No. 18-6237

IN THE
Supreme Court of the United States

JACOB L. SMITH,
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

PETITIONER'S REPLY BRIEF

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITIONER'S REPLY BRIEF

By statute, a district court must provide "the reasons" for the imposition of a particular sentence. 18 U.S.C. § 3553(c). And when a particular sentence exceeds the advisory guidelines range (as in this case), a district court must provide "the specific reason for the imposition of" the above-range sentence. 18 U.S.C. § 3553(c)(2). This Court held over a decade ago that a failure to provide an adequate explanation for the imposed sentence is procedural error. *Gall v. United States*, 552 U.S. 38, 50 (2007). An adequate explanation is necessary "to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.*

But since this Court decided *Gall*, a complex and entrenched Circuit split has developed over how a party must preserve a § 3553(c) challenge. Pet. 11-15. In some Circuits, a party who argues for a lower sentence than the one imposed necessarily preserves a § 3553(c) challenge. Pet. 13-14. In other Circuits, in order to preserve a § 3553(c) challenge, a party must object to the adequacy of the sentence's explanation, but only if the district court gives the party an opportunity to do so. Pet. 14-15. And in other Circuits, like the Tenth Circuit here, a party must always object to the adequacy of the sentence's explanation in order to preserve a § 3553(c) challenge for appellate review. Pet. 12-13.

The government admits, as it must, that this conflict exists. BIO 8, 13. But the government asks this Court not to resolve the conflict for three reasons: (1) the conflict is "narrower than" we've suggested, BIO 14-18; (2) the Tenth Circuit's forfeiture rule is correct, BIO 8-13; and (3) Mr. Smith would not be entitled to relief

in any event, BIO 18-21.

None of the government's arguments are persuasive. Nor should they deter this Court from resolving this Circuit split. As the government admits, this issue is recurring. BIO 17-18 (noting that this Court has refused to resolve the issue on at least eleven different occasions). Until this Court steps in to resolve the split, it will continue to receive petitions asking it to do just that. And for good reason. This Court's primary function is to maintain uniformity in the lower courts. Sup.Ct.R. 10(a). Review is necessary.

Nor does the government deny the importance of this issue. One of the primary purposes of an adequate explanation is to "allow for meaningful appellate review." *Gall*, 552 U.S. at 50. Yet, in the Circuits that require a formalistic, often impossible-to-make objection to the sentence's explanation (like the Tenth Circuit), appellate review is generally meaningless, not meaningful. Pet. 15-17. As here, appellate courts often summarily dismiss the claims under plain error review. Pet. App. 3a. If this Court is serious about "meaningful appellate review" of a sentence's explanation, it should grant this petition, resolve the conflict in the Circuits, and reverse the Tenth Circuit's decision.

I. The Circuits are split at least three ways on this issue.

According to the government, the Circuit split is "narrower" than what we've suggested. BIO 14. But even the government's "narrower" split involves three different approaches. BIO 15-18. The government does not dispute that the Fourth and Eleventh Circuits do not require an objection to the sentence's explanation so

long as the party asked for a lower sentence than the one imposed. BIO 16-18. The government also does not dispute that the Sixth Circuit "automatically considers a claim preserved when a district court does not invite objections after announcing a sentence." BIO 15. Both of these rules differ from the Tenth Circuit's rule "that plain-error review applies when a defendant fails to object to the district court's failure to explain a sentence." BIO 14. Putting all else aside, a three-way split on such an important issue is in need of resolution.

The government attempts to undermine this three-way split in two ways. First, the government claims that the Eleventh Circuit could switch sides in the conflict because its precedent on this subject dates prior to this Court's decision in *Gall* and *Rita v. United States*, 551 U.S. 38 (2007). BIO 16-17. But the government never explains the point.

Gall confirmed what § 3553(c)'s plain text requires: district courts must give adequate reasons for their sentences. Nothing in *Gall* undermines the Eleventh Circuit's rule that the "question of whether a district court complied with 18 U.S.C. § 3553(c)(1) is reviewed de novo, even if the defendant did not object below." *United States v. Bonilla*, 463 F.3d 1272, 1274 (11th Cir. 2006). Just the opposite. *Gall* instructs district courts that an above-range sentence must be supported by a "sufficiently compelling" justification. 552 U.S. at 50. "After settling on the appropriate sentence, [the district court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* With this clear instruction, surely parties need not remind

district courts of such an obligation via an exception or objection to the sentence's explanation. *Gall* is clear: that explanation "allow[s] for meaningful appellate review." *Id.* It is for the appellate court to "first ensure" whether the district court "adequately explain[ed] the chosen sentence." *Id.* at 51.

Nor does anything in *Rita* undermine the point. Rather, *Rita* also stresses the need for an adequate explanation. "Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." 551 U.S. at 357. The district court's "reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission." *Id.* at 358. In *Rita*, this Court found the district court's "statement of reasons [] brief but legally sufficient." 551 U.S. at 358. This Court did not treat the claim as forfeited, even though the defendant in *Rita* did not object to the district court's explanation.[1] Because *Rita* is consistent with the Eleventh Circuit's approach, it is not a reason for the Eleventh Circuit to reconsider that approach.

The government also claims that the Eleventh Circuit's rule is "inconsistent with" this Court's decision in *Booker v. United States*, 543 U.S. 220 (2005), because *Booker* instructed the lower courts to apply "ordinary prudential doctrines . . . including plain error, when reviewing sentences." BIO 17. But this argument is a misreading of *Booker*. This Court acknowledged in *Booker* that its remedial holding must apply to

[1] The briefs filed by both parties in this Court in *Rita* make clear that no objection was lodged to the sentence's explanation.

all cases on direct review. 543 U.S. at 268. Undoubtedly in light of the immense number of cases affected by *Booker*, this Court commented that it did not "believe that every appeal will lead to a new sentencing hearing . . . because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Id.* But "the issue" in *Booker* was the Sixth Amendment violation identified in that case. It is disingenuous to read this aspect of *Booker* as applying to all sentencing errors. Indeed, if this were true, we fail to see why the government concedes that a party need not object to the length of a sentence in order to preserve a substantive reasonableness challenge on appeal. BIO 12-13.

The government ignores two other points. First, the Eleventh Circuit's rule is over a decade old. If the Eleventh Circuit were unhappy with this rule, surely it would have reconsidered it by now. And second, the Fourth Circuit has adopted the identical no-need-to-object rule as the Eleventh Circuit. BIO 16. Even if the Eleventh Circuit were to reconsider its rule, the three-way conflict in the Circuits would persist.

The government's second attempt to undermine the three-way split is to note that the Sixth Circuit has labeled its rule "an exercise of [its] supervisory powers over the district courts," and not an interpretation of the federal rules. BIO 15. But this argument ignores the fact that the requirement to give reasons is found in a *statute*, not a *rule*. 18 U.S.C. § 3553(c)(2). The conflict here goes to the heart of this *statute*. And regardless, the underlying rationale adopted by the Sixth Circuit does nothing to diminish the conflict on this issue. Review is necessary.

Finally, we have explained that at least three other Circuits prefer district courts to give parties a "fair opportunity to object" to the imposed sentence. Pet. 14-15. While the government claims that this flexible standard differs from the Sixth Circuit's inflexible standard, BIO15-16, that is beside the point. The important point is that this flexible standard differs from the other three approaches just mentioned, resulting in a fourth rule adopted by the lower courts. Such cacophony cannot stand. Review is necessary.

II. The Tenth Circuit erred.

The government claims that the Tenth Circuit's need-to-object rule is consistent with Federal Rule of Criminal Procedure 51. BIO 8-13. The government acknowledges that Rule 51(a) does not require a party to take exception to a court's rulings. BIO 10. But it claims that Rule 51(a) applies only to issues that were raised prior to the district court's ruling. This qualification, however, is not found in Rule 51(a)'s plain text. Nor should this Court rewrite the rule in such a manner. As just one example, consider a district court's written order on a suppression issue. If that order contains an unforeseen error (perhaps the district court misapplies a case or relies on a clearly erroneous fact), a party in that situation would have had no opportunity to object (before or after the ruling) and would not have raised this issue "at all." BIO 10. Under the government's reading of Rule 51(a), the defendant has forfeited that issue and must overcome plain-error review on appeal. Rule 51(a)'s text, however, says the exact opposite: because the district court has already ruled, an exception to that rule is "unnecessary." Fed.R.Crim.P. 51(a).

The government also fails to explain how a party can object to the sentence's explanation *before* the imposition of sentence. Instead, in the government's view, "a defendant necessarily has not objected to the adequacy of the court's explanation of the sentence before that explanation is provided." BIO 13. And if this is true, a party would necessarily have to take *exception* to the adequacy of a sentence's explanation in order to preserve it for review. Yet, the plain text of Rule 51(a) does not require a party to take exception to the district court's rulings.

But, the government says, Rule 51(b) requires an objection "when the court ruling or order is made or sought." BIO 11. In the government's view, after a district court imposes sentence, a party *must always* raise a § 3553(c) challenge. *Id.* 11-12. According to the government, when a party takes exception to the sentence's explanation, a district court can then "correct" any "mistake." BIO 9. A district court, the government tells us, "may well supplement that explanation." *Id.*

The government's interpretation of Rule 51(b) is unpersuasive for three reasons. First, it conflicts with Rule 51(b)'s plain text. While the rule requires an objection "when the court ruling or order is made or sought," it also provides: "If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Fed.R.Crim.P. 51(b). In contrast, the Tenth Circuit's rule (which the government adopts) requires an objection in situations where a party is not given an opportunity to object. Pet. App. 3a (citing *United States v. Craig*, 794 F.3d 1234, 1238 (10th Cir. 2015) ("It is a lawyer's job to object—by way of interruption, if the circumstances warrant—when the court is in the midst of

committing an error.")).

Second, the government's rule is unrealistic. It is simply not true that a district court, who is informed that a party is dissatisfied with the sentence's explanation, will thereafter "correct" or "supplement" that explanation. Why would it? As we have already explained, district courts are presumed to know the law, and the law requires a detailed statement of reasons. Pet. 19. There is absolutely no reason to think that a district court who is told that a party thinks that a sentence's explanation is inadequate will thereafter alter that explanation, just as there is no reason to think that a district court who is told that its sentence is too long (or short) will thereafter alter the length of the sentence. Pet. 19-21. And practically speaking, the government has cited no case where this has actually happened.

This leads to our third point: as the government acknowledges, the courts of appeals unanimously hold that Rule 51 does not require an exception or an objection to the length of a sentence in order to preserve a substantive reasonableness challenge on appeal, so long as the defendant has asked for a shorter sentence. BIO 13. This is so because, by asking for a shorter sentence, "the defendant has already put the court on notice of his objection to the length of the sentence." *Id.* But, as we have already explained, the same logic applies to the sentence's explanation. Pet. 17-20. There is no plausible reason to distinguish between the length of a sentence and its explanation. If a party disagrees with a sentence's length, then that party also necessarily (and obviously) disagrees with the sentence's explanation. It is nonsensical to require an objection to one, but not the other. The better rule is the

one adopted by the Fourth and Eleventh Circuits. Pet. 13-14. The Tenth Circuit's rule is nothing more than "a trap for the unwary" that "saddle[s] busy district courts with the burden of shifting through an objection – probably formulaic – in every criminal case." Pet. 17.

III. This is an excellent vehicle.

The government offers two reasons why, even if this Court is inclined to resolve this conflict, it should not do so in this case. BIO 18-19. Neither reason is persuasive.

The government first asserts that, even if this Court were inclined to adopt the rule advanced by the Sixth Circuit, it would not affect the outcome here because "the district court expressly offered petitioner the opportunity to object." BIO 18. This argument is unpersuasive for two reasons. First, this argument ignores the rule adopted by the Fourth and Eleventh Circuits. If this Court were to adopt that rule (as it should), Mr. Smith had no obligation to object *even if given the opportunity*. By asking for a lower sentence, Mr. Smith preserved a § 3553(c) challenge to the sentence's explanation, and the Tenth Circuit erred when it applied plain-error review.

Second, the argument is based on a false premise. The district court asked the parties to comment on its *tentative* sentence, not its *final* sentence. Pet. 21-22. The government concedes the point. BIO 12. It then summarily states that an opportunity to object to a *tentative* sentence is sufficient to trigger Rule 51(b). *Id.* In doing so, the government ignores the material differences between *tentative* and *final* sentences. Pet. 21-22. The government also implies that a *tentative* sentence is nothing more

than the *final* sentence. BIO 12. But that is simply untrue. As any attorney who practices before a district court that regularly imposes "tentative" sentences can attest, such district courts not infrequently impose final sentences that differ from the tentative sentences. And when that happens, it makes little sense to say that an objection to a *tentative* sentence is sufficient to preserve a challenge to a *final* sentence.

The government's other poor-vehicle claim is that the resolution of this conflict under the facts of this case would not affect the outcome "because the district court's explanation of petitioner's sentence was adequate under any standard of review." BIO 18. We obviously disagree. And there is no reason to think that the Tenth Circuit does not disagree either. Under the four-pronged plain-error review test, the first prong requires an error, whereas the second prong requires this error to be "plain." *United States v. Olano*, 507 U.S. 725, 732-734 (1993). If the district court did not err at all, the Tenth Circuit would have resolved this appeal under the first prong of plain-error review. Yet, the Tenth Circuit did not do this. Instead, the Tenth Circuit resolved this appeal on the second-prong of plain-error review: "We conclude this explanation was not *plainly* inadequate." Pet. App. 3a. If the Tenth Circuit is taken at its word, absent plain-error review, Mr. Smith established error, and that error would have lead to a resentencing under nondeferential review.

In any event, whether Mr. Smith is entitled to relief under a proper standard of review is not an issue before this Court. Any concern the government has can be addressed on remand in the Tenth Circuit.

In the end, Mr. Smith was eighteen years old when he committed the instant offense. Pet. 4. Mr. Smith had minimal criminal history, but a documented history of mental illness. *Id.* 4-6. His difficult childhood is also well documented. *Id.* And in committing the offense, he was influenced heavily by a much older individual. *Id.* In the district court's own words, "but for [Mr. Smith's codefendant], this particular crime probably would not have occurred, at least not in the manner that it did." Pet. 6. Yet, Mr. Smith received a 300-month above-guidelines-range term of imprisonment. Pet. 8. The district court's explanation for this sentence was inadequate. Had the Tenth Circuit not found Mr. Smith's § 3553(c) challenge forfeited, he would have been entitled to resentencing. Review is necessary.

CONCLUSION

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

Respectfully submitted,

MELODY BRANNON
Federal Public Defender

DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner