No. 18-7739

IN THE

Supreme Court of the United States

GONZALO HOLGUIN-HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Court granted certiorari to decide "[w]hether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence." Pet. i. Faced with the plain text of Rule 51, the Court-appointed Amicus agrees that no such objection is necessary. "[A]n after-the-fact objection," Amicus concedes, "is not the *only* way to preserve a substantive-reasonableness challenge." Amicus Br. 30; *see also* Petr. Br. 10-15.

But tasked with defending the judgment below, Amicus argues the Fifth Circuit actually follows an alternative test and faults petitioner for failing to satisfy it. That test—which would still diverge from the approach taken by every other court of appeals—would require a defendant to argue not only that he "should be sentenced to a specific sentence," but also to tell the district court that "anything above a [certain] sentence" would be reversed on appeal. Amicus Br. 30. This proposal finds no more support in the text of Rule 51 (or 18 U.S.C. § 3553) than does the Fifth Circuit's rule. It also contravenes this Court's federal sentencing precedent, offers no practical benefit, and would upend settled practice in numerous other areas of the law.

Amicus's other contention—that Rule 51 requires defendants to tick off "the specific facts and circumstances" supporting each argument in favor of a lower sentence, Amicus Br. 20—is no more availing. This Court need not address this contention. The question here is what is necessary "to invoke appellate reasonableness review of the length of a defendant's sentence," Pet. i, not what defendants must do to preserve particular arguments in support of such a

claim. In any event, the district court had fair notice of each aspect of the Section 3553 claim petitioner seeks to advance in this appeal. To the extent Amicus maintains otherwise, he demands a level of ritualistic formality that is neither required nor useful.

For all of these reasons, this Court should hold that the Fifth Circuit erred in applying plain error review to petitioner's substantive Section 3553 claim. If, as in past cases, this Court also considers for itself whether the district court's sentence is reasonable, it should hold that it is not. The district court wanted to ensure that petitioner's first offense "mean[t] something." J.A. 11. Yet that offense already produced 23 months of mandatory extra prison time in connection with petitioner's second offense. The additional term of imprisonment the district court imposed on top of that sentence was therefore "greater than necessary" to achieve the goals of Section 3553(a).

I. Plain error review does not apply to petitioner's challenge to the length of his sentence.

A. The Fifth Circuit's post-sentence objection requirement is wrong.

1. Attempting to muddy the issue this Court granted certiorari to decide, Amicus initially asserts that it is "not at all clear" that the Fifth Circuit requires a post-sentence objection to preserve a challenge to the length of a sentence for appeal. Amicus Br. 30. Amicus is incorrect. The Fifth Circuit requires a post-sentence objection, and it applied that rule here.

In *United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007), the Fifth Circuit considered whether it should follow the Seventh Circuit's holding that there is no need "to object to a sentence as unreasonable *after its*

pronouncement" to preserve a substantive Section 3553(a) claim for appeal. J.A. 35-37 (reprinting *Peltier*) (quoting *United States v. Castro-Juarez*, 425 F.3d 430, 433 (7th Cir. 2005)) (emphasis added). The Fifth Circuit rejected the Seventh Circuit's rule, holding that a defendant must "object at sentencing to the reasonableness of his sentence," *id.* 35—a phrase that makes no sense unless it contemplates objecting to a sentence that has already been imposed.

Neither of the subsequent Fifth Circuit cases Amicus cites backed away from this requirement. *United States v. Heard*, 709 F.3d 413, 425 (5th Cir. 2013), cited *Peltier* while faulting the defendant for "fail[ing] to object[]" to the reasonableness of his sentence. And *United States v. Neal*, 578 F.3d 270, 272-74 (5th Cir. 2009), involved an alleged "procedural error"—not a substantive Section 3553(a) claim. Consequently, lawyers in the Fifth Circuit continue to understand circuit law to require a post-sentence objection to preserve the ability to challenge the length of a sentence on appeal. *See* NACDL Br. 9-13.

