No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

RENE ANTONIO AGUILAR,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

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QUESTION PRESENTED

Following *Rita v. United States*, 551 U.S. 338 (2007), can a district court at sentencing fail to respond to a party's non-frivolous sentencing arguments, as the Second, Fifth, Eighth, and Ninth Circuits have held, or must the court respond, as the Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuits have held?

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PRAYER FOR RELIEF

Petitioner, Rene Antonio Aguilar, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case presents an important question about federal sentencing procedural law: Following this Court's decision in *Rita v. United States*, 551 U.S. 338 (2007), what obligation to respond does a district court have when a party raises a non-frivolous sentencing argument? In the decade since *Rita*, the circuits have not only failed to reach agreement in answer to that question, their schism has deepened. Most recently, the D.C. Circuit joined the Third, Fourth, Sixth, Seventh, and Tenth Circuits in enforcing a procedural requirement that a district court must respond to a non-frivolous argument made at sentencing. By contrast, the Second, Fifth, Eighth, and Ninth Circuits do not impose the same requirement. This Court should grant review in this case to resolve the worsening circuit split.

OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is appended hereto. *See* Pet. Appendix (App.) at 1. The Ninth Circuit rejected Mr. Aguilar's argument that the district court failed to consider his mitigating sentencing argument, concluding that the district court properly considered his arguments and sufficiently explained its sentencing decision. *Id.* at 2.

JURISDICTION

The court of appeals entered judgment on November 5, 2018. *See* Pet. App. at 1. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Aguilar first came to the United States in the early to mid 1980s when he was only 16 years old, fleeing his native country during the height of the Salvadoran Civil War. With no siblings and being estranged from his mother, his ties to El Salvador disappeared once he left there. He settled in Mendota, California, where he established a life working as a field laborer in the years that followed. During this time, he met and wed his wife and had two children, who are currently in their twenties. Mr. Aguilar has a third child from a subsequent relationship, a son who is approximately nine years old and lives in San Antonio. Due to his time in custody and his removals from the United States, he eventually lost contact with his children. His efforts to contact them have been unsuccessful, especially from outside the United States. Mr. Aguilar planned to make his way to San Antonio, Texas, to obtain work and reunite with his son had he not been arrested.

Mr. Aguilar admittedly has a history of criminal convictions, with his most serious convictions all occurring before he was 28, which is now almost 25 years ago. He suffered three separate drug-related felonies between 1989 and 1995, one of which involved marijuana and two of which resulted in sentences less than a year - 77 days' jail and 365 days jail. The third conviction resulted in his longest term of incarceration at 6 years' imprisonment. Since then, Mr. Aguilar's only felony related criminal history has been immigration-related. He suffered three felony illegal entry convictions, which occurred in 2007 (he initially received 30 months' custody with a subsequent violation of supervised release resulting in another 18 months' custody), 2010 (he initially received 33 months' custody with a subsequent violation of supervised release resulting in another 21 months' custody) and 2014 (he received 24 months' custody). He has one other misdemeanor conviction for immigration-related conduct, which occurred in 2004. His only drug-related cases since 1995

pertain to misdemeanor, personal use possession of marijuana.

According to the Presentence Report (PSR), Mr. Aguilar's four deportations from the United States all occurred at the conclusion of his serving jail or prison time for the four immigration-related convictions. The PSR alleged seven occasions between May 1983 and February 2017, where "[i]t appears [Mr. Aguilar] was voluntarily returned to Mexico each time." Mr. Aguilar was most recently deported to Mexico on March 8, 2017.

Mr. Aguilar re-entered the United States on April 11, 2017, by walking across the border east of the Otay Mesa, California, Port of Entry. United States Border Patrol agents apprehended him after responding to a seismic sensor device's activation. Mr. Aguilar complied with the agents and was arrested. Post-arrest, Mr. Aguilar identified himself as a citizen of El Salvador and confessed to illegally entering the United States after previously having been deported.

Mr. Aguilar eventually was charged in a one count information for violating 8 U.S.C. § 1326(a) and (b). He also faced revocation of supervised release imposed as a result of his 2013 illegal entry conviction in another district.

Mr. Aguilar promptly entered into a plea agreement to resolve the new illegal entry case charged in the Information. In the plea agreement, which applied the November 1, 2016 Guidelines, the government stated it would recommend a sentence within the advisory Guidelines range as calculated by the government. The government, probation and Mr. Aguilar all calculated the applicable guideline range for the new § 1326 conviction as 15 to 21 months. The Guidelines started with a base offense level of eight under U.S.S.G. § 2L1.2(a), plus four points for committing the conduct in the instant case after sustaining a conviction for a felony that is an illegal reentry offense (U.S.S.G. § 2L1.2(b)(1)(A)), minus two points for acceptance of responsibility (U.S.S.G. §

3E1.1(a)), and minus two points for fast-track (U.S.S.G. § 5K3.1).[1] With 12 criminal history points, Mr. Aguilar was in Criminal History Category V.

Probation recommended a 36-month term of imprisonment for the new illegal entry offense, after emphasizing Mr. Aguilar's criminal history, but acknowledging how difficult deportation must have been given that Mr. Aguilar resided in the United States since he was 16 years old.

The government recommended a custodial sentence of 21 months for the new illegal entry offense.

Mr. Aguilar argued for imposition of a 15-month sentence for the new illegal entry offense.

During sentencing arguments, the court asked defense counsel "How do I get to the sentencing recommendation you've made, 15 months, or even the one the government's made?" The court stated that "both of those are very difficult propositions." The court noted that the "new case" is Mr. Aguilar's fourth felony conviction for illegal entry along with his prior misdemeanor conviction. The court noted four prior deportations and seven voluntary returns. The court also noted the previous sentences of *30, 33 and 24 months* Mr. Aguilar received in his past illegal entry

[1] The Guideline calculations for Mr. Aguilar's prior illegal reentries were higher because his drug-related felony convictions enhanced his offense level by 16 under the now defunct § 2L1.2 guideline regime. *See* U.S.S.G. § 2L1.2(b)(1)(A)(2013). And, because those prior convictions no longer receive criminal history points under Chapter Four, they could no longer be used to enhance the offense level under the recently amended § 2L1.2 guideline. *See* U.S.S.G. § 2L1.2 app. n.3. This change "is a result of the Commission's multi-year study of immigration offenses and related guidelines, and reflects extensive data collection and analysis relating to immigration offenses and offenders." U.S. Sentencing Guidelines Manual, supp. to app. C, amend. 802 at 153 (Nov. 1, 2016). Specifically, the Sentencing Commission received commentary and reviewed data that "indicated that the existing 16- and 12-level enhancements for certain prior felonies committed before a defendant's deportation were *overly severe*." *Id.* at 155 (emphasis added). Most pointedly, the amendment now specifically excludes stale convictions, concluding that the prior iteration of the guideline "sometimes provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points." *Id.* at 159.

cases.

In response, defense counsel argued that

> the guidelines changed, Your Honor, and so even it, the last time he was convicted it was under the old guideline scheme. So the guidelines have changed and I think, personally I think that's a recognition that perhaps the guidelines were overly punitive in the past.

The court put the case, as it described, "in full context" as follows.

> [T]his fellow faces 20 years, this is a 20 year offense. We now have a fifth time immigration offender. And, you, for you to say, well, 15 months is adequate under the objectives of 3553 to the government, I'm not faulting you, Ms. Ferrara. I understand your job is to reduce his exposure as much as possible. If you could get me to say probation, that would be a clear victory, but you're right, you and I have a divide in our thinking about what's appropriate in a case like this.

After calculating the guidelines, the court later considered the case under the "3553 factors." It started with the "nature and circumstances of the offense and the history and characteristics of the defendant." The court went through Mr. Aguilar's history of criminal convictions, starting with those as far back as 1986. The court identified what it believed were three convictions pertaining to the sale of controlled substances by or before the time Mr. Aguilar was 27 years old. The court then cited Mr. Aguilar's misdemeanor immigration offense, which it explained was followed by drunk driving and possession of marijuana cases. The court concluded its discussion of Mr. Aguilar's criminal history with what it characterized as "the countdown on immigration offenses, interspersed with misdemeanor offenses . . . [a]ll the way up through 2013."

The court next considered the "seriousness of the offense" and relied upon the illegal entry statute's twenty-year maximum to debunk why a 21 month government sentencing recommendation was appropriate. The court noted that 21 months "is less than a tenth of the exposure" under the statute and that "prior sentences haven't worked." The court stated that Mr. Aguilar last received

a 42 month sentence and "came back within a month." According to the court, "that didn't work, we've got to go back to the drawing board and do something else here."

The court then considered the need to "promote respect for the law," which it claimed neither the defense nor the government's sentencing recommendations did. The court called a 21-month sentence "arbitrary."

The court went on to discuss "just punishment," which 21 months was not with Mr. Aguilar's criminal history. It also discussed "affording adequate deterrence." The court believed that "prior sentences of 30 months, 33 months, and 42 months have not deterred" Mr. Aguilar. The court questioned how a "lesser sentence" would "deter him or do we turn up the heat as the consequences increase in an effort to deter him?" The court believed that "turn[ing] up the heat" "is what makes sense," which "would argue in favor of a longer sentence than 42 months, not just 42." The court concluded the 3553 discussion with the need to "protect the public from further crimes," again noting the entirety of Mr. Aguilar's criminal history.

The court acknowledged that Mr. Aguilar "has a – somebody here, a son here and he wants to reunite with his son and that's understandable, but he has to understand that the United States has a righteous interest in telling someone with a record like this that they cannot come back here."

The court found that the 21 to 27 month guideline range was "inadequate, that the guidelines here are just inadquate to meet those objectives of sentencing that I've just recited." The court found an upward variance applied and varied upward "by 21 months from the high end [of the guideline range]." According to the court, "that upward variance is warranted to account for the sentencing objectives that are not captured by the guidelines in this case, in particular, deterrence."

The court imposed a sentence of 48 months.

Defense counsel noted that such a sentence not only was an upward variance from the sentence for his last illegal entry conviction of a few months, but a doubling of that last sentence. The court made clear that it was varying upward from the total 42 month sentence last imposed, which was comprised of consecutive sentences on Mr. Aguilar's previous 2013 illegal entry conviction and his 2010 violation of supervised release.

Importantly, the court completely failed to address Mr. Aguilar's argument that the § 2L1.2 guideline changed since his last illegal entry conviction, which the defense argued was a recognition by the Sentencing Commission that the former § 2L1.2 guideline was overly punitive. The court never acknowledged the defense's argument or the fact that the Sentencing Commission amended the sentencing guidelines for illegal entry offenses because they were "overly punitive in the past." The Court also never explained how, in light of the amendments to the illegal entry guideline that lowered sentencing ranges, it was appropriate to use past illegal entry sentences resulting from a now-defunct guideline as a benchmark to determine what constituted a sufficient but not greater than necessary sentence under § 3553(a). The mitigating arguments presented by Mr. Aguilar were non-frivolous and have been long-recognized as relevant under § 3553(a) to a determination of a fair and just sentence. Yet the court silently rejected all of these arguments without explanation.

On appeal, Mr. Aguilar argued that the district court procedurally erred in imposing the sentence because it ignored his specific, non-frivolous mitigation argument related to the Sentencing Commission's decision to amend the sentencing guidelines for illegal entry offenses because they were "overly punitive in the past." He argued that the district court never addressed the defense's argument that in light of these amendments it was unsound for the district court to use past illegal entry sentences resulting from a now-defunct guideline as a benchmark to determine what

constituted a sufficient by not greater than necessary sentence under § 3553(a). He showed how the argument was tethered to the sentencing factors that the court consider the kinds of sentence and the sentencing range established by the Sentencing Commission, and the Sentencing Commission's pertinent policy statements. Mr. Aguilar established that this was procedural error under *Rita v. United States*, 551 U.S. 338, 356 (2007), which provides that "[t]he sentencing judge should set forth enough to satisfy the appellate court that he had considered the parties' arguments . . . ."

The Ninth Circuit affirmed. Relying on its interpretation of Rita v. United States, 551 U.S. 338, 357-58 (2007) as discussed in *United State v. Perez-Perez*, 512 F.3d 514 (9th Cir. 2008), the court held that "[t]he record reflects that the court considered Aguilar's mitigating arguments and was not persuaded that they warranted a lower sentence. *See United State v. Perez-Perez*, 512 F.3d 514 (9th Cir. 2008)." *See* Pet. App. at 2. In other words, the Ninth Circuit held that the district court's silence in the face of Mr. Aguilar's specific mitigation argument was permissible.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to resolve an important question that deeply divides the circuits: following *Rita*, can a district court utterly fail to respond to a party's non-frivolous sentencing argument in imposing a non-Guidelines sentence? The courts of appeals have answered the question in two opposite ways. Six courts have held that a district court must respond to a party's non-frivolous sentencing arguments. Four courts-including the court below-have held that a district court need not respond to a party's non-frivolous arguments at a sentencing hearing. The result is a procedural schism in the federal courts that results in significant sentencing disparities. This Court should grant review to identify the correct procedure and ensure uniformity, consistency, and equal treatment of defendants throughout the federal system.

I. *Rita* set the standard regarding a district court's procedural obligations to explain a sentence when a party makes a non-frivolous sentencing argument

Since the Court made the Federal Sentencing Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005), it has provided guidance on a sentencing court's obligation to explain its sentencing rationale only once, in *Rita v. United States*, 551 U.S. 338 (2007). *Rita* discussed a district court's procedural obligations at sentencing, and ruled that a district court has an obligation to announce its sentencing rationale. *See id.* at 356-57. The Court reasoned that "[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution," and "[a] public statement of those reasons helps provide the public with the assurance that creates that trust." *Id.* Moreover, "[b]y articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve" through feedback to the Sentencing Commission. *Id.* at 357.

After setting forth the general rule that the district court must explain its sentencing decision, *Rita* discussed how much explanation is necessary. The Court cautioned that there is no need for a "full opinion in every case:"

> The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word "granted" or "denied" on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment.

Rita, 551 U.S. at 356-57. And because the Court in *Rita* held that appellate courts may presume that a within-Guidelines sentence is substantively reasonable, *id.* at 347-51, it noted that a district court's obligation to explain will often hinge on whether the parties agree about whether the case can be deemed a typical one under the Guidelines:

> The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority. Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under [18 U.S.C.] § 3553(a)-that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the pro per way-or argues for departure, the judge normally need say no more.

Id. at 356-57 (internal citation omitted and emphasis added). This logic extends to the reverse scenario: when the parties reason that the Guidelines sentence is a proper sentence, but the district court rejects the Guidelines recommendation as unsound, the district court normally does need to say more to explain its rationale.

In a statement that has since divided the courts of appeals, *Rita* laid a special obligation on district courts when a party makes a non-frivolous sentencing argument:

> Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation.

Rita, 551 U.S. at 357.

In view of the standard for explanation in response to a party's non-frivolous arguments, the Court held that the district court in *Rita* had sufficiently explained its sentencing rationale. *See* 551 U.S. at 359. The defendant in that case had asked for a below-Guidelines sentence based on several factors, including his military service. *See id.* at 343-44. The district court expressly acknowledged all of the defendant's arguments and summarized each of them before concluding that the arguments did not justify a below-Guidelines sentence. *See id.* at 344. The Court noted that the district court "might have said more," but determined that the district court's statements were sufficient. *Id.* at

359.

II. Following the Court's decision in *Rita*, the courts of appeals are split regarding the scope of a district court's procedural obligations when a party makes a non-frivolous sentencing argument

Since *Rita*, the courts of appeals have come to diametrically opposed conclusions regarding what procedural obligation a district court has when a party makes a non-frivolous sentencing argument.

Six courts of appeals have held that a district court must always respond to a party's non-frivolous argument for a below-Guideline sentence during a sentencing hearing:

- ***D.C. Circuit***. In *United States v. Bigley*, 786 F.3d 11, 13 (D.C. Cir. 2015) (per curiam), the defendant stated that he would have been eligible for a much lower Guidelines range had he not been manipulated by an undercover operative, resulting in his exposure to a significant Guideline enhancement. The defendant therefore argued in favor of a below-Guidelines sentence. *See id.* The district court stated that it "considered all of the factors under 3553(a)" in imposing a sentence of 84 months, but was silent as to the defendant's specific manipulation argument. *Id.* The D.C. Circuit, reviewing for plain error, held that "the court's failure to consider [the defendant's] nonfrivolous sentencing argument was error" that "affected [the defendant's] sentence" and "seriously affects the fairness, integrity, or public reputation of judicial proceedings" because "[a] district judge must adequately explain the chosen sentence to promote the perception of fair sentencing, which is important not only for the defendant but also for the public to learn why the defendant received a particular sentence." *Id.* at 14, 15-16 (internal quotation marks and citations omitted). The court of appeals vacated the sentence and remanded for resentencing. *Id.* at 16. On remand, the district court lowered the sentence from 84 months to time-served (at that point, the defendant had been in custody for approximately four-and-a-half years). *See United States v. Bigley*, No. 1l-CR-282, Dkt. No. 45 (D.D.C. Dec. 22, 2015).

- ***Third Circuit***. In *United States v. Friedman*, 658 F.3d 342, 350-52 (3d Cir. 2011), the district court failed to address the defendant's argument that a Guideline sentence would result in unwarranted sentencing disparities in light of his co-defendants' sentences. The Third Circuit ruled that "district courts should engage in a true, considered exercise of discretion ...including a recognition of, and response to, the parties' non-frivolous arguments." *Id.* at 359 (internal quotation marks and citation omitted). Accordingly, the Third Circuit held that the district court had procedurally erred. *See id.* at 363. On remand, the district court reduced the defendant's sentence from 34 months to 24 months. *See United States v. Friedman*, No. 09-CR-132, Dkt. No. 104 (D.N.J. Mar. 1, 2012).

- ***Fourth Circuit***. In *United States v. Lynn*, 592 F.3d 572, 575 (4th Cir. 2010), the Fourth Circuit addressed the sentencing claims of four defendants in a consolidated appeal. With respect to one defendant, the Fourth Circuit held that the lower court had "committed significant procedural error in sentencing" him because the court did not address his "'non-frivolous reasons for imposing'" a below-Guidelines sentence. *Id.* at 581 (quoting *Rita*, 551 U.S. at 357). On remand, the district court lowered the defendant's sentence from 101 months to 63 months. *See United States v. Tucker*, No. 08-CR-666, Dkt. No. 60 (D.S.C. Jun. 16, 2010). With respect to another defendant in this case, the Fourth Circuit held that despite having explained the need for a high sentence, the district court's explanation was "inadequate because it failed to address [defendant's] specific § 3553 arguments or explain why the sentence imposed on him was warranted in light of them." *Lynn*, 592 F.3d at 584. On remand, the district court lowered that defendant's sentence from 396 to 360 months. *See United States v. Lynn*, No. 08-CR-82, Dkt. No. 122 (E. D. Va. Sept. 13, 2010).

- ***Sixth Circuit***. In *United States v. Peters*, 512 F.3d 787, 788 (6th Cir. 2008), the district court never addressed the defendant's arguments for a time-served sentence. The Sixth Circuit stated that "[w]hen the defendant or prosecutor 'presents nonfrivolous reasons for imposing a different sentence,' ... a sentencing judge should address the 'parties' arguments' and 'explain why he has rejected those arguments.'" *Id.* at 789 (quoting *Rita*, 551 U.S. at 339). Because this "did not happen" in the district court in Peters, the Sixth Circuit reversed. *Id.* On remand, the district court lowered the defendant's sentence from 57 months to time served. *See United States v. Peters*, No. 02-CR-20027, Dkt. No. 154 (W.D. Tenn. Mar. 24, 2008).

- ***Seventh Circuit***. In *United States v. Miranda*, 505 F.3d 785, 790 (7th Cir. 2007), the district court never responded to the defendant's argument that he should receive a below-Guidelines sentence because of his severe mental illness. The Seventh Circuit reversed, holding that when a party "'presents nonfrivolous reasons for imposing'" a non-Guidelines sentence, the court should "'normally go further and explain why he has rejected those arguments.'" *Id.* at 796 (quoting *Rita*, 551 U.S. at 339). On remand, the district court lowered the defendant's sentence from 50 months to time served. *See United States v. Miranda*, No. 05-CR-787, Dkt. No. 83 (N.D. Ill. Jan. 24, 2008).

- ***Tenth Circuit***. In *United States v. Lente*, 647 F.3d 1021, 1026-30 (10th Cir. 2011),[2] the district court did not respond to the defendant's argument, based on Sentencing Commission data, that the government's suggested sentence would create sentencing disparities. The

[2] The Tenth Circuit's rule is more limited that the other Circuits - it applies this rule only when the sentence is above-Guidelines, as the sentence was in Mr. Aguilar's case. *See Lente*, 647 F.3d at 1034-35. *See also United States v. Wireman*, 849 F.3d 956, 963 (10th Cir. 2017). But in the Tenth Circuit, when the sentence is within-Guidelines, the district court need not "respond to every argument for leniency that it rejects in arriving at a reasonable sentence." *Lente*, 647 F.3d at 1034.

Tenth Circuit reversed, holding that the defendant had presented "a material, non-frivolous argument based on sentencing data and comparative cases" and the district court "did not address" the defendant's argument about sentencing disparities at all. *Id.* at 1034. In reaching that conclusion, the Tenth Circuit rejected the government's contention that the lower court did not need to "expressly consider" sentencing disparity "on the record." *Id.* On remand, the district court sentenced the defendant to the same 192-month sentence. *See United States v. Lente*, No. 05-CR-2770, Dkt. No. 161 (D.N.M. Dec. 20, 2012).

Thus, these six courts of appeals remanded for a new sentencing hearing in each case solely because the district court had failed to respond to a party's non-frivolous argument in favor of a lower sentence.

By contrast, four courts of appeals, including the Ninth Circuit, have held that a district court need not respond to a party's non-frivolous arguments for a mitigated sentence:

- ***Second Circuit***. In *United States v. Thomas*, 628 F.3d 64, 72 (2d Cir. 2010), the district court did not address the defendant's argument that a particular sentencing enhancement was unreasonable as applied in his case and he should therefore receive a below-Guidelines sentence. In affirming the sentence, the Second Circuit held that it "rejected the notion that a district court must respond specifically to even a non- frivolous argument concerning a policy disagreement with a Guideline enhancement," reasoning that a district court must merely "satisfy" the court of appeals that it had "considered the party's arguments[.]" *Id.* (internal quotation marks omitted).

- ***Fifth Circuit***. In *United States v. Bonilla*, 524 F.3d 647, 657 (5th Cir. 2008), the defendant raised various arguments for a below-Guidelines sentence, and the district court, in announcing its sentence, merely stated that it had "considered the arguments made earlier[.)" Even though the district court did not respond to any of the defendant's arguments, the Fifth Circuit held that the court's explanation was sufficient because of the general reference to those arguments. *See id.* at 658.

- ***Eighth Circuit***. In *United States v. Knight*, 613 F.3d 1172, 1173 (8th Cir. 2010), the defendant made a number of mitigation arguments that the district court failed to specifically address. The Eighth Circuit held that the district court need not specifically respond to every mitigation argument, as long as the district court has set forth enough on the record to show that it has considered the arguments and has a reasoned basis for the sentencing decision. *Id.*

- ***Ninth Circuit***. In *United States v. Carter*, 560 F.3d 1107, 1116-18 (9th Cir. 2009), the district court did not address any of the defendant's sentencing arguments. The Ninth Circuit affirmed, noting that it "rejected" the contention that a district court needed to "directly address" a defendant's argument, as long as context made clear the court's justification for

the defendant's sentence. *Id.* at 1118-19. Carter relied on *Rita*, as well the court of appeals' prior decision in *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (*en banc*) to reach this holding, believing that both decisions established that silent consideration of a party's argument was sufficient. *See id.*

Thus, these four courts of appeals affirmed the defendants' sentences, even though the district courts failed to respond to the defendants' non-frivolous arguments at sentencing.

The above cases describe the deepening divide over what procedural obligation a district court has when a party makes a non-frivolous request for a different sentence following the Court's decision in *Rita*. Only the Court can provide clarity on the scope of the district court's obligation.

III. This procedural issue significantly impacts the proper administration of the federal criminal justice system

A. The vast number of sentencings and the need to ensure application of a uniform standard at sentencing compel clarification of a district court's obligation to respond to a party's non-frivolous arguments

There are more than 67,000 sentencing hearings in the federal system each year. *See* U.S. Sentencing Commission, Overview of Federal Cases: Fiscal Year 2017, at *1. The extent of a district court's obligation to articulate its sentencing rationale thus affects an enormous number of cases. And it is quite simply unacceptable in a national system of criminal justice that these 67,000 hearings are not governed by the same procedural standard. Indeed, the Court has continually recognized the need for intervention when a circuit split develops over the sentencing process post-*Booker*. *See Peugh v. United States*, 133 S. Ct. 2072, 2082-84 (2013) (resolving the circuit split over whether the *Ex Post Facto* Clause applies to the advisory Guidelines); *Rita*, 551 U.S. at 341 (resolving the circuit split over whether a court of appeals can presume that a within-Guideline sentence is reasonable); *Kimbrough v. United States*, 552 U.S. 85, 93 n.4 (2007) (resolving the circuit split over whether a district court may use its discretion to remedy the crack-powder

disparity); *Gall v. United States*, 552 U.S. 38, 40 (2007) (resolving the circuit split over the scope of an appellate court's review when a defendant receives a non-Guideline sentence). The Court should intervene in this case as well to set forth a uniform, national standard that district courts (and courts of appeals) may rely on in responding to a party's non-frivolous arguments.

B. A district court's acknowledgment of a party's non-frivolous arguments implicates fundamental due-process interests in the criminal justice system

Addressing a party's non-frivolous arguments protects basic due process rights because it assures that the court actually heard and considered the party's argument. After all, there is no way to determine on appeal if a sentencing court actually considered an argument if it did not explicitly address the argument.

As Judge Posner stated in the context of holding that a court must respond to a party's non-frivolous sentencing argument: "A judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight." *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). It is common (because it is human) for a judge initially to think that he or she might favor one party's argument, only to find in setting pen to paper that an opinion "'just won't write'" from that vantage. *See* Kenneth F. Ripple, *Legal Writing in the New Millennium: Lessons from a Special Teacher and a Special 'Classroom*,' 74 NOTRE DAME L. REV. 925, 926 (1999). Forcing oneself to engage with an argument either in writing or orally makes one think about it more critically.

This cognitive bias is poignantly illustrated by the fact that all but one of the six court of appeals decisions remanding for the district court to address a party's non-frivolous sentencing argument resulted in the district court issuing a lower sentence after applying the explanation. *See supra* at 7-9. Nor are these cases outliers; a survey of cases shows that the same phenomenon

frequently occurs when an appellate court remands a case in which the district court initially failed to sufficiently explain its sentencing rationale. *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation in Federal Sentencing*, 36-MAR CHAMPION 36 (2012) (listing myriad cases that follow this pattern).

C. Requiring district courts to respond to non-frivolous arguments is consistent with the three important purposes of an explanation requirement discussed in *Rita*

Rita stated that one function of an explanation requirement is to facilitate accurate appellate review. *See* 551 U.S. at 357-58. In the four courts of appeals that simply assume that a district court considered and rejected any argument when the record is silent, the reviewing court necessarily will have a less accurate understanding of what actually led the district court to impose the sentence that it did. Any error in the district court's thought process will be shielded by a silent record. The court of appeals will have to fill in the blanks left by the silent record, then "review" that manufactured rationale to determine whether the district court properly exercised its discretion. *See United States v. Ruiz-Apolonia*, 657 F.3d 907, 919-20 (9th Cir. 2011) (holding that a simple "yes" was a sufficient explanation for rejecting a complicated mitigation argument, and supporting its ruling with legal reasoning that was never provided by the district court). This is hardly review. Indeed, a silent record makes meaningful appellate review for substantive reasonableness difficult, if not impossible.

Another function of an explanation requirement is to benefit the public. As the Court stated in *Rita*, "[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution," and "[a] public statement of those reasons helps provide the public with the assurance that creates that trust." 551 U.S. at 356. Allowing a district court to silently dismiss potentially meritorious arguments does not build trust in the judiciary. To the contrary, it leaves the public, including crime

victims, wondering whether the judge meaningfully considered and resolved such arguments. Moreover, public skepticism about whether courts are meaningfully considering arguments that are not addressed appears warranted, given that so many district courts alter their sentences on remand following a reversal for a failure to explain.

Finally, *Rita* stated that a sentencing court's explanation of its decisions provides relevant information to the U.S. Sentencing Commission. 551 U.S. at 358. In creating the Sentencing Guidelines, the Commission examined "tens of thousands of sentences" to determine how best to accomplish the basic sentencing objectives set forth by Congress in § 3553(a). *Id.* at 347, 349. And the Commission continues to engage in such review, such that a sentencing court's "reasoned sentencing judgment" allows the Commission to make "reasoned responses" that "help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw." *Id.*

D. Defendants themselves benefit greatly from hearing the district court explain and discuss its sentencing rationale

Finally, defendants also gain from a requirement that the sentencing judge address non-frivolous arguments made at sentencing, including the judge's thoughts on the defendant's arguments for a more lenient sentence. A district court's response to a defendant's arguments "communicates a message of respect for defendants, strengthening what social psychologists call 'procedural justice effects,' thereby advancing fundamental purposes of the Sentencing Reform Act." *Bigley*, 786 F.3d at 17 (Brown, J., concurring) (citing Michael M. O'Hear, *Explaining Sentences,* 36 FLA. ST. U. L. REV. 459, 47 2 (2009)). Thus, requiring courts to respond to a defendant's non- frivolous arguments can foster compliance with the law by providing more legitimacy to the process from the defendant's perspective.

In sum, putting the fairly minimal onus on district courts to respond to non-frivolous

arguments for a different sentence makes it more likely that a district court will impose a lawful, fair sentence, permits the courts of appeals to engage in meaningful review, and bolsters the legitimacy of the judicial system in the eyes of those whom it serves. Accordingly, the court of appeals in this case erred when it interpreted *Rita* as finding silence sufficient.

IV. The Court should grant review, because this case is an ideal vehicle to resolve the circuit split

Mr. Aguilar's case presents an ideal opportunity for the Court to address the scope of a district court's obligation to explain its sentencing rationale. Mr. Aguilar argued that the court should have imposed a lower sentence because the Sentencing Commission had amended the sentencing guidelines for illegal entry offenses based upon the conclusion they were "overly punitive in the past" and, as a result, it was unsound to use past illegal entry sentences resulting from a now-defunct guideline as a benchmark to determine what constituted a sufficient by not greater than necessary sentence under § 3553(a). The underlying premise to his arguments - that the Sentencing Commission had amended the sentencing guidelines for illegal entry offenses based upon the conclusion they were "overly punitive in the past" - was not even contested by the government. And the arguments were properly tied to the sentencing factors under § 3553(a), including the sentencing range established by the Sentencing Commission and the Sentencing Commission's pertinent policy statements. As such, they went to the core of what a district court should consider when deciding the appropriate sentence.

But the district court utterly failed to address Mr. Aguilar's non-frivolous mitigation arguments. It did not make so much as a perfunctory claim that it had considered the arguments in selecting the sentence.

Review is particularly warranted in this case because the court of appeals below is on the

minority side, and the wrong side, of the split in authority among the circuits. Contrary to what the court held below, silent consideration of any non-frivolous argument that a party makes for a different sentence no longer is enough in the wake of *Rita*. Before a district court exercises its broad discretion to send a defendant to prison, the court must acknowledge the argument and explain why the court agrees, or does not agree, with that argument. Indeed, given the district court's failure to engage his argument, Mr. Aguilar's sentence would have been vacated and his case remanded for a new sentencing hearing in the Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuits. *See Bigley*, 786 F.3d at 13; *Friedman*, 658 F.3d at 362-63; *Lynn*, 592 F.3d at 581-82, 584-85; *Peters*, 512 F.3d at 788-89; *Miranda*, 505 F.3d at 791-92, 796; *Lente*, 647 F.3d at 1032-34. But because the case occurred in the Ninth Circuit, his sentence was affirmed. *See* Pet. App. at 2. A similar result would have occurred in Second, Fifth, and Eighth Circuits. *See Thomas*, 628 F.3d at 72; *Bonilla*, 524 F.3d at 657-58; *Knight*, 613 F.3d at 1173. This case thus squarely presents the issue over which the courts of appeals are divided.

Finally, Mr. Aguilar continues to serve his sentence from this case with a projected release date of September 23, 2021, and will be on supervised release thereafter. Thus there are no concerns with mootness.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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