No. _____

In the

Supreme Court of the United States

_____

Islam Yaser-Abdel Said,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Whether criminal defendants challenging a statute as unconstitutionally vague may raise facial attacks in cases not involving the First Amendment?

2. Whether substantive reasonableness review necessarily requires the court of appeals to reweigh the sentencing factors?

PARTIES TO THE PROCEEDING

Petitioner is Islam Yaser-Abdel Said, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Islam Yaser-Abdel Said seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is available at *United States v. Said*, 2022 WL 3097848 (5th Cir. August 3, 2022)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on August 3, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Section 1071 of Title 18 provides in relevant part:

> Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined under this title or imprisoned....

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

Section 3553(a) of Title 18 provides:

(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

A. Facts and Proceedings in District Court

Petitioner Islam Yaser-Abdel Said suffers from a serious intellectual disability; his IQ is 62. *See* (ROA.1044-1048). Unfortunately, he grew up in a terrible environment for someone with this condition. He lived in a household headed by aa cruel and autocratic father, who committed abuse of every form against his children, including physical abuse of Petitioner. *See* (Record in the Court of Appeals, at 1297).

In August of this year, a jury found that Petitioner's father murdered his own daughters because they dated American men. *See* Krista Torralva and Maggie Prosser, *Dallas Morning News*, *Yaser Said found guilty of capital murder in 2008 slayings of daughters, Sarah and Amina* (August 9, 2022), *available at https://www.dallasnews.com/news/courts/2022/08/09/closing-arguments-to-begin-this-morning-in-the-capital-murder-trial-of-yaser-said/*, *last visited November 1, 2022*. This case arises from the aftermath of the killings, which occurred January 1, 2008. *See* (Record in the Court of Appeals, at 1288).

When state authorities charged the murders, Petitioner allowed his father to live with him in his apartment for some time. *See* (Record in the Court of Appeals, at 803). The federal government charged Petitioner with conspiracy to conceal his father, a violation of 18 U.S.C. § 371, and with harboring him from arrest, a violation of 18 U.S.C. § 1071. *See* (Record in the Court of Appeals, at 46-52). In a superseding

indictment, it added an allegation that Petitioner conspired to obstruct an official proceeding. *See* (Record in the Court of Appeals, at 146).

Petitioner moved to dismiss the harboring and conspiracy counts on the ground that 18 U.S.C. §1071 exhibits unconstitutional vagueness. *See* (Record in the Court of Appeals at 133-137). The court denied the motion, and Petitioner pleaded guilty to each count. *See* (Record in the Court of Appeals, at 216-220, 995, *et seq*.).

A Presentence Report uncovered the history of abuse perpetrated by Petitioner's father against his children, *see* (Record in the Court of Appeals, at 1297), and identified a Guideline range of 30-37 months imprisonment, *see* (Record in the Court of Appeals, at 1300). It noted no criminal history, *see* (Record in the Court of Appeals, at 1296), and identified no factors suggesting a need to sentence outside the Guideline range, *see* (Record in the Court of Appeals, at 1302).

At sentencing, the district court reduced the Guideline range to 21-27 months, sustaining a defense objection. *See* (Record in the Court of Appeals, at 1021-1023). It heard evidence from a psychologist that Petitioner suffered from intellectual disability, a condition substantiated by school and social security records. *See* (ROA.1044-1048). Yet it sentenced Petitioner to 120 months imprisonment, 60 months on counts one and two, and 120 months on count three, all to run concurrently. *See* (ROA.1075-1076). In support of the severe sentence, it cited the resources expended on the manhunt for Petitioner's father, Petitioner's claim that people of another race may have killed sisters, threatening conduct toward the agents, and illegal material found on Petitioner's computer. *See* (ROA.1075-1077).

B. Proceedings in the Court of Appeals

Petitioner appealed. He contended that the district court had erred in overruling his vagueness challenge to 18 U.S.C. §1071, and that his sentence was simply too long. *See* Initial Brief in *United States v. Said,* No. 21-10455, 2021 WL 4995400, at *7-8 (October 18, 2021). [1]

The court of appeals affirmed. It rejected the vagueness challenge on the sole ground that Petitioner could not show the statute vague as applied to his own conduct. [Appendix A]; *United States v. Said*, No. 21-10455, 2022 WL 3097848, at *3 (5th Cir. August 3, 2022)(unpublished). It said:

> Vague criminal statutes "violate[ ] the first essential of due process." To meet the high bar of unconstitutionality, a statute must be "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Further, in the majority of cases, vagueness review looks no further than the facts before the court. Unless a vagueness challenge "involve[s] First Amendment freedoms," this court will evaluate "the statute only in light of the facts of the case at hand."
>
> The factual stipulation that Said signed and submitted to the court in support of his guilty plea describes conduct that an ordinary person would understand to violate Section 1071 under either construction of the statute. Specifically, Said admitted he knew there was a federal arrest warrant for his father and provided him shelter "in order to prevent his discovery, arrest, and prosecution." An ordinary person would understand these actions to violate Section 1071's prohibition on harboring fugitives, so Said's as-applied vagueness challenge must fail.

[1] He also contended that the district court had erred in refusing him to cross-examine an agent about the criminal history of an informant. %%

Said, No. 21-10455, 2022 WL 3097848, at *3 (quoting *United States v. Edwards*, 182 F.3d 333, 335 (5th Cir. 1999*), Johnson v. United States*, 576 U.S. 591, 595–96 (2015) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)), and 18 U.S.C. §1071).

As to the substantive reasonableness claim, the court treated it essentially as a claim of procedural error. See id. at *3-4. It noted that the district court had likely considered all of Petitioner's mitigating evidence, noted that the judge relied on valid sentencing factors, and concluded with the following blunt statement: "we are not permitted to reweigh the factors." *Id.* (citing *United States v. Brantley*, 537 F.3d 347, 349 (5th Cir. 2008)).

REASONS FOR GRANTING THE PETITION

I. The lower federal courts have not consistently or faithfully applied *Johnson v. United States*, 576 U.S. 591 (2015), insofar as it addresses the availability of facial vagueness challenges.

"The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United States*, 576 U.S. 591, 594-596 (2015) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). A vague criminal statute runs afoul of due process when it (1) fails to provide sufficient notice that would enable ordinary people to understand what conduct it prohibits; or (2) encourages arbitrary and discriminatory enforcement. *United States v. Coutchavlis*, 260 F.3d 1149, 1155 (9th Cir. 2001) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). Vagueness concerns are enhanced with that impose criminal penalties. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982).

In *Johnson v. United States*, 576 U.S. 591 (2015), this Court held the residual clause of the Armed Career Criminal Act to be unconstitutionally vague. *See Johnson*, 576 U.S. at 597. The dissent took the view that courts could grant relief from a vague statute only on an as applied basis, at least in the absence of a colorable First Amendment issue *Id*. at 636 (Alito, J., dissenting)("'It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined' on an as-applied basis.")(quoting *United States v. Mazurie*, 419

U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975)). The dissent cited *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988), for the proposition that "[o]bjections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.'" *Id.* (quoting *Maynard*, 486 U.S. at 361). Indeed, it contended that a statute becomes unconstitutionally vague "'only if the enactment is impermissibly vague in all of its applications.'" *Id.* (quoting *Village of Hoffman Estates*, 455 U.S. 489, 494–495 (1982); *Chapman v. United States*, 500 U.S. 453, 467 (1991)).

Yet the *Johnson* majority disagreed. Although it acknowledged that "statements in some of our opinions could be read to suggest otherwise," it thought the Court's prior holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602-603. It explained:

> For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. These decisions refute any suggestion that the existence of some obviously risky crimes establishes the residual clause's constitutionality.

Id. (citing and quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), and *Coates v. Cincinnati*, 402 U.S. 611 (1971)).

A. The lower federal courts have not consistently applied the holding of Johnson as to the availability of facial vagueness challenges.

Confusion persists about *Johnson's* treatment of this issue in the lower courts, which this Court should address. Specifically, two or three courts have declined to follow the above language to its logical conclusion, while recognizing the resulting tension. Further, courts have taken conflicting positions on the availability of facial vagueness challenges.

1. Three courts have identified tension in this Court's precedent even as they declined to entertain facial vagueness challenges.

Most circuits hold that a litigant challenging a statute as vague must show that it is vague as to their own conduct. But even some of these courts acknowledge confusion and tension in this area of the law.

Thus, Ninth Circuit observed that *Johnson* "looked past [the] as-applied challenge directly to the petitioner's facial challenge." *Henry v. Spearman*, 899 F.3d 703, 709 (9th Cir. 2018). And it noted therefore that the rule that "a statute must be vague as applied to the person challenging it ... may not reflect the current state of the law." *Henry*, 899 F.3d at 709. But it ultimately continued to apply that rule -- it did not think *Johnson* spoke clearly enough to justify disregarding this Court's earlier opinions on the issue. *Kashem v. Barr*, 941 F.3d 358, 375–77 (9th Cir. 2019)(citing, inter alia, *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

Similarly, the Seventh Circuit in *Whatley v. Zatecky*, 833 F.3d 762 (7th Cir. 2016), a case arising under 28 U.S.C. §2254, cited *Johnson* for the proposition that

"'[i]f we hold a statute to be vague, it is vague in all its applications[.]'" *Whatley*, 833 F.3d at 782–83, n.15 (quoting *Johnson*, 576 U.S. at 603)(brackets by *Whattley* court). It thus questioned whether the State could save the conviction on the ground "that Whatley's conduct fell within some constitutional core of the statute." *Id.* But it proceeded to address the petitioner's case as an as applied challenge only because the defendant had raised it as such. *See id.* This strongly suggests that it was prepared to consider facial challenge to a criminal enactment – selling drugs near a youth program center - that did not arguably implicate the First Amendment.

But like the Ninth Circuit, the Seventh Circuit acquired cold feet when the issue became dispositive, specifically when addressing a facial challenge to 18 U.S.C. §922(g)(3), which forbids possession of a firearm by a user of illicit drugs. *United States v. Cook*, 970 F.3d 866, 875–78 (7th Cir. 2020). Even so, it acknowledged the uncertainty in the area of law. *See Cook*, 970 F.3d at 875–78 ("It is not clear how much *Johnson*—and the Court's follow-on decision in *Sessions v. Dimaya*, —— U.S. – ——, 138 S. Ct. 1204 (2018), which invalidated similar language in the Immigration and Nationality Act—actually expand the universe of litigants who may mount a facial challenge to a statute they believe is vague.").

Post-*Johnson* precedent of the Eighth Circuit followed the pattern, though it recognized tension with a different authority, namely *City of Chicago v. Morales*, 527 U.S. 41 (1999). In *Nygard v. City of Orono*, 39 F.4th 514 (8th Cir. 2022), the Eighth Circuit declined to entertain a facial challenge to a property improvement permitting regime. *See Nygard*, 39 F.4th at 519. It recognized that a plurality of this Court in

Morales reserved a place for such challenges in cases of pervasive vagueness. *See id.* But it declined to follow the plurality in *Morales* because it regarded itself as bound by contrary Eighth Circuit law. *See id.*

The Seventh, Eighth and Ninth Circuit have all complained of difficulty in following the full body of this Court's vagueness precedent. This suggests that the law requires clarification.

2. The lower courts have issued conflicting opinions.

Ultimately, most federal courts of appeals have continued to require that vagueness challengers raise their claims as applied rather than facially. *See United States v. Ragonese*, 47 F.4th 106, 113–14 (2d Cir. 2022); *United States v. Barronette*, 46 F.4th 177, 190 (4th Cir. 2022); [Appendix A]; *United States v. Said*, No. 21-10455, 2022 WL 3097848, at *3 (5th Cir. August 3, 2022)(unpublished); *Kashem*, 941 F.3d at 375–77; *United States v. Wells*, 38 F.4th 1246, 1258–59 (10th Cir. 2022); *United States v. Jones*, No. 20-11841, 2022 WL 1763403, at *2–4 (11th Cir. June 1, 2022)**;** *Ramsingh v. Transportation Sec. Admin.*, 40 F.4th 625, 635–36 (D.C. Cir. 2022)**.** The Sixth Circuit is an exception; it permitted a facial challenge to criminal aspects of a historic preservation ordinance. *See Stevens v. City of Columbus, Ohio,* No. 21-3755, 2022 WL 2966396, at *5 (6th Cir. July 27, 2022). In so doing, it concluded that this Court's precedent permits such challenges for criminal provisions, even if they do not involve plausible First Amendment claims. *See Stevens*, 2022 WL 2966396, at *5. I

As the foregoing shows, *Johnson*'s treatment has left the courts of appeals uncertain as to their duty to entertain facial challenges based on a statute's

unconstitutional vagueness. Some of them openly acknowledge that uncertainty; it is also reflected in a circuit split on the issue, discussed above, between most circuits and the Sixth.

3. Most circuits have not faithfully applied *Johnson* and its progeny.

Circuits that decline to follow the *Johnson* court in entertaining a generally offer two explanations, but neither holds water. First, they reason that a challenger need not show that all applications of a statute involve indeterminacy in order to show that it is vague as applied to them. *See Kashem*, 941 F.3d at 375 ("The principle that a litigant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge rests on an independent foundation, apart from the vague-in-all-applications rule."); *United States v. Hasson*, 26 F.4th 610, 619–20 (4th Cir. 2022). As such, they do not think the as applied requirement conflicts with the *Johnson* majority's decision to reject "the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602-603; *see Kashem*, 941 F.3d at 375–77; *Hasson*, 26 F.4th at 619–20.

Although this argument has a surface logic, it does not offer a plausible reading of *Johnson* and its progeny. The passage of *Johnson* quoted above did not simply hold reject the notion that vagueness challengers must show vagueness in every application of the statute – it also responded to statements in the dissent urging it to preserve those applications of the residual clause that addressed obviously risky offenses. ***Compare*** *Johnson*, 576 U.S. at 602-603, ***with*** *id.* at 636 (Alito, J.,

dissenting). Notably, the *Johnson* majority scarcely considered the risks attendant to the possession of a sawed-off shotgun, Johnson's prior conviction. S*ee id*. at 600. Yet we would this issue to figure critically in the outcome expect if the majority believed that Johnson had to show vagueness in his own case. As the Ninth Circuit observed, but did not fully appreciate, *Johnson* "looked past [the] as-applied challenge directly to the petitioner's facial challenge." *Henry*, 899 F.3d at 709.

Johnson, moreover, was not the last word on the issue from this Court. In *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204 (2018), this Court held that the residual clause of 18 U.S.C. §16 could not be constitutionally applied to aliens seeking relief in removal proceedings. *See Dimaya*, 138 S. Ct. at 1206. The dissent in *Dimaya* urged this Court to reject the vagueness challenge because, in its view, the residual clause clearly encompassed completed burglaries, and Dimaya had been convicted of such an offense. *See id*. at 1250-1252 (Thomas, J., dissenting). The *Dimaya* majority, however, flatly rejected the argument, citing the above passage of *Johnson. See id.* at 1214, n.3 Clearly, then, *Johnson* stands for more than the proposition that a statute need not be vague in every application to be unconstitutional. It stands for the proposition that vagueness challenges may sometimes be brought even if the statute is clear as to the litigant, and even if the statute does not colorably offend the First Amendment.

Finally, if *Johnson* excluded vagueness challenges whenever a statute offers adequate notice in the defendant's case – generalized vagueness notwithstanding – we would expect the residual clause to apply in cases where a statute actually

requires physical injury. After all, no defendant could reasonably plead ignorance that his or her prior statute of conviction "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. §924(e)(2)(B), if it actually required such injury. Yet this Court in *Borden v. United States*, ___U.S.___, 141 S.Ct. 1817 (2021), recently reversed a defendant's ACCA designation where it depended on a statute requiring reckless injury as an element. Clearly, this Court has treated *Johnson* as a broad rejection of the as-applied requirement for vagueness challenges.

Second, these circuits have attempted to confine *Johnson*'s holding on the as applied requirement to cases involving the categorical approach. They reason:

> …although the Court did not say so explicitly, the residual clauses did not lend themselves easily to a traditional as-applied analysis. Both cases involved the categorical approach, which "requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out," instead of considering the conduct underlying the convictions.

Kashem, 941 F.3d at 377(quoting *Johnson*); *accord Cook*, 970 F.3d at 876 ("…so much of the Court's analysis in *Johnson* deals with a statute that is in key respects *sui generis*. In particular, it was the categorical approach called for by the ACCA's residual clause.").

This is clearly incorrect – it confuses the facts underlying the defendant's prior conviction with the particular statutes considered under the residual clause. True, the categorical approach to criminal history enhancements employed by ACCA makes it irrelevant whether the defendant committed a prior offense in a risky way. *See Johnson*, 576 U.S. at 596. But some offenses are nonetheless obviously more risky

than others when considered in the abstract. An offense requiring injury as an element, for example, poses a 100% chance of physical injury. Yet the *Johnson* court did not salvage the residual clause as to these offenses either.

In short, the *Johnson* court's treatment of the as applied requirement should be clarified. Several circuits have expressed difficulty in following all aspects of this Court's precedent in this area. A circuit split has resulted. And most circuits have employed implausible readings of *Johnson* and its progeny that unduly limit its scope.

B. The present case is an excellent vehicle to consider this issue.

The question presented is likely dispositive. The opinion below rejects Petitioner's fully preserved vagueness challenge on the sole ground that Petitioner's factual stipulation, "describes conduct that an ordinary person would understand to violate Section 1071 under either construction of the statute." [Appendix A]; *Said*, 2022 WL 3097848, at *3. It regarded this conclusion as dispositive because "[u]nless a vagueness challenge 'involve[s] First Amendment freedoms,' [it] will evaluate 'the statute only in light of the facts of the case at hand.'" *Id.* (quoting *United States v. Edwards*, 182 F.3d 333, 335 (5th Cir. 1999)).

And a facial challenge against the harboring statute would likely succeed. Petitioner's statute of conviction authorizes criminal liability when a defendant "harbors" a fugitive "so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person." 18 U.S.C. §1071. This language does not provide adequate notice of the acts that will trigger liability, and certainly does not constrain arbitrary

enforcement. It therefore fails the standard for constitutional vagueness. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Specifically, Congress's choice of the word "harbor," a term whose contemporary meaning is unusually dependent on its connotation of illegality[2] rather than its denotation, reflects a basic ambivalence toward criminal liability for ordinary acts of care provided to fugitive loved ones. "Harboring" in contemporary parlance refers only to improper assistance; as a consequence, the statute essentially sets forth a tautology, stating that it is illegal to shelter a fugitive when it is illegal to do so. And if the text of the statute alone does not reflect such ambivalence, it is manifest in the interpretive case law, as will be shown below. The result is a statute that denies due process.

The term "harbor" might naturally encompass any act tending to promote the fugitive's survival. Thus, the government has obtained convictions for defendants who allowed a fugitive to remain in their home, *see United States v. Whitman*, 480 F.2d 1028 (6th Cir.1973), who traveled with them to obtain medical care, *see United States v. Yarborough*, 852 F.2d 1522, 1543 (9th Cir. 1988), and who loaded camping gear into a car, *see United States v. Kutas*, 542 F.2d 527, 528 (9th Cir. 1976).

Because of the high degree of overlap between acts that facilitate a fugitive's survival and those that prevent his or her capture, a broad reading of the statute

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[2] *See* Oxford English Dictionary Online ("harbor, v. 3. To give shelter to, to shelter. *Formerly often in a good sense*: to keep in safety or security, to protect; *now mostly dyslogistic*, as to conceal or give covert to noxious animals or vermin; to give secret or clandestine entertainment to noxious persons or offenders against the laws.")(emphasis added), *available at* https://www.oed.com/view/Entry/84114?rskey=PDZ5hk&result=4&isAdvanced=false#eid , *last visited November 1, 2022*.

might essentially criminalize the defendant's relationship with a fugitive loved one. For similar reasons, it might capture a range of omissions by those confronted with a fugitive, effectively requiring a duty to report. Perhaps uncomfortable with this outcome, the federal courts have constructed various *ad hoc* rules to limit the scope of the statute. Thus a defendant may not be convicted for offering money to a fugitive, *see United States v. Shapiro*, 113 F.2d 891, 892 (2d Cir.1940), for mere failure to report the presence of a fugitive, *see United States v. Magness*, 456 F.2d 976, 978 (9th Cir.1972), nor even for lying to the police about the presence of a fugitive in the house, *see United States v. Foy*, 416 F.2d 940, 941 (7th Cir.1969).

As a result, felony criminal liability under 18 U.S.C. §1071 turns on a confusing and unpredictable hodge-podge of razor-thin distinctions. Thus, a defendant may falsely tell the FBI that he has not seen the fugitive without violating the statute, even if the fugitive is hiding on a ledge in the defendant's apartment. *See Foy*, 416 F.2d at 941. But he may not help the fugitive obtain a fake driver's license and "actively lure[] the FBI away from a house where he believed [the fugitive] was hiding." *United States v. Vizzachero*, 1997 WL 597750 (E.D. PA. 1997)(unpublished)(describing *United States v. Lockhart*, 956 F.2d 1418 (7th Cir.1992)). Further, while the defendant may give money to the fugitive to buy his or her own food and shelter without violating the statute, *see Shapiro*, 113 F.2d at 892, the defendant may not make the same donation in kind, *see United States v.*

Bissonette, 586 F.2d 73 (8th Cir.1978).[3] And while the Fifth Circuit has held that mere "[f]ailure to disclose a fugitive's location" does not violate the statute, it has also held thatr closing the front door of a residence when police approach may do so. *See United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990).

This last scenario, worthy of a law school hypothetical or a final exam in moral philosophy, illustrates the profound indeterminacy of the statute's reach. No person of average intelligence could reliably predict that door-closing would be the moment that support of a fugitive loved one turns criminal. *Compare City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)(invalidating loitering statute that forbade remaining in place "with no apparent purpose" because "It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'"). The experience of the courts attempting to define the scope of this demonstrates that it is "nearly impossible to apply consistently." *Johnson v. United States*, 576 U.S. 591, 601 (2015)(quoting *Chambers v. United States*, 555 U.S. 122, 133 (2009)(Alito, J., concurring in judgment)). It supports a finding of unconstitutional vagueness. *See Johnson*, 576 U.S. at 601.

In short, the word "harbor," together with the manifest discomfort evinced by the federal courts in accepting its broadest, literal meaning, deprive the defendant of fair notice as to the starting point of criminal liability. "No one may be required at

[3] Perhaps the defendant may give the fugitive money, and then receive it back in exchange for food and shelter.

peril of life, liberty or property to speculate as to the meaning of penal statutes," *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). And it is all the more offensive to "ordinary notions of fair play and the settled rules of law,'" *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), to compel such speculation in a context where the law seeks to limit the most basic, pre-legal, social impulses. Congress may make it a felony to feed and shelter one's family in certain situations, but it must say as much in clear terms.

The statute and its schizophrenic treatment by the federal courts also encourage arbitrary and discriminatory enforcement. Because it is not clear when innocent conduct becomes criminal, law enforcement may choose to target those associated with the worst criminals, rather than those whose conduct provides the most assistance. This potential for arbitrary and discriminatory enforcement denies due process. *See Morales*, 527 U.S. at 56-57.

II. The courts of appeals are in conflict as to the nature of substantive reasonableness review.

A. The courts are divided.

The length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *See United States v. Booker*, 543 U.S. 220, 261 (2005). A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. §3553(a)(2). *See* 18 U.S.C. §3553(a)(2). The district court's compliance with this dictate is reviewed for reasonableness. *See Rita v. United States*, 551 U.S. 338, 359 (2007). In *Gall v. United States*, 552 U.S. 38 (2007), this Court emphasized that all federal sentences, "whether

inside, just outside, or significantly outside the Guidelines range" are reviewed on appeal "under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 51. This review "take(s) into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id*. And "a major departure should be supported by a more significant justification than a minor one." *Id*. at 50.

Fifth Circuit precedent imposes several important barriers to relief from substantively unreasonable sentences. By forbidding the "substantive second guessing" of the district court, it very nearly forecloses substantive reasonableness review entirely. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008). To similar effect is its oft-repeated unwillingness to "reweigh the sentencing factors." *United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017); *United States v. Cotten*, 650 Fed. Appx. 175, 178 (5th Cir. 2016)(unpublished); *United States v. Vasquez-Tovar*, 2012 U.S. App. LEXIS 21249, at *4 (5th Cir. 2012)(unpublished); *United States v. Mosqueda*, 437 Fed. Appx. 312, 312 (5th Cir. 2011)(unpublished); *United States v. Turcios-Rivera*, 583 Fed. Appx. 375, 376-377 (5th Cir. 2014); *United States v. Douglas*, 667 Fed. Appx. 508, 509 (5th Cir. 2016)(unpublished). Although *Gall* plainly affords the district court extensive latitude, it is difficult to understand what substantive reasonableness review is supposed to be, if not an effort to reweigh the sentencing factors, vacating those sentences that fall outside a zone of reasonable disagreement.

Notably, other circuits have declined to abdicate their roles in conducting substantive reasonableness review. The Second Circuit has emphasized that it is not the case that "district courts have a blank check to impose whatever sentences suit

their fancy." *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008). The Eleventh and Third Circuits have likewise read *Gall* to "leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished." *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008); *accord United States v. Levinson*, 543 F.3d 190, 195-196 (3d Cir. 2008). These cases conform to the consensus among the federal circuits that it remains appropriate to reverse at least some federal sentences after *Gall* as substantively unreasonable. *See United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008)*; United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008); *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008).

The Fifth Circuit's restrictive approach to substantive reasonableness review is evident in its opinion. In affirming the sentence, the court essentially undertook only review for procedural error. It said that the district court was not "unaware of" his mitigating information, including his mental disability and abusive childhood. [Appendix A]; *Said*, 2022 WL 3097848, at *4. Addressing his claim that the district court simply failed to balance the sentencing factors in a reasonable manner, it said:

> Although the degree of the variance is considerable and this court may have weighed the Section 3553(a) favors differently, **we are not permitted to reweigh the factors.**

Id. (citing *Brantley*, 537 F.3d at 349)(emphasis added). The case accordingly squarely presents the issue that has divided the courts of appeals. Here, the court said that it simply would not reweigh the factors; in other circuits – and according to this Court's

precedent, *see Booker*, 543 U.S. at 261 – that is precisely the task of substantive reasonableness, albeit with deference.

That issue is recurring and important. It is potentially implicated in nearly every federal criminal case that proceeds to sentencing, and it serves as an important check on the substantive injustice of sentences that are simply too long or too short.

B. The present case is the right vehicle.

This case, moreover, presents an unusually strong vehicle to address the nature of substantive reasonableness review. Here, the district court imposed a massive upward variance on a defendant who suffered from a serious intellectual disability, for a crime that a person with such a disability – a person easily influenced, and who may have difficulty separating familial duty from the legal expectations of the larger world -- would be more likely to commit. A court willing to engage in pure, true, substantive reasonableness review would be very likely to find the sentence too high.

The preponderance of medical evidence showed Petioner's IQ to be 62, which renders him disabled. *See* (ROA.1044-1045). It is a score lower than 99% of the population, very nearly the flip side of genius in its relation to the intellectual norm. This fact is profoundly relevant to every sentencing factor named in 18 U.S.C. §3553(a)(2)(A) – the defendant's amenability to rehabilitation, his capacity for manipulation by an abusive father, and his basic moral blameworthiness. *See Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

A defendant with these limitations does not merit the same punishment as one without them; to say otherwise would be like ignoring a child-defendant's minority. And the nature of Petitioner's criminal conduct – giving food and shelter to his father – only magnifies the significance of his disability. In every other context, this kind of conduct towards family is lauded; it is not reasonable to ignore the defendant's disability when we judge him for failing to tell the difference.

The district court did rely on valid sentencing considerations in arriving at its enormous upward variance: the commission of extraneous offenses, the resources consumed by the FBI manhunt, and the seriousness of his father's crime. But the defendant's intellectual disability is not simply one more fact to be placed on the scale with the other weighty, valid, considerations. Rather, it casts the entire case in a different light, just as if the defendant caused a serious harm with a lesser *mens rea*. The sentencing court has wide discretion, but a nearly five-fold variance for a man with a serious intellectual disability, punished for offering shelter to his father, is not reasonable.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 1st day of November, 2022.

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