Moreover, the Fifth Circuit applied *Peltier*'s post-sentence objection rule in this case. The court of appeals stated that plain error review applies "when a defendant fails to object in the district court to the reasonableness of the sentence imposed," and it cited *United States v. Whitelaw*, 580 F.3d 256 (5th Cir. 2009). J.A. 2. *Whitelaw*, in turn, cites *Peltier* for this same rule. 580 F.3d at 259-60.

2. The closest Amicus comes to defending the Fifth Circuit's post-sentence objection requirement is referencing two types of claims, outside the criminal sentencing context, that sometimes require post-ruling objections. Amicus Br. 31-32. Neither example is analogous.

Start with Amicus's reference to jury instructions. To preserve a claim of instructional error, a litigant must object after the instruction issues; a request beforehand for a different proposed instruction is insufficient to preserve a claim of error. But as Amicus recognizes (Br. 31), this requirement is explicitly stated in the rules governing jury instructions. *See* Fed. R. Crim. P. 30(d) (requiring a specific objection after the court informs the parties of its intended instructions); Fed. R. Civ. P. 51(c)(2)(A) (same). The reason is simple: When a court irons out differences in competing proposed instructions, its refusal to adopt particular language could reflect merely stylistic preferences. The after-the-fact objection requirement forces litigants to alert the court when they believe deviations from their proposals implicate important legal rights.

Criminal Rule 51, by contrast, contains no comparable language requiring a post-ruling objection. That, too, makes sense, particularly in the setting at hand: No sentencing judge would ever think a defendant's earlier request for a shorter sentence was just a matter of style.

Next, Amicus references practices governing excessive damages. Amicus asserts that "[e]ven if a defendant had previously argued for no damages or low damages," a defendant "must still challenge the excessiveness of a damages award via a post-trial motion to preserve an excessiveness claim for appeal." Amicus Br. 32. The cases Amicus cites for that proposition, however, involve a scenario not present here: a defendant who wishes to preserve an argument for appeal that is legally distinct from the arguments it raised earlier. In *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73, 88 (2d Cir.

2003), for example, the defendant argued on appeal that the punitive damages award against it violated the Due Process Clause. Yet it "never raised this argument with the district court." *Id.* at 89. Instead, it had previously argued merely for evidentiary and statutory reasons that a lower punitive award should be imposed. *Id.* at 79. Similarly, in *Young v. Langley*, 793 F.2d 792, 794 (6th Cir. 1986), the trial court "never had an opportunity to pass on the claim" the defendants presented on appeal.

Here, by contrast, petitioner advanced the same legal claim during the sentencing hearing in the district court that he is pressing on appeal—namely that Section 3553 dictates a shorter sentence. In other words, a defendant who argues on appeal that his sentence is substantively unreasonable is not advancing a different *claim*; he is merely renewing his previous claim in a new *forum*, phrased in terms of the applicable standard of review.

3. Amicus is also incorrect insofar as he suggests that the preservation requirements for procedural Section 3553 claims dictate that a post-sentence objection rule should apply to substantive Section 3553 claims. Amicus Br. 24-26.

As a practical matter, defendants must often object to procedural irregularities after they occur. This need stems from the way such irregularities arise, not from any inconsistency in how Rule 51 applies. For example, a defendant cannot know ahead of time that a district court will "fail[] to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51 (2007). So any objection will necessarily follow imposition of the sentence. By contrast, a defendant will always tell the court before sentencing what sentence he thinks is appropriate.

And once he does so, he satisfies Rule 51 by alerting the court of the action he "wishes the court to take." Fed. R. Crim. P. 51(b).

