IN THE SUPREME COURT OF THE UNITED STATES

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FRANCISCO GALLEGOS-LOPEZ,

PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

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PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does urging a sentencing recommendation lower than that ultimately imposed, and grounded in the statutory factors in 18 U.S.C. § 3553(a), suffice to preserve procedural-error claims—as some circuits hold—or does it require separate exception—as other circuits require—or does it hinge on whether the judge invited further comment—as yet another circuit maintains?

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

Petitioner, Francisco Gallegos-Lopez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed the sentence for violation of 8 U.S.C. § 1324. *See* Appendix A (*United States v. Gallegos-Lopez,* 745 F. App'x 679 (9th Cir. 2018)).

The panel denied rehearing, and the Ninth Circuit declined to rehear the matter en banc. *See* Appendix B.

JURISDICTION

On December 19, 2018, the Ninth Circuit affirmed the sentence. *See* Appendix A. On April 8, 2019, it denied a petition for rehearing. *See* Appendix B. The Court

has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS[1]

18 U.S.C. § 3553
Fed. R. Crim. P. 51

STATEMENT OF THE CASE

A. Introduction

This Petition concerns a continuing, three-way split in circuit-court authority. The disunity relates to what a litigant must do to preserve for plenary review on appeal a claim the sentencing court committed a procedural error in imposing a sentence higher than the party recommended and argued for.

Some circuits, including the Fourth, Seventh, and Eighth, hold that promoting a sentencing recommendation that the court rejects preserves claims of procedural error on appeal, even absent an exception to the sentence or sentencing decision.

Others—like the First, Second, Fifth, Ninth and (variably) the Third and Tenth—require an exception (often termed an "objection") citing the specific, procedural flaw in order to avoid plain-error review.

The Sixth Circuit uses a hybrid, quasi-waiver rationale: it accords plenary review of sentences, unless the judge asks whether there is any objection, and the error assigned on appeal is not raised.

All these treatments of sentencing error implicate concerns that had

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[1] The text of these provisions is laid out in Appendix C, pursuant to Sup. Ct. R. 14.1(f).

supposedly been addressed in 1944 with the adoption of FED. R. CRIM. P. 51. That rule holds that exceptions are not required. Instead, to preserve a claim for appeal requires the party ask the judge to rule a particular way and then get denied. Only the first set of circuit decisions comports with this general rule.

Here, the Ninth Circuit applied its contrary rule by treating Mr. Gallegos's procedural-error claims as plain error. Although he recommended and argued for a lower sentence than the judge imposed, the Ninth Circuit declined plenary treatment of his claim of procedural error. Even though the judge did not start from the Guideline recommendation and keep it in mind throughout sentencing, the Ninth Circuit nonetheless denied relief on the third (prejudice) prong of plain error, stating the record showed the judge "was aware of the range and had the correct range in mind throughout the proceeding." *Gallegos-Lopez*, 745 F. App'x at 679-80.

But when a sentencing court simply fails to calculate the advisory recommendation, such silence is the purest form of misapplication of the Guidelines. It is untenable that a judge could "have the correct range in mind throughout the proceeding," when he or she fails to make any calculation until reminded after the sentencing is fully completed.

Accordingly, the Ninth Circuit's rule of requiring an "objection" to avoid plain error for procedural flaws at sentencing perpetuates this long-standing circuit split and subjects defendants like Mr. Gallegos to a different standard of appellate review, depending on the happenstance of which circuit their sentencing occurs in.

The Court should accept review of this case to resolve this persistent split in

circuit authority. It affects thousands of criminal sentencing appeals across the nation annually, subjecting defendants to disparate legal treatment according to the variable law of the circuit. Moreover, some circuits' reasoning fails to accord with the general principle of Rule 51 for preserving error. This, too, is a question of paramount, legal importance. The effects of this continued split provide "compelling reasons" for this Court to grant the Petition and resolve the Question Presented. SUP. CT. R. 10.

B. Circumstances of the Offense

Mr. Gallegos was charged with harboring an illegal alien for pay and aiding and abetting. He pled guilty and admitted he knowingly concealed one Crecencio Cruz-Clava at a residence in El Centro, California for the purpose of avoiding detection by immigration authorities.

The Presentence Report described how Cruz had contacted a smuggler named Tony in Mexicali, Baja California and agreed to pay $7,000 to be smuggled into the United States. Another person housed and fed Cruz in Mexicali and then instructed him to climb the border fence and hide in a shed on the United States side. About 30 minutes later, Mr. Gallegos took Cruz from the shed into the adjoining house, giving him clothing, a sandwich, and a soda. During this time, Cruz received a cell phone call from Tony with further instructions. Mr. Gallegos and Tony argued over the phone about the fee for hiding Cruz.

Border Patrol agents had observed Cruz crossing the fence, but lost track of

him in searching the neighborhood. A couple hours later, Imperial County authorities conducting a probation check came to the residence and discovered Cruz there with Mr. Gallegos and Mr. Gallegos's nephew. The authorities called Border Patrol, suspecting Cruz was undocumented. All three men were taken into custody.

C. The District Court Proceedings

Mr. Gallegos pled guilty to the harboring charge. Probation and the Government both calculated a custodial Guideline range of 27 to 33 months, recommending the high end.

The defense sentencing memorandum concurred in the Guideline calculations, but recommended the low-end sentence of 27 months. The recommendation was based on Mr. Gallegos's substance-abuse history and a change in attitude arising from the sudden death of his long-term partner and mother of his two children.

At the sentencing hearing, defense counsel stated that the parties agreed on the Guidelines, but without citing the result or any calculations. The parties differed as to which end of the range was appropriate. Counsel stressed Mr. Gallegos's long-standing substance abuse and heroin addiction. In contrast to his prior attempts to become sober, his current situation promised a stronger motivation to succeed. That is because of the sudden, accidental death of his long-term partner, Norma, leaving a minor son to be cared for, as well as an adult daughter. This turn of events provided Mr. Gallegos with a strong motivation to deal with his addiction and be there for his young son as he had not previously been. Mr. Gallegos confirmed this directly with

the court. Probation and prosecution both adhered to their 33-month recommendations.

The district court opined it found nothing "different about Mr. Gallegos-Lopez" from many others who became involved with drugs in their youth. It also stated it believed the Sentencing Guidelines were inadequate to "take account of all the conduct the defendant engaged in." In particular, it noted that a four-level specific offense characteristic in U.S.S.G. § 2L1.1(b)(3) for prior immigration convictions did not vary if there were two convictions or ten. Nor did the addiction history or new motivation to support his children "in any way shape or form detract" from the "considerable, considerable criminal history."

The court went on to recite a list of non-scoring, prior convictions (virtually all misdemeanor petty theft and drug possession). The court discounted defense counsel's explanation that these were stale convictions from the 1990s and reflective of Mr. Gallegos's substance-abuse problems. The court then noted the first scoring conviction—under 8 U.S.C. § 1324—which drew a sentence of 41 months. Additional, minor offenses were followed by the second § 1324 conviction with a 30-month sentence. As to that conviction, the court remarked, "I suppose that if one followed the logical progression of 41 months, 30 months, perhaps, you know, 27 months might appear reasonable but I think that's counterintuitive."

It then noted a number of arrests without prosecution and that prior attempts at drug treatment had apparently failed. Counsel insisted that Norma's recent death provided a different motivation from before. But the court continued to stress the

prior convictions and police contacts, summing up its sentencing rationale thus:

> Now, frankly, I have a very, very difficult time understanding and I'd love to have anyone explain to me how imposing a lesser sentence as time goes by for someone who continues to commit the same offenses makes any sense whatsoever so far as attempting to satisfy the 3553(a) factor of deterring further criminal behavior.

The court imposed an above-Guideline term of 41 months and three years of supervised release. As Mr. Gallegos was being handed the written conditions of supervision, the courtroom deputy stated, "I need some guidelines," to which the judge responded, "Did I forget to do those?" Briefly articulating a calculation, the court returned to advising Mr. Gallegos of his appeal rights.

Defense counsel made an objection to the reasonableness of the sentence, stating "the Court relied upon legally improper factors" and failed to respond adequately to non-frivolous arguments. Counsel cited the drug addiction and traumatic death as instances, but the court disputed that Mr. Gallegos had demonstrated he was upset over the death of the woman who was the mother of his children and whom he had known since age 12. It noted, "so people suffer all kinds of tragedies during their lives, so I just don't know what else I can do or say about that" Counsel also objected that the court violated the parsimony mandate of 18 U.S.C. § 3553(a).

D. The Appellate Decisions

On appeal, Mr. Gallegos argued the district court had erred under circuit and Supreme Court precedent by failing to calculate the Guideline range. He argued that the court's procedure was contrary to the line of precedent stemming from *Gall*

v. United States, 552 U.S. 38 (2007), which demands that a properly calculated Guideline range is the "starting point and initial benchmark" of all federal sentences. *Id.* at 49. The failure to adhere to the requirement of *Gall* and progeny was prejudicial, as the court's illogical reasoning applied a rule of blanket increases over any previous sentence, regardless of any legitimate reductions due to changes in the Guideline calculations.

The Ninth Circuit, however, reviewed these claims for plain error. *See Gallegos-Lopez*, 745 F. App'x at 679-80. The panel held,

> Gallegos-Lopez contends that the district court procedurally erred by first determining and imposing the sentence, and then calculating the correct Guidelines range. *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 541 (2013) ("[D]istrict courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.") (internal quotations omitted). We review the district court's sentencing procedure for plain error because Gallegos-Lopez failed to preserve the issue properly at the sentencing hearing. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). On this record, we conclude that there is none. … [D]espite the district court's failure to calculate the Guidelines range at the outset of the hearing, the record reflects that it was aware of the range and had the correct range in mind throughout the proceeding.

Id.

Mr. Gallegos sought rehearing on the basis that the panel's analysis of the third (prejudice) prong of plain error was contrary to this Court's holding in *Molina-Martinez v. United States,* 136 S. Ct. 1338 (2016). He argued that, even if plain-error review applied, *Molina-Martinez* instructs that Guidelines error is prejudicial "absent unusual circumstances." *Id.* at 1347.

The Ninth Circuit declined to rehear the matter. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

THE CIRCUITS HAVE BEEN DIVIDED FOR OVER A DECADE WHETHER A DEFENDANT MUST MAKE A FORMAL EXCEPTION AFTER IMPOSITION OF SENTENCE TO PRESERVE PROCEDURAL SENTENCING ERRORS FOR PLENARY REVIEW; THIS COURT SHOULD ACT TO RESOLVE THE DISPARITY

A. Post-*Booker* Sentencing Review Looks to a Unified Assessment of "Reasonableness" with the Single Standard of Abuse of Discretion

After *United States v. Booker*, 543 U.S. 220, 261-62 (2005), federal sentences are now reviewed by appellate courts for overall reasonableness ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."). Since then, the Court has repeatedly indicated that reasonableness review equates with the abuse of discretion standard. *See Rita v. United States*, 551 U.S. 338, 351 (2007) ("Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, ..."); *id.* at 361 & n.2 (Stevens, J., concurring) ("Simply stated, *Booker* replaced the de novo standard of review required by 18 U.S.C. § 3742(e) with an abuse-of-discretion standard that we called 'reasonableness' review."); *Kimbrough v. United States*, 552 U.S. 85, 111 (2007) ("The ultimate question in Kimbrough's case is 'whether the sentence was reasonable—*i.e.*, whether the District Judge abused his discretion . . .' "); *Gall*, 552 U.S. at 41 ("courts of appeals must review all sentences–whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.").

The first step of this reasonableness review is to "ensure that the district court committed no significant procedural error." *Gall*, 552 U.S. at 51. Procedural errors include, "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.*

Thus, the review of sentences post-*Booker* looks to a unified "reasonableness" inquiry, equated with the abuse of discretion standard. Gone was the former split-standard in § 3742(e)(3) & (4), where some parts of the sentencing process were reviewed *de novo*, while others were judged on the basis of reasonableness. *See Booker*, 543 U.S at 260. Rather, a unitary "reasonableness" standard applies, whether the challenge on appeal concerns one or another of the different sources of error listed in § 3742(e). Whether a court commits a specific mistreatment of the Guidelines or some other misjudgment, the sentence is reviewed under the standard of reasonableness. *See Gall,* 552 U.S. at 51 ("Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard.").

Despite the rule in *Gall* that a district court abuses its discretion—imposes an unreasonable sentence—when it fails to follow the required procedures, the circuit courts are sharply divided regarding how to preserve such claims of error for appellate review and so which standard applies. Shortly after *Booker*, three approaches arose and have coalesced in the decade and a half since.

B. The Circuit Courts Are Sharply Divided on How to Preserve a Procedural, Sentencing Error for Appeal

At common law, lawyers were required to "preserve an issue in a 'bill of exceptions' by promptly taking an 'exception' to a ruling overruling the objection." Benjamin K. Raybin, Note, "*Objection: Your Honor is Being Unreasonable!"—Law and Policy Opposing the Federal Sentencing Order Objection Requirement*, 63 VAND. L. REV. 235, 251 (2010). The lawyer was required to state "Exception," "Note my exception, please," or words of similar effect. *Id.* "The purpose of the bill of exceptions was to preserve the relevant portions of the trial in order to create a record for the appellate court to review." *Id.* at 252.

With the advent of transcripts, the formal exception requirement was abandoned. *See id.* In 1944, Congress adopted Federal Rule of Criminal Procedure 51, which eliminated the requirement of a formal exception. *See id.* In its current form, Rule 51(a) provides that "[e]xceptions to rulings or orders of the court are unnecessary." FED. R. CRIM. P. 51(a). The current version of Rule 51(b) provides that a party preserves a claim for appeal by "informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, **or** the party's objection to the court's action and the grounds for that objection." FED. R. CRIM. P. 51(b) (emphasis added).

But, despite this clear principle of Rule 51 covering forensic requests of all sorts, the circuit courts are sharply divided regarding how to preserve a procedural, *sentencing* error for appeal. The Ninth Circuit, joined by the First, Second, Third,

Fifth, and perhaps the Tenth, requires a specific objection after the district court has imposed sentence. *See Valencia-Barragan*, 608 F.3d at 1108 & n.3, *cert. denied*, 562 U.S. 1017 (2010) ("Where, as here, a defendant failed to object [sic] on the ground that the district court erred procedurally in explaining and applying the § 3553(a) factors, we review only for plain error"); *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 & n.2 (5th Cir. 2009) (noting circuit split, but holding failure to raise a procedural objection below is reviewed for plain error); *United States v. Flores-Mejia*, 759 F.3d 253, 258 (3d Cir. 2014) (en banc); *United States v. Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007) *cert. denied,* 553 U.S. 1019 (2008); *United States v. Villafuerte*, 502 F.3d 204 (2d Cir. 2007); *United States v. Romero*, 491 F.3d 1173, 1177-78 (10th Cir.), *cert. denied*, 552 U.S. 930 (2007). These circuits all require a specific after-the-fact "objection" to obtain plenary review of procedural, sentencing errors.

However, the Fourth, Seventh, and Eighth Circuits have applied the rule that procedural error is preserved by arguing for a sentence based on the § 3553(a) factors that is different from the sentence the district court imposed. These circuits' approach is consistent with Rule 51—that a procedural sentencing error is preserved, if a defendant *makes* a specific sentencing request, but then the court *rejects* it, imposing a higher sentence. As the Seventh Circuit explained, requiring an "objection" to the sentence imposed after the party has already made a specific factual or legal argument would require an "exception" to the district court's ruling, a result expressly at odds with the text of Rule 51:

> Both the Rules of Evidence and the Rules of Criminal Procedure require a litigant to make known the position it advocates and to present evidence and argument for that position. These steps are essential to facilitate intelligent decision in the district court. Counsel present positions, and judges then decide. But the rules do not require a litigant to complain about a judicial choice after it has been made. Such a complaint is properly called, not an objection, but an exception. The rule about exceptions is explicit: "Exceptions to rulings or orders of the court are unnecessary." Fed. R. Crim. P. 51(a). Rule 51(b) adds that a litigant preserves a contention for review "by informing the court [before the decision is made] of the action the party wishes the court to take . . . and the grounds for" that action. Bartlett and his lawyer argued for a lower sentence, and they gave reasons. They have preserved their appellate options.

United States v. Bartlett, 567 F.3d 901, 910 (7th Cir. 2009).

Consequently, plain-error review for the Guideline error in Mr. Gallegos's case would not apply in the Seventh Circuit. In *United States v. Dale*, 498 F.3d 604, 610 (7th Cir. 2007), for instance, the defendant claimed that his sentence was unreasonable, in part, because the district court failed "to explain adequately its consideration of [the § 3553(a)] factors." The Seventh Circuit rejected the government's argument that plain error review applied, holding that "a defendant need not object to his sentence on the grounds that it is unreasonable to preserve appellate review for reasonableness." *Id.* at 610 n.5. The Seventh Circuit has consistently applied this reasoning to procedural reasonableness claims ever since. *See, e.g., United States v. Boling*, 648 F.3d 474, 483 (7th Cir. 2011) ("We review *de novo* any alleged procedural error—such as failure to adequately explain a departure from the guideline recommendation or failure to consider the factors listed in 18 U.S.C. § 3553(a)."); *United States v. Williams*, 616 F.3d 685, 694 (7th Cir.), *cert.*

denied, 562 U.S. 1092 (2010) ("A sentence is procedurally unreasonable when a trial court fails to give meaningful consideration to a defendant's non-frivolous sentencing arguments.").

The Fourth and Eighth Circuits are in accord.[2] *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010) ("By drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim") (emphasis added); *United States v. Swehla*, 442 F.3d 1143, 1145 (8th Cir. 2006) ("Once a defendant has argued for a sentence different than the one given by the district court, we see no reason to require the defendant to object to the reasonableness of the sentence after the court has pronounced its sentence."). *Cf. Dale*, 498 F.3d at 610 n.5 ("failure on the part of Mr. Dale to object to his sentence on the specific ground that it was unreasonable did not result in forfeiture of the argument and plain error does not apply.").

In other words, these circuit courts reason that proffering a specific, recommended sentence is "informing the court … of the action the party wishes the court to take" under Rule 51(b), making the "claim" that this is the correct sentence. As anywhere in the law, "[o]nce a federal claim is properly presented, a party can

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[2] The Seventh Circuit has expressly equated its rule with that of the Fourth Circuit and rejected the approach of the First, Second, and Tenth Circuits. *See United States v. Jones*, 438 F. App'x 515, 518 (7th Cir. 2011).

make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Rather, it is *claims* that are deemed waived or forfeited, not *arguments*. *See Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention … is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim"). The view of these circuits matches the intent of Rule 51 to accord plenary review to affirmative requests that are denied by the court. By proffering and urging a specific sentence, a defendant preserves review of errors in the *process* of denying that request without separate exception to each misstep.

On the other hand, the Sixth Circuit has adhered to a hybrid, quasi-waiver solution that is unique. The Sixth Circuit requires the district court specifically ask the parties whether they have any "objections" to the sentence just pronounced. Only if the district court complies by such inquiry will plain error govern any procedural reasonableness claim not raised before the sentencing judge. *See United States v. Vonner*, 516 F.3d 382, 385-86 (6th Cir.) (en banc), *cert. denied*, 555 U.S. 816 (2008). Thus, the circuit is not in accord with the other circuits. *See United States v. Vanderwerfhorst*, 576 F.3d 929, 934 (9th Cir. 2009) (Ninth Circuit expressly rejecting Sixth Circuit approach).

Finally some circuits addressing the matter appear ambivalent about which standard applies. Thus, the Tenth Circuit has subsequently retreated from a categorical application of the objection-rule to give plenary review to issues not

arising solely during the hearing. *See United States v. Lopez-Avila*, 665 F.3d 1216, 1217-19 (10th Cir. 2011) (holding that variance request made prior to sentencing hearing need not be renewed after imposition of higher sentence to avoid plain error). And in the D.C. Circuit, which claims to apply plain-error review, a district court's failure to adequately explain the sentence imposed will always result in reversal. *See* In re *Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008). *See also United States v. Akhigbe*, 642 F.3d 1078, 1087-88 (D.C. Cir. 2011) (following *Sealed Case*'s holding that failure to explain adequately the sentence imposed is "prejudicial in itself").

In sum, then, at least three circuits hold that procedural error is preserved by arguing for a sentence based on the § 3553(a) factors that is different from the sentence imposed. But other circuits apply plain-error review when the defendant fails to make an "objection," even though he requested and argued for a specific sentence that the court denied. One circuit, however, splits the baby, applying plain error only when offered the express opportunity to state the claim and failing to do so. Other circuits appear divided which way to turn. Such a fractured treatment—where one's standard of review on appeal varies from circuit to circuit—is a prime case of disuniformity in application of national law which this Court should address and resolve.

C. The Court Should Resolve This Long-Standing, Triple Split of Authority

The Court should grant the Petition to resolve this triple conflict in circuit case law and ensure uniformity. Not only is division in application of national law inherently baleful, but in this instance, it affects thousands of criminal sentencings

by subjecting those sentences to variable review process based on the vicissitudes of geography. It also creates inconsistency with the general principles embodied in Rule 51 and to no institutional benefit. These are compelling reasons for the Court to finally address this disparity in national. sentencing law. *See Vonner*, 516 F.3d at 406 (Moore, dissenting) ("The majority's plain-error analysis also deepens a growing circuit split that surely merits the attention of the Supreme Court.").[3]

Resolving this circuit split is particularly important, because whether an appellate court applies the plain-error standard usually controls the outcome of an appeal. *See* G. Ross Anderson, Jr., *Metamorphosis of the Sentencing Landscape: Changes in Procedure Affect Judges, Attorneys, and Defendants*, 57 OCT FED. LAW. 62, 63 (2010) ("What should be of preliminary importance within this changing regime is which standard of review a court employs, because the standard of review chiefly determines the ultimate direction of the appeal."). For example in *Lynn*, the Fourth Circuit consolidated the cases of four different defendants who each made claims that the district court failed to adequately explain the sentence imposed. 592 F.3d at 574. The preserved errors were remanded for resentencing. But when applying plain error, the sentences were affirmed. *Id.* Thus, "[t]he role of the

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[3] The focus on preserving challenges to the procedural reasonableness of sentencing in this case makes it the flip-side, legal question to that presented by *Holguin-Hernandez v. United States*, No. 18-7739, which concerns preservation of substantive reasonableness. The Court may make the most comprehensive consideration of reasonableness review by granting review in both cases to address the union of their Questions Presented and avoid piecemeal treatment of what is a unitary standard after *Booker.*

standard of review cannot be overstated," 57 OCT FED. LAW. at 65, and the writ should be granted to ensure that the outcome of an appeal will not depend upon which circuit reviews a defendant's sentence. That is the very essence of this Court's function in securing national uniformity: avoiding unequal treatment before the law.

Moreover, the need to harmonize the circuit treatments of post-*Booker* standards is underscored by the simultaneous discrepancy in the application of Rule 51 that this division represents. Contrary to the holdings of some circuits, Rule 51(a) expressly provides that "[e]xceptions to rulings or orders of the court are unnecessary." As such, "the Rules abandon the requirement of formulaic 'exceptions'—after the fact—to court rulings." *Lynn*, 592 F.3d at 578; *accord Bartlett*, 567 F.3d at 910 (Rule 51 does "not require a litigant to complain about a judicial choice after it has been made."). Instead, "[a] party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take." FED. R. CRIM. P. 51(b). By drawing arguments for a sentence "different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim." *Lynn*, 592 F.3d at 578; *see also Vonner*, 516 F.3d at 399 (Clay, J., dissenting) ("once a defendant has made [§ 3553(a) factor] arguments and the district court has imposed a sentence,

neither *Bostic*[4] nor Rule 51 imposes upon the defendant the further obligation to challenge the 'procedural reasonableness' of his sentence before the district court."); *id.* at 409 (Moore, J., dissenting) (by arguing for a variance and citing *Booker* "Vonner gave the district court notice that he sought a reasoned explanation for his sentence, and the district court could expect that our appellate review of the sentence would include an evaluation of the district court's stated reasoning.").

The circuits requiring what amounts to an exception to the denial of a requested sentence reason contrary to Rule 51. They also demand unnecessary, judicial costs without any benefit. The Fourth Circuit explains:

> Requiring a party to lodge an explicit objection after the district court explanation would "saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case." When the sentencing court has already "heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence," we see no benefit in requiring the defendant to protest further.

Lynn, 592 F.3d at 578-79 (quoting *United States v. Castro-Juarez,* 425 F.3d 430, 433-34 (7th Cir. 2005)).

Here, Mr. Gallegos proffered a specific, sentence recommendation and argued for it at the hearing based on appeal to various statutory sentencing factors under § 3553(a). The district court rejected that request and imposed a sentence above the Guidelines, but without any reference to the advisory range, which it failed to

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[4] *United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004).

calculate until after the fact. Instead, it showed unreasonable fixation on imposing a sentence at least as high as any previous one for the same offense, regardless of very different, factual circumstances[5] and even changes to Guideline calculations applying to those earlier cases. Moreover, after proffering and supporting a different sentencing request, counsel for Mr. Gallegos did alert the judge of dissatisfaction with the result, noting reliance on improper factors, ignoring defense arguments, and failure to follow the parsimony mandate of § 3553(a). The Ninth Circuit's categorization of such a record as a default, so triggering plain error, shows how far it has drifted from proper implementation of Rule 51 and this Court's precedents from *Gall* forward.

In essence, the Ninth Circuit held Mr. Gallegos was required to take a specific exception to the district court's sentence, detailing the specific missteps the court made in denying his request. All this, despite his written and oral urging of an alternative sentence based on the statutory sentencing factors. Such a holding conflicts with the plain text of Rule 51(a) that a defendant need not make an

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[5] As Mr. Gallegos argued on appeal, the two prior violations of § 1324 showed a consistent diminishing in conduct. The 2004 offense involved physical resistance and deployment of pepper spray. Seven years later, Mr. Gallegos simply drove an alien to the border as a passenger in a car. In 2017, his conduct consisted of directing Cruz to come into the house from a neighboring shed and giving him a sandwich. This de-escalating scale of conduct could well explain why the first sentence could be 41 months, but the one 13 years later could be lower, in addition to the changes to criminal history score. That this is so is starkly shown by the fact that it was the same district judge as in the instant appeal who had given Mr. Gallegos the allegedly "counterintuitive" sentence of 30 months after 41 months in 2011.

"exception to the district court's ruling." *See Bartlett*, 567 F.3d at 910; *Lynn*, 592 F.3d at 578-79; *Swehla*, 442 F.3d at 1145. Under Rule 51(b), Petitioner's claim was preserved when he informed the court "of the action the party wishes the court to take," namely impose a low-end, Guideline sentence. FED. R. CRIM. P. 51(b). The application of the plain-error standard where the rule and this Court's precedent calls for plenary review is a deviation in law which calls for remedy to restore legal uniformity. SUP. CT. R. 10.

D. This Case Provides a Suitable Vehicle for Finally Addressing the Question Presented

Mr. Gallegos's case provides this Court a suitable vehicle to finally address this long-standing division in circuit authority. Though the Court has hitherto avoided healing the rift that has lingered without resolution for over a decade, cases where the Court has declined to review an issue are, ultimately, of no moment to the decision to review *now*. The "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quotations omitted). Moreover, "[t]he 'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value." *Id.* (quoting *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.)).

With this split in circuit authority arising over a decade ago, but continuing still despite multiple opportunities for convergence, the conflict is fully developed and ripe for decision. The legal lines have been drawn by the three courses taken by the

circuits; as each leads to different results, disparity in treatment on a national, legal question calls for resolution to avoid unfair and unequal treatment in thousands of future cases going forward.

This case is a suitable vehicle to review the issue. Because of the lengthy sentence imposed, both custodial and supervisory, the matter retains its status as an active controversy.

The Question Presented is focused and ripe for resolution. Although the approaches vary, the principal conflict between the circuit courts lies in some requiring a specific, after-the-fact exception, while others hold that the issue is preserved whenever a defendant has made an argument for a particular sentence based on the § 3553(a) factors different from the one ultimately imposed. The *Court* must choose which of these options is correct, since sometimes even a unanimity of circuit holdings is not proof against a mistaken interpretation. *See Rehaiff v. United States,* No. 17-9560, 2019 WL 2552487, at *16 n.6 (2019) (Alito, J., dissenting) (noting majority construes statute contrary to how every circuit hitherto had).

The facts here provide proper scope for the Question: Mr. Gallegos requested a particular sentence and did not get it. The flaw of failing to calculate the Guidelines as the "starting point and initial benchmark." *Gall*, 552 U.S. at 49, means the court manifestly failed to recognize "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez,* 136 S. Ct. at 1347. Such error was prejudicial, because the court intimated it disputed the policy behind some of the Guidelines applying here (without addressing them specifically—

in fact, its complaint did not materialize on this record) and applied a blanket rule of always making a subsequent sentence the same or higher as any previous violation of the same statute, despite different facts and subsequent Guideline changes.

A more generous, plenary review of these errors would unmask the court's illogic. Attending to the actual Guideline calculation here would have highlighted that the court's complaint about a deficiency in § 2L1.1 simply did not arise on these facts. Attending to the Guideline calculations would have underscored the legitimate reasons the sentences for the three convictions are gave rise to differing results. And such attention would demonstrate why the particular facts called for a lesser, not a higher sentence, under the parsimony rule in § 3553(a). All of these assigned errors reasonably may have been ameliorated had the district court done its duty to attend to the Guideline "lodestar" throughout its reasoning, not just as a perfunctory afterthought. But for the improperly high standard of review the Ninth Circuit applied to these claims, Mr. Gallegos showed harmful error. Had his appeal been heard in the Seventh Circuit, for instance, his case would have ended differently.

Because the Court's answer to the focused Question Presented will be dispositive of whether Mr. Gallegos is entitled to relief on his active controversy, his case is a suitable vehicle for the Court to finally resolve this legal divide. It affects thousands of criminal cases annually and has festered for nearly a decade and a half after *Booker* unified the standard of review. It therefore presents compelling reasons for review.

CONCLUSION

The Court should grant the Petition, because the Ninth Circuit decision conflicts with the straightforward application of Federal Rule of Criminal Procedure 51 and perpetuates a long-standing division in circuit authority on the important issue of appellate standard of review. SUP. CT. R. 10(a) & (c).

Date: July 5, 2019

Respectfully submitted,

s/ James Fife

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