

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

JOSE ALFREDO PEREZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

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**PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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MAUREEN SCOTT FRANCO  
Federal Public Defender

ERIK ANTHONY HANSHEW  
Assistant Federal Public Defender  
Western District of Texas  
727 E. César E. Chávez Blvd., B-207  
San Antonio, Texas 78206-1205  
(210) 472-6700  
(210) 472-4454 (Fax)

*Counsel of Record for Petitioner*

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**QUESTION PRESENTED FOR REVIEW**

Whether a district court's mere recitation of the sentencing statute absent any application of case-specific facts is sufficient to support a five-year upward variance.

No. \_\_\_\_\_

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Petitioner Jose Alfredo Perez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 28, 2023.

**PARTIES TO THE PROCEEDING**

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

**RELATED PROCEEDINGS**

All proceedings directly related to the case are as follows:

- *United States v. Perez*, No. 6:21-cr-00111-ADA (W.D. Tex. July 27, 2022) (judgment)

- *United States v. Perez*, No. 22-50683 (5th Cir. Mar. 28, 2023)  
(unpublished opinion)

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

<i>Gall v. United States</i> , 552 U.S. 38 (2007) .....	4–6
<i>Peugh v. United States</i> , 569 U.S. 530 (2013) .....	3–4
<i>United States v. Booker</i> , 543 U.S. 220 (2005) .....	4
<i>United States v. Fama</i> , 636 F. App'x 45 (2d Cir. 2016) (per curiam) .....	6
<i>United States v. Munoz-Fontanez</i> , 61 F.4th 212 (1st Cir. 2023) .....	5
<i>United States v. Rivera-Gonzalez</i> , 809 F.3d 706 (1st Cir. 2016) .....	5
<i>United States v. Ware</i> , 577 F.3d 442 (2d Cir. 2009) .....	6

### Statutes

<b>18 U.S.C. § 922(g)(1)</b> .....	<b>1</b>
<b>18 U.S.C. 3553</b> .....	<b>1–5</b>
<b>28 U.S.C. § 1254(1)</b> .....	<b>1</b>

### Rules

<b>Sup. Ct. R. 13.1</b> .....	<b>1</b>
<b>Sup. Ct. R. 13.3</b> .....	<b>1</b>

**DECISION BELOW**

A copy of the unpublished opinion of the court of appeals, *United States v. Perez*, No. 22-50683 (5th Cir. Mar. 28, 2023) (per curiam), is attached to this petition as Appendix A.

**JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 28, 2023. This petition is filed within 90 days after entry of judgment or order sought to be reviewed. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

**FEDERAL STATUTE INVOLVED**

The text of 18 U.S.C. § 3553 is reproduced in Appendix C.

**STATEMENT**

Petitioner Jose Alfredo Perez was charged with one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). App. B.

Perez pleaded guilty as charged.

A probation officer prepared a presentence report. That report calculated a total offense level of 12 and a criminal history category of VI. That offense level and criminal history combination yielded a recommended imprisonment term of 30 to 37 months.

At sentencing, defense counsel explained that Perez was dedicated to starting a new life focused on being a responsible and caring individual. Defense counsel requested a sentence within the recommended guidelines range. Perez, himself, acknowledged his guilt and detailed his plans to become a proper family man and reprioritize his main life considerations. Perez also testified that this case had already taught him a lot and that he would never be around a firearm again. The government responded that Perez's criminal history, including prior assaultive behavior, warranted a longer sentence.

After hearing the parties' allocutions, the district court gave a five-year upward variance, imposing a sentence of 100 months of imprisonment. The totality of the district court's explanation for the upward variance was: "The Court is going to take into consideration 18 United States Code Section 3553 and give an upward variance for the need for the sentence – for both the nature and circumstances of the offense and the history and characteristics of the defendant, the need for sentence imposed to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense but also to afford adequate deterrence to criminal conduct in the future and to protect the public from the future and further crimes of the defendant."

Perez timely appealed. On appeal, Perez argued that the 100-month sentence was substantively and procedurally unreasonable. The court of appeals affirmed his sentence. App. A.

## **REASONS FOR GRANTING THE WRIT**

### **The Court Should Grant Certiorari to Consider Whether a District Court’s Mere Recitation of the Sentencing Statute, Absent Any Application of Case-Specific Facts, is Sufficient to Support a Five-Year Upward Variance.**

In the first year of law school, all soon-to-be lawyers learned some iteration of IRAC – Issue, Rule, Application/Analysis and Conclusion, to frame legal writing. The various competing methodologies include, for example, CREAC, MIRAT, IDAR, CREAC, TREACC, CRuPAC, ISAAC and ILAC. The common and most important component to all these methodologies being Application and/or Analysis.

It is precisely this component that was absent from the district court’s sentencing pronouncement in this case. The district court failed to provide any explanation of the factual basis supporting its five-year upward variance. Instead, the district court merely parroted the language of Section 3553.

This Court has made clear that the sentencing guidelines are the starting point in all federal sentencing. *Peugh v. United States*, 569 U.S. 530, 541 (2013) (quoting *Gall v. United States*, 552

U.S. 38, 50, n.6 (2007); *United States v. Booker*, 543 U.S. 220, 260 (2005)). And that this start, the advisory Guidelines range, is not the end but instead one of various considerations sentencing courts rely upon when imposing sentences. *Peugh*, 569 U.S. at 541; *Gall*, 552 U.S. at 50 n.6. Section 3553, another of these considerations, is the federal sentencing statute that provides a list of factors to be considered by the court when imposing a sentence. *Gall*, 552 U.S. at 50 n. 6.

In *Gall*, the Court emphasized that district courts must explain and provide sufficient justifications for imposing a non-guideline sentence. 552 U.S. at 46 (“It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.”). *Gall* even detailed the procedural requirements of a sentencing district court when imposing a non-guideline sentence as follows:

He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the

appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

*Id.* at 50.

Here, the district court imposed a sentence that was five years above and three times larger than the Guidelines range. Unlike *Gall*, wherein the district court provided a lengthy fact-based analysis and application of the requisite sentencing considerations, the district court gave a one sentence quote of Section 3553. Locking a human being in a cage for over eight years based upon a single sentence that merely quotes a statute cannot be characterized as any form of justification, let alone a significant one, and clearly belies any notion of a fair sentencing. Even Perez himself gasped, “Is he talking about nine years?,” when the district court imposed his sentence sans explanation. Perez, as all defendants, deserves to have the district court explain and justify its significantly harsh and above guideline sentence.

Other circuits agree with Perez. Unlike the Fifth Circuit, the First and Second Circuits have concluded that failure to explain an upward sentencing variance affects a defendant’s substantial rights and the absence of an explanatory sentencing statement undermines the trust and respect of