Nor is the line between procedural reasonableness and substantive reasonableness so "blurry," Amicus Br. 25, that the Court should require after-the-fact objections across the board for the sake of simplicity. The distinction between procedural and substantive Section 3553 claims is generally clear-cut. As the United States explains, a procedural Section 3553 claim involves "an objection to the evaluation process," U.S. Br. 22—for instance, a mathematical error in calculating the Guidelines range, "treating the Guidelines as mandatory," or failing to explain the chosen sentence. *See Gall*, 552 U.S. at 51. A substantive Section 3553 claim, by contrast, challenges "the *result* of that process." U.S. Br. 22 (emphasis added). And while the remedy for a procedural claim is merely a new evaluation, untainted by procedural error, the remedy for a substantive claim is necessarily a shorter sentence.

Contrary to Amicus's suggestion, therefore, procedural Section 3553 claims are not typically susceptible to repackaging as substantive claims. Indeed, Amicus offers no real-world examples of defendants trying to dress forfeited procedural claims in substantive garb. That failure is telling. Petitioner's rule has been the law in most circuits for decades. *See* Petr. Br. 9-10 (citing cases). If it actually led to the sorts of difficulties Amicus predicts, one would expect to see some evidence. But Amicus musters none. And the Government—the party with the greatest experience with sentencings and the most to lose from the sort of gamesmanship Amicus posits—supports petitioner.

B. Amicus's alternative argument for applying plain error review is wrong as well.

Even if Amicus were correct that an after-the-fact objection may not be "the *only* way" in the Fifth Circuit "to preserve a substantive-reasonableness challenge," the Fifth Circuit's rule would be no more defensible. Amicus Br. 30. At the very least, the Fifth Circuit requires a defendant, "prior to the imposition of sentence," to argue not only "that he should be sentenced to a specific sentence (*e.g.*, 10 months)," but also "that anything above a [certain] sentence (*e.g.*, 15 months) would be beyond the range of reasonable sentences." *Id.* This is still far more than any other circuit demands—and far more than Rule 51 requires.

1. Section 3553 instructs district courts to "impose a sentence sufficient, but not greater than necessary," to fulfill the statute's enumerated purposes. 18 U.S.C. § 3553(a). Based on this language, Amicus asserts that a defendant who requests a certain sentence is not identifying "the maximum sentence [he believes] the court *could* impose under [the Section 3553(a)] factors." Amicus Br. 21. Amicus is incorrect. When a defendant argues that a certain sentence is sufficient to serve the purposes of Section 3553(a), he is telling the court that he views that sentence as the particular sentence that is appropriate under Section 3553(a). Put differently, he is arguing that "any lengthier sentence would be 'greater than necessary'" for his case. U.S. Br. 22.

The meaning of Section 3553(a)'s term "sufficient" supports this reading. In legal parlance, "sufficient" means "of such quality, number, force, or value *as is necessary* for a given purpose." *Sufficient*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Accordingly, while Amicus focuses on the indefinite

article in the phrase "*a* sentence sufficient, but not greater than necessary," Amicus Br. 16-17, any sentence greater than one that is "sufficient" to accomplish the goals of Section 3553(a) is, by definition, "greater than necessary." *See Dean v. United States*, 137 S. Ct. 1170, 1175 (2017) (recognizing that Section 3553(a) establishes a "parsimony principle"). To express the point in concrete terms: if 10 months is "*a* sentence" sufficient to fulfill the purposes of Section 3553(a), then 15 months is indisputably greater than necessary.

The structure of Section 3553(a) reinforces this conclusion. The provision requires courts to consider not just the Guidelines' recommended sentencing ranges, but also the specific "nature and circumstances of the offense" and other factors. 18 U.S.C. § 3553(a). Sentencing courts, therefore, should start with Guidelines ranges and then use the other factors to fine-tune a specific sentence according to the particulars of each defendant's case. *See Peugh v. United States*, 569 U.S. 530, 536-37 (2013).

Amicus emphasizes in response that appellate courts will not vacate a sentence as too long unless it falls "outside the reasonable range of sentences for a given case," and a defendant's request for a particular sentence in the district court "says nothing about the potential range of reasonable sentences." Amicus Br. 17-18, 21 (citation omitted). This merely repackages the Fifth Circuit's error: It conflates the standard of review on appeal (namely, reasonableness) with Section 3553(a)'s directive to the district court. *See* Petr. Br. 17. And, as petitioner and the Government have explained, parties need not frame arguments or objections in district courts according to the standard of appellate review. *Id.* 18; U.S. Br. 23-25.

2. Even if Amicus were correct that Section 3553(a) itself instructs district courts merely to select any sentence from a range of available options, it would make no difference. It would still not follow that a defendant who asks for a particular sentence must also identify the upper limit of the permissible range and expressly argue that any sentence above that limit would "exceed[] the range of reasonable sentences that § 3553(a) allows," Amicus Br. 18. This is so for several reasons.

a. Most important, Amicus's argument finds no support in the text of Rule 51. To preserve a claim of error, Rule 51 simply requires a party to "inform[] the court—when the court ruling or order is . . . sought—of the action the party wishes the court to take." Fed. R. Crim. P. 51(b). Nowhere in Rule 51 is there a requirement that the party inform the court of the full range of actions the party thinks is permissible for the court to take. Nor does Rule 51 require the party to state that an action it thinks the court might take is outside the permissible range of actions.

b. Amicus's proposed requirement is also at odds with this Court's precedent. As petitioner noted in his opening brief, this Court has twice reviewed sentences for substantive reasonableness, as opposed to plain error. *See* Petr. Br. 20 (citing *Rita v. United States*, 551 U.S. 338, 359-60 (2007); *Gall v. United States*, 552 U.S. 38, 59-60 (2007)). Yet the defense counsel in *Rita* simply asked the district court for a "downward departure" from the sentencing guidelines and explained the reasons he thought a departure was warranted. *See* Tr. 6-28, *United States v. Rita*, No. 3:04-cr-00105-1 (W.D.N.C. June 7, 2005). The attorney never stated what the highest permissible sentence would be or "specifically argue[d]," Amicus

Br. 18, that a sentence beyond that point would be unreasonable.

Likewise, in *Gall*, the government simply recommended a particular sentence. It did not identify a permissible range of sentences or state that any sentence below a certain lower limit would be unreasonable. *See* Tr. 27-41, *United States v. Gall*, No. 4:04-cr-00116 (S.D. Iowa June 8, 2005).

c. Much like the Fifth Circuit's post-sentence objection requirement, Amicus's proposed requirement would also lack any practical or tangible benefit. For starters, an argument that a sentence is outside the "range" of reasonable sentences would add nothing of value for a district court. Any such arguments would mimic the defendant's arguments for a lower sentence. By articulating the reasons why a particular sentence is sufficient, a defendant puts the district court on notice of the reasons why he thinks a longer sentence would transgress Section 3553(a). Requiring anything more from the defendant would be redundant.

Moreover, even if there were a theoretical distinction between the kinds of arguments that support a requested sentence and those that establish an upper limit on the district court's available options, no competent defense counsel would ever argue that the sentence she requests is less than the maximum permissible sentence. It is difficult to imagine a lawyer telling the court: "You should impose a 10-month sentence, but anything up to 15 months would also be perfectly legal." This would cut the legs out from under the requested sentence. The practical effect of Amicus's rule, then, would be simply that all defendants would formulaically argue that their

requested sentences are the maximum permissible sentences under Section 3553.

d. Lastly, requiring defendants to argue specifically that any sentence beyond a particular length would fall beyond the range of permissible options would clash with existing practice beyond the context of criminal sentencing. In myriad areas of law—all governed by Rule 51 or its civil counterpart—a judge may choose from a range of options. And in all these areas, the Rules require litigants to request from the court only their desired action. Litigants need not also argue to the district court that anything beyond some outer limit of the court's discretionary range would be illegal. A few examples:

- Under numerous civil rights statutes, district courts have discretion to award prevailing parties a "reasonable attorney's fee." *E.g.*, 42 U.S.C. § 1988(b). To preserve the ability to challenge an award on appeal, litigants must simply argue for a different amount than the court ultimately awards. They need not argue that any given amount falls outside of some permissible range of options. *See, e.g.*, *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 547-50 (2010); *Hensley v. Eckerhart*, 461 U.S. 424, 428-29 (1983); *Barbour v. City of White Plains*, 700 F.3d 631, 634-35 (2d Cir. 2012).
- A district court imposing sanctions under Federal Rule of Civil Procedure 11 has "discretion to tailor an 'appropriate sanction,'" *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 399 (1990), including a particular dollar amount or length of punishment. To preserve the right to appeal, litigants do not need to identify the permissible range of options for the

district court. *See id.* at 389-91, 399-401; *Geller v. Randi*, 40 F.3d 1300, 1303-04 (D.C. Cir. 1994); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1370-74 (4th Cir. 1991).

- The Speedy Trial Act enables courts to grant continuances to give counsel "reasonable time necessary for effective preparation." 18 U.S.C. § 3161(h)(7)(B)(iv); *see also id.* § 3161(h)(8). To preserve for appeal a challenge to the length of a continuance, a defendant simply needs to object to the granting of the continuance or request a shorter one. *See, e.g.*, *United States v. Williams*, 753 F.3d 626, 635-36 (6th Cir. 2014); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1196-98 (2d Cir. 1989). A defendant does not need to argue separately that any continuance beyond a certain length would be unreasonable.

Amicus's proposed objection requirement would upend all of these long-settled understandings. This Court should not adopt a new approach in this case that would require sweeping changes across criminal and civil procedure alike.

C. Amicus's "facts and circumstances" argument has no bearing on the proper standard of review.

Amicus does not dispute that, if petitioner preserved his overall substantive reasonableness claim, he may argue to the court of appeals that the sentence he proposed in the district court would have been long enough to satisfy Section 3553(a)'s deterrence factor. Amicus Br. 35. Amicus argues, however, that petitioner's contention on appeal that his proposed shorter sentence would have been sufficient "to protect the public," 18 U.S.C.

§ 3553(a)(2)(C), is not preserved. Amicus Br. 33-34. According to Amicus, Rule 51 requires defendants to list for the district court "the specific facts and circumstances" relating to each argument in support of a shorter sentence, *id.* 20, and petitioner did not identify in the district court "the specific grounds" supporting his public-dangerousness argument. *Id.* 33.

This Court should not consider Amicus's contention. The question presented asks what is necessary to "invoke appellate reasonableness review of the length of a defendant's sentence," Pet. i—that is, what a defendant must do to ensure that his challenge is reviewed on appeal for abuse of discretion, not plain error. Whether a particular argument may be advanced on appeal in support of a preserved challenge is a distinct, fact-bound issue. At any rate, there is no problem with petitioner's advancing his "public dangerousness" argument in support of his Section 3553(a) claim.

1. To preserve a claim for appeal, a litigant must generally "put[] the court on notice as to his concern." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988). Accordingly, a criminal defendant seeking to preserve a challenge to the length of his sentence for appeal must provide the district court with fair notice of his arguments in support of a shorter sentence.

At the same time, a defendant challenging the substantive reasonableness of his sentence on appeal is not strictly beholden to the precise contentions he advanced in the district court. Rather, a defendant may press any argument regarding the Section 3553(a) factors that fairly flows from the contentions and facts he presented to the district court. This parallels the distinction this Court has drawn between claims and arguments more generally. As this Court

has put it, so long as "a federal claim is properly presented" on appeal, "parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). So too here.

Amicus seems to contend that Rule 51 requires something more. As Amicus puts it, a defendant must make "specific mention of . . . § 3553(a) factors" and present "particular circumstances that relate to those factors" to preserve the right to challenge the sentence imposed as substantively unreasonable on appeal. Amicus Br. 23. Insofar as Amicus insists that a defendant must not only explain to the district court how the facts and circumstances merit a shorter sentence but also must expressly tie each argument to particular sentencing factors under Section 3553(a), Amicus goes too far.

To begin, Amicus's argument is based on an analogy to the requirement in Federal Rule of Civil Procedure 46 that litigants state the "grounds" for all requests. Amicus Br. 14-15. Amicus assumes the word "grounds" means "facts and circumstances." *Id.* 13, 23. But the "grounds" Rule 46 refers to are *legal*, not factual, grounds. *See* 9B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2473 (3d ed. 2008) (providing examples). So, assuming Rule 51 tracks Rule 46's "grounds" requirement, it does not require defendants requesting a shorter sentence to recite every "fact and circumstance" relevant to that request. Instead, Rule 51 requires a defendant arguing for a shorter sentence to make sure the district court understands he is relying on Section 3553—as opposed, say, to the Eighth Amendment's Cruel and Unusual Punishment Clause. And petitioner did just that when he told the

district court that "under 3553" a shorter sentence would be sufficient. J.A. 10.

A more rigid requirement to link every "fact and circumstance" with particular Section 3553(a) factors would not offer district courts any practical benefits either. District courts are well aware that their "overarching duty" in sentencing is to impose the sentence that is "sufficient but not greater than necessary" to achieve the purposes described in Section 3553(a). *Pepper v. United States*, 562 U.S. 476, 491 (2011) (quotation marks omitted). And they are intimately familiar with the Section 3553(a) factors. *Cf. Koon v. United States*, 518 U.S. 81, 99 (1996) (quotation marks omitted) (recognizing district courts' "special competence" in sentencing). After all, they oversee the sentences of more than 70,000 defendants every year.[1] District courts do not need defendants to explain how each and every fact and circumstance maps on, for example, to the need "to promote respect for the law" or "to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).

Indeed, the Section 3553(a) factors are so broad and overlapping that any such requirement would only "saddle busy district courts with the burden of sitting through" formalistic recitations of the sentencing factors courts already know. *United States v. Castro-Juarez*, 425 F.3d 430, 434 (7th Cir. 2005). Consider a defendant who argues to the district court that a shorter sentence is warranted because his crime was a one-off occurrence driven by exceptional

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[1] *See, e.g.*, U.S. Courts, *U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending March 31, 2016*, https://www.uscourts.gov/sites/default/files/data_tables/fjcs_d4_0331.2016.pdf.

circumstances. That defendant is arguing that "the nature and circumstances of the offense" merit a shorter sentence. 18 U.S.C. § 3553(a)(1). But he is *also* arguing that his "history and characteristics" merit a shorter sentence. *Id.* And that there isn't as great a need "to protect the public from [his] further crimes." *Id.* § 3553(a)(2)(C). And, by extension, that his need for deterrence is diminished. *Id.* § 3553(a)(2)(B). By any reasonable measure, a defendant need not spell out each of these linkages to "put[] the court on notice," *Beech Aircraft*, 488 U.S. at 174, regarding why he thinks a sentence is sufficient.

2. Applying the proper fair-notice framework makes clear that petitioner may maintain on appeal not only that his sentence was unjustified by the need for deterrence, but also that he did not pose an ongoing danger to the public. Before the Fifth Circuit, petitioner argued that "[n]othing in the record" indicated he posed a danger to the public. Petr. CA5 Br. 11. This simply notes the absence of a finding—i.e., that the district court did not find he posed an ongoing danger. And this notation was in keeping with petitioner's argument that a shorter sentence would have made him equally unlikely to reoffend, J.A. 10—an argument that speaks to whether a longer sentence was needed "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C).

Amicus also notes that petitioner made an affirmative assertion in support of his public dangerousness argument—namely, that when he was arrested, he "was found in remote areas of Texas, far from people." Amicus Br. 8 (quoting Petr. CA5 Br. 11). But the district court was adequately apprised of this fact, too. The record states, and the Government reminded the court at sentencing, that petitioner was

arrested in Culberson County, Texas. Presentence Investigation Report (PSR) ¶ 10; J.A. 8. The reality that Culberson County consists of open desert would have been as well known to the U.S. District Court for the Western District of Texas as the fact that downtown San Antonio is densely populated.

II. Petitioner's sentence is substantively unreasonable.

In both *Rita* and *Gall*, this Court did not only answer the questions presented regarding how appellate courts should review criminal sentences. It also addressed the merits of each defendant's substantive Section 3553(a) claim. *See Rita v. United States*, 551 U.S. 338, 359-60 (2007); *Gall v. United States*, 552 U.S. 38, 56 (2007). The Government defends the reasonableness of petitioner's sentence, U.S. Br. 32-33, so this Court may elect to undertake substantive reasonableness review here. If it does, it should deem petitioner's sentence unreasonable.

When the district court sentenced petitioner, it imposed a 72-month sentence: a 60-month mandatory minimum for the second offense, plus a 12-month revocation sentence on the original offense to run consecutively. J.A. 9-11. Although the district court admitted that the Section 3553(a) arguments against imposing this cumulative sentence were "good," it reasoned that the 12-month sentence was necessary to make petitioner's original offense "mean[] something." J.A. 11. The Government defends the reasonableness of the 12-month sentence primarily on the ground that it was within the range recommended by the Guidelines. U.S. Br. 32-33. The Government also maintains, echoing the district court, that the sentence

properly accounted for petitioner's being on supervised release when he committed the second offense. *Id.*

The Government overlooks the fact that petitioner's sentence independently accounted for his recidivism. If the second offense had been petitioner's first, his Guidelines range would have been 30-37 months. PSR ¶¶ 17-27 (offense level); U.S.S.G. § 5A (sentencing table). That range was superseded by a mandatory minimum of 60 months. J.A. 9; 21 U.S.C. § 841(b)(1)(B). But if petitioner had not been a repeat offender, the district court would have had discretion, under the oft-invoked "safety valve" provision, to set aside the 60-month mandatory minimum and follow the Guidelines' recommendation. *See* 18 U.S.C. § 3553(f); *see also* U.S.S.G. § 5C1.2. Accordingly, petitioner's original offense forced the district court to impose 23 months of prison time for the second offense that it would not otherwise have been required to impose. It was therefore unreasonable to impose *another* 12 months of imprisonment simply to account for petitioner's original offense. *See* Petr. CA5 Reply Br. 3-4. That extra term was "greater than necessary" to effectuate the purposes of Section 3553(a). *See Dean v. United States*, 137 S. Ct. 1170, 1175 (2017).[2]

[2] At the very least, we agree with the Government that the Court should remand to allow the court of appeals to address the substantive reasonableness of petitioner's sentence in the first instance. U.S. Br. 32-33. Contrary to Amicus's argument (Br. 36-37), the Fifth Circuit's conclusion that petitioner's sentence did not "constitute a clear or obvious error" does not render such action unnecessary. Substantive reasonableness review does not turn on whether "clear or obvious error" occurred. Rather, it involves whether the district court abused its discretion—that is, whether the district court unreasonably concluded that "the

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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§ 3553(a) factors, on the whole, justified the sentence." *Gall*, 552 U.S. at 51. Consequently, the Fifth Circuit itself has recognized that the plain error standard "erects a more substantial hurdle to reversal of a sentence than does the reasonableness standard." J.A. 35; *see also United States v. Nino*, 728 Fed. Appx. 413, 414 (5th Cir. 2018).