal quotation marks omitted). That is quite plainly a "categorical rule." Opp. 30. Likewise, in *United States v. Ausburn*, 502 F.3d 313 (3d Cir. 2007), the Third Circuit acknowledged "one concrete requirement": a sentencing court "must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit and a factual basis." *Id.* at 329. The court then applied that *legal rule* to vacate a sentence because the district court "did not address at least one potentially meritorious argument" advanced by the defendant. *Id.*; *see also United States v. Jackson*, 467 F.3d 834, 841 (3d Cir. 2006). In *United States v. Miranda*, 505 F.3d 785 (7th Cir. 2007), the Seventh Circuit vacated a defendant's sentence precisely because, as here, the court "did not directly address [his] non-frivolous arguments" for a lower sentence. *Id.* at 786. Respondent cannot cite *one* other case from these circuits refuting or qualifying these legal rules.

Nor are these decisions "inapposite" because the court "considered petitioner's [other] arguments for a below-Guidelines sentence." Opp. 30. The court "did not specifically address" the disparity argument, which is the critical inquiry. *See Miranda*, 505 F.3d at 792 (court must "specifically address" all nonfrivolous arguments). Moreover, the court indisputably did not explain *why it rejected* that argument. *See Gapinski*, 561 F.3d at 474 (record

must reflect "both that the district judge considered the defendant's argument *and that the judge explained the basis for rejecting* it" (emphasis added)); *Ausburn*, 502 F.3d at 329 (court must "acknowledge *and respond to*" nonfrivolous argument (emphasis added)).

2. Respondent also characterizes petitioner's § 3553(a)(6) argument as "barely developed." Opp. 26, 28. But petitioner vigorously pressed the argument at every appropriate opportunity. *See* 2:08-cf-1324 Doc. No. 895, at 52-54 (sentencing memorandum); Doc. No. 937, at 70 (sentencing hearing); Pet. C.A. Br. 90-93 (Eighth Circuit). Respondent faults petitioner for devoting "three pages" of his sentencing memorandum to the argument, Opp. 25, but no rule of preservation requires more, and it does not take long to develop the argument that a 25-year sentence for a first-time non-violent offender is wildly disparate from other sentences. And far from "simply select[ing] a handful of well-known defendants" and "assert[ing] that his sentence should be comparable to or lower than theirs," *id.*, petitioner argued that he merited a shorter sentence given the others' more serious crimes ("large-scale Ponzi schemes"), motives ("greed, avarice and for personal gain"), and consequences ("defraud[ing] vulnerable victims of their life savings"). Doc. No. 895, at 53.

Regardless, the relevant consideration is whether petitioner's argument was "frivolous"; not even respondent makes that claim. The court's conceded failure to specifically address and explain its basis for rejecting the argument would have resulted in vacatur in the Third, Sixth, and Seventh

Circuits. The conflicting decision here warrants review.

3. Respondent contends (Opp. 26, 29) that *Rita v. United States*, 551 U.S. 338 (2007), "makes clear that the district court did not commit any error." Petitioner would welcome the opportunity to address that merits question at length on plenary review. Nonetheless, respondent is incorrect. *Rita* observed that when a defendant "presents nonfrivolous reasons for imposing" a non-Guidelines sentence, "[s]ometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation." *Id.* at 357. But *Rita* never said that sometimes *no* explanation will suffice. A failure to provide *any* explanation undercuts the appellate review process and undermines the legitimacy of criminal sentencing. *See* Pet. 31-33.

4. Respondent is silent on both the importance of the sentencing question and the substantive unreasonableness of petitioner's 27-year sentence. *See* Pet. 33-36. For good reason: courts continue to struggle implementing this Court's landmark sentencing decisions, and this case provides an ideal vehicle for the Court to provide much-needed guidance concerning reasonableness review. It has deservedly drawn the attention of leading sentencing expert *amici* as a symbol of what ails federal sentencing and an opportunity for remedying those deficiencies. The Court's review is plainly warranted.

CONCLUSION

The combined rulings of the Court of Appeals deprived petitioner of any consideration of new evidence indicating that the trial judge never should have sat on his case *and* any explanation for his wildly disparate sentence. Those rulings conflict with the rules of multiple other circuits, but also with a more fundamental premise of our system. Justice demands a statement of reasons and abhors a ukase. This Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

NATHAN LEWIN
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
1775 Eye Street NW
Suite 850
Washington, DC 20006
(202) 828-1000

Counsel for Petitioner

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