No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VALENTE ARIAS-AVILA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When conducting their substantive-reasonableness review of sentences, can appellate courts reweigh the sentencing factors in 18 U.S.C. § 3553(a), as the First, Eighth, Ninth, and Eleventh Circuits hold, or does this Court's decision in *Gall v. United States*, 552 U.S. 38 (2007), prohibit appellate courts from reweighing the sentencing factors, as the Fifth and Tenth Circuits hold?

II. What is the appropriate standard for appellate courts to apply when conducting their substantive-reasonableness review of sentences?

PARTIES TO THE PROCEEDINGS

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Valente Arias-Avila prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as the Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment and opinion were entered on October 26, 2021. *See* Appendix. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

DIRECTLY RELATED PROCEEDINGS

- *United States v. Arias-Avila*, No. 20-cr-662, U.S. District Court for the Southern District of Texas. Judgment entered May 3, 2021.
- *United States v. Arias-Avila*, No. 21-20227, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Oct. 26, 2021.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Petitioner pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326(a) and (b). At sentencing, the district court calculated the advisory imprisonment range under the United States Sentencing Guidelines as 2 to 8 months, based on a total offense level of 6 and a criminal history category of III. The court imposed a sentence of 48 months (4 years) of imprisonment, to be followed by a 3-year term of supervised release. Counsel for petitioner objected that the sentence—6 times above the top of the Guidelines range—was greater than necessary in light of the 18 U.S.C. § 3553(a) sentencing factors and that the district court gave unreasonable weight to petitioner's very old criminal convictions from 1995. The court overruled the objection, and petitioner timely appealed.

On appeal petitioner argued that the 48-month sentence was substantively unreasonable. The district court imposed that sentence as either an upward departure or as an upward variance. Petitioner contended that the extent of the departure was not justified by the facts of the case, and the sentence as a variance resulted from a clear error of judgment in balancing the sentencing factors. The court's sentence was a shocking 2,300% increase from the bottom of the Guidelines range and 500% increase from the top of the range. The instant offense was petitioner's first time being prosecuted in federal court, and his first time being prosecuted for illegal entry or reentry into the United States. All of his prior felonies occurred a long time ago. The bulk of his criminal history consisted of misdemeanors for which he received relatively short sentences. The district court's

sentence was double the top of the government's recommendation, and drastically exceeded the nationwide average of 8 months. In sum, the district court's extreme sentence of 6 times the top of the Guidelines range was an abuse of discretion.

The Fifth Circuit affirmed the sentence in an unpublished opinion, stating:

> Arias does not claim procedural error, placing at issue only whether a lesser sentence was appropriate in the light of how the court weighed his history and characteristics. For the following reasons, he does not establish abuse of discretion. *See Gall*, 552 U.S. at 51 (noting review "give[s] due deference to the district court's decision that the [18 U.S.C.] § 3553(a) [sentencing] factors, on a whole, justify the extent of the variance"; and contention "appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court".); *United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017) ***(stating our court will not "reweigh the sentencing factors and substitute [its] judgment for that of the district court").***
>
> The district court's considerable departure or variance is not unprecedented. *See, e.g.*, *United States v. McElwee*, 646 F.3d 328, 342-45 (5th Cir. 2011) (noting our court has "upheld substantial Guidelines deviations" when "district court based its upward variance on permissible, properly spelled-out considerations"). The court provided such considerations concerning Arias' history and characteristics, concluding the Guidelines range failed to provide an appropriate sentence. *See id.* A judge "may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented". *Gall*, 552 U.S. at 50 (citation omitted).
>
> AFFIRMED.

United States v. Arias-Avila, No. 21-20227, slip op. at 2-3 (5th Cir. Oct. 26, 2021) (unpublished) (Appendix) (emphasis added).

Petitioner now asks this Court resolve the conflict among the federal circuit courts on the appropriate standard for evaluating the substantive reasonableness of sentences.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals have adopted divergent approaches to substantive-reasonableness review of sentences.

Congress has instructed district courts, when imposing sentence, to consider the sentencing factors listed in 18 U.S.C. § 3553(a). Appellate courts review those sentences, as established by this Court in *Gall v. United States*, 552 U.S. 38 (2007), first for procedural reasonableness and then for "[t]he substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51. Since *Gall*, the courts of appeals have struggled with defining the scope of substantive-reasonableness review and have adopted divergent interpretations of the standard.

The Fifth Circuit, in petitioner's case as in numerous others, has made clear that it will not entertain an argument that the district court erred in weighing the § 3553(a) factors. *See, e.g.*, *Arias-Avila*, No. 21-20227, slip op. at 2 (Appendix); *United States v. Hinojosa-Almance*, 977 F.3d 407, 412 (5th Cir. 2020); *United States v. Douglas*, 957 F.3d 602, 609 (5th Cir. 2020); *United States v. Scully*, 951 F.3d 656, 672 (5th Cir.), *cert. denied*, 141 S. Ct. 344 (2020); *United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017) (cited in *Arias-Avila*); *United States v. Malone*, 828 F.3d 331, 342 & n. 42 (5th Cir. 2016); *United States v. Guerrero-Saucedo*, 779 Fed. Appx. 264, 265 (5th Cir. 2019) (unpublished); *United States v. Vazquez-Chavarria*, 777 Fed. Appx. 777, 778 (5th Cir. 2019) (unpublished); *United States v. Rosales*, 776 Fed. Appx. 260, 261 (5th Cir. 2019) (unpublished); *United States v. Thompson*, 757 Fed. Appx. 408, 410 (5th Cir. 2019) (unpublished); *United States v. Robertson*, 744 Fed. Appx. 237, 238 (5th Cir. 2018)

(unpublished). The Fifth Circuit will "not reweigh the § 3553(a) factors" because, in its view, *Gall* forbids it. *United States v. Romero*, 621 Fed. Appx. 303, 304 (5th Cir. 2015) (unpublished) (citing *Gall*, 552 U.S. at 51-52); *see also Malone*, 828 F.3d at 342 & n. 42 (same); *Guerrero-Saucedo*, 779 Fed. Appx. at 265 (same); *Vazquez-Chavarria*, 777 Fed. Appx. at 778 (same); *Rosales*, 776 Fed. Appx. at 261 (same); *Thompson*, 757 Fed. Appx. at 410 (same); *United States v. Rivera-Solis*, 733 Fed. Appx. 207, 207 (5th Cir. 2018) (unpublished) (same, citing *Malone*); *United States v. Zuniga-Navarra*, 667 Fed. Appx. 448, 449 (5th Cir. 2016) (unpublished) (same).

The Tenth Circuit takes the same approach as Fifth Circuit. It will "not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them." *United States v. Solis-Alvarez*, 563 Fed. Appx. 622, 626 (10th Cir. 2014) (unpublished) (quoting *United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008)). Like the Fifth Circuit, the Tenth Circuit views *Gall* as barring that inquiry. *See Smart*, 518 F.3d at 807-08 (citing *Gall*).

By contrast, the Eleventh Circuit's substantive-reasonableness review expressly includes reweighing the § 3553(a) factors:

> [E]ven though we afford due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance, we may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence. ***We are therefore still required to make the calculus ourselves, and are obliged to remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors*** by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.

United States v. McQueen, 727 F.3d 1144, 1156 (11th Cir. 2013) (emphasis added) (quoting *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)). And, contrary to Fifth and Tenth Circuits' interpretation of *Gall*, the *en banc* Eleventh Circuit has concluded that *Gall* "actually confirms that appellate courts, with the proper measure of deference, should review the reasonableness of the weight placed on a § 3553(a) factor by the sentencing court." *United States v. Irey*, 612 F.3d 1160, 1192 n.18 (11th Cir. 2010) (*en banc*).

The First, Eighth, and Ninth Circuits have adopted approaches that are similar to the Eleventh Circuit's. The First Circuit invites appellants to "persuade us that the district judge was unreasonable in balancing pros and cons despite the latitude implicit in saying that a sentence must be 'reasonable.'" *United States v. Madera-Ortiz*, 637 F.3d 26, 30 (1st Cir. 2011) (quoting *United States v. Navedo-Concepción*, 450 F.3d 54, 59 (1st Cir. 2006)); *see also United States v. Ofray-Campos*, 534 F.3d 1, 43 (1st Cir. 2008) ("While the factors identified by the court may have justified a substantial upward variance, they simply do not support the imposition of a statutory maximum sentence of forty years, that is so far above the guidelines range.").

The Eighth Circuit considers whether the district court committed a clear error of judgment in weighing appropriate factors. *United States v. Feemster*, 572 F.3d 455, 561 (8th Cir. 2009) (*en banc*); *see also United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016) (holding that "the district court gave undue weight to Martinez's violent past to justify its extreme deviation from the guideline range").

And the Ninth Circuit will reverse a sentence as substantively unreasonable if the court's review of the record leaves it with a "definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *United States v. Ressam*, 679 F.3d 1069, 1087 (9th Cir. 2012) (*en banc*) (quoting *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009)); *see also Ressam*, 679 F.3d at 1087 (rejecting the dissent's position that the appellate court's re-weighing of the sentencing factors violates *Gall*).

In addition to this circuit split, the Fourth, Sixth, and Seventh Circuits have adopted a different approach to substantive-reasonableness review. They focus on the reasons given by the district court and evaluate whether those reasons are sufficiently compelling to support the sentence. *See United States v. Howard*, 773 F.3d 519, 530 (4th Cir. 2014) (determining "whether the district court's proffered justification for imposing a non-guidelines sentence is sufficiently compelling to support the degree of the variance") (quoting *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir. 2008)); *United States v. Aleo*, 681 F.3d 290, 300 (6th Cir. 2012) (determining "if the district court provided compelling reasons" for a sentence that went "so far beyond the guidelines range"); *United States v. Bradley*, 675 F.3d 1021 (7th Cir. 2012) (determining "whether the district court offered justification 'sufficiently compelling to support the degree of variance'").

The Third Circuit shares the focus on the district court's reasons, but with a twist. A sentence that passes procedural review is substantively reasonable in the Third Circuit "unless no reasonable sentencing court would have imposed the same sentence on that

particular defendant for the reasons the district court provided." *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (*en banc*).

Finally, under the Second Circuit's unique interpretation of *Gall*, the Second Circuit will "not consider what weight we would ourselves have given a particular factor," but the court will consider "whether a factor relied on by a sentencing court can bear the weight assigned to it." *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (*en banc*); *see also United States v. Jenkins*, 854 F.3d 181, 187 (2d Cir. 2017) ("We conclude that the factors upon which the district court relied . . . cannot bear the weight of the sentence the district court imposed."). A comparison of the Second Circuit's evaluation of a substantive-reasonableness challenge using its methodology with how the Fifth Circuit considered petitioner's claim illustrates that results in factually similar cases differ depending on the happenstance of geography. In *United States v. Singh*, 877 F.3d 107 (2d Cir. 2017), the Second Circuit held that a 60-month sentence for illegal reentry was substantively unreasonable. In *Singh*, "the Guidelines range was only 15 to 21 months and the government and the Probation Office had both recommended a within-Guidelines sentence." *Id.* at 116. The district court, however, imposed a sentence of 60 months' imprisonment, which was "almost three times the high end of the Guidelines range." *Id.* The Second Circuit, relying on statistics from the Sentencing Commission, emphasized that "the sentence of 60 months drastically exceeded nationwide norms"—the average sentence in fiscal year 2013 for illegal reentry was 18 months, with a median sentence of 12 months. *Id.* (citation omitted). Furthermore, "[a]n above-Guidelines sentence was

imposed in only 1.3% of all illegal reentry cases," and in cases where an eight-level enhancement for an aggravated felony was applied (before the Guideline for illegal reentry was overhauled in 2016), "an above-Guidelines sentence was imposed in only 1.2% of the cases." *Id.*

The Second Circuit further explained that the defendant's criminal history did not justify the magnitude of the district court's upward variance, due to the nature and age of those convictions, as well as the defendant's age when he committed the offenses. The court explained that, "[w]hile Singh indeed had eight prior convictions, as the district court acknowledged, however, none involved violence or narcotics trafficking." *Id.* at 117. "Six of the eight convictions were more than ten years old. Four were more than twenty years old, counting back from the date of sentencing, and Singh was only 21 and 22 years old when he committed those offenses." *Id.* And, "[t]he four more recent convictions occurred over the course of fifteen years, and three were so minor they resulted in conditional discharges, that is, the sentencing court did not believe the crime warranted imprisonment or even probation." *Id.* Finally, the court again turned to Sentencing Commission statistics, noting that "57.2% of illegal reentry offenders were in Criminal History Category ('CHC') III or higher. Singh was only in CHC II, and yet he was sentenced to more than three times the national average for all illegal reentry offenders, 57.2% of whom were in a higher CHC." *Id.* (internal citation omitted).

In petitioner's case, the Guidelines range—of 2 to 8 months—was significantly lower than the 15-to-21-month range in *Singh*, and the district court's sentence was of a

significantly higher magnitude (6 times the top of the range) than in *Singh* (almost 3 times). The government in petitioner's case recommended a much lower sentence (of 24 months) than the one imposed by the court. Petitioner's criminal history is comparable to that in *Singh* with respect to its nature and age, and the fact that much of his criminal history was for misdemeanors and resulted in relatively short sentences from the state sentencing courts. Likewise, Sentencing Commission data show that petitioner's sentence "drastically exceeded nationwide norms." *Singh*, at 877 F.3d at 117. In fiscal year 2020, 11% of illegal-reentry offenders received an upward variance, 20.4% were in CHC III, and the "average sentence for all illegal reentry offenders was eight months." United States Sentencing Commission, *Quick Facts: Illegal Reentry Offenses*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf. Despite the factual similarities, the result in petitioner's case, due to its arising in the Fifth Circuit instead of the Second Circuit, was affirmance instead of reversal.

The Court should grant the petition for certiorari to resolve these divergent, and inconsistent, approaches to substantive-reasonableness review. *See* Sup. Ct. R. 10(a).

II. This Court has provided the courts of appeals with very little guidance on how to conduct their important substantive-reasonableness review.

As mentioned above, the Court in *Gall* established a bifurcated process of appellate review of federal sentences. First, the appellate court considers whether the sentence is procedurally reasonable. *Gall*, 552 U.S. at 51. This component of the review process was well-defined by the Court in *Gall*, which delineated "significant procedural errors" of "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.*

If a sentence passes procedural evaluation, the appellate court then considers whether the sentence is substantively reasonable. *Id.* But the Court's decision in *Gall* provided much less guidance on the scope of substantive-reasonableness review than it did on procedural-reasonableness review, to the point where one court of appeals has characterized *Gall* as providing "mixed messages." *United States v. Levinson*, 543 F.3d 190, 197 (3d Cir. 2008); *see also Feemster*, 572 F.3d at 462 n.4 (quoting *Levinson*). Another commentator has observed that the Court's lack of guidance on substantive-reasonableness review has left "courts in the same indeterminate muddle as before" *Gall*. Laura I. Appleman, *Toward a Common Law of Sentencing:* Gall, Kimbrough, *and the Search for Reasonableness*, 21 Fed. Sent'g Rep. 1, 3 (2008). Yet another (a Third Circuit judge) has lamented, "Ultimately, it seems that the limited definition of reasonableness review outlined by the Supreme Court has created more questions than answers, particularly in the realm of substantive reasonableness." D. Michael Fisher, *Still in*

Balance? Federal District Court Discretion and Appellate Review Six Years After Booker, 49 Duq. L. Rev. 641, 652 (2011).

In fact, the Sentencing Commission has also acknowledged the struggle of the courts of appeals to implement substantive-reasonableness review: "The appellate courts lack adequate standards and uniform procedures in spite of a number of Supreme Court rulings addressing them, and the ultimate outcome of the substantive review of a sentence may depend in part on the circuit in which the appeal is brought." United States Sentencing Commission, *Report of the Continuing Impact of* United States v. Booker *on Federal Sentencing* (2012), http://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing.

Because of the lack of adequate standards, "a troubling consensus is emerging that substantive-reasonableness review is unworkable or even undesirable." Note, *More Than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 Harvard L. Rev. 951, 951 (Jan. 2014); *see also id.* at 958 ("The workability of substantive reasonableness review has been the subject of withering criticism from the bench, the academy, and the Sentencing Commission itself.").

Accordingly, the Court should grant the petition for certiorari to provide much needed guidance on the important question of how courts of appeals should review sentences for substantive reasonableness. *See* Sup. Ct. R. 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: December 16, 2021

Respectfully submitted,

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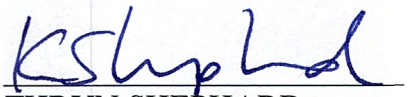
By 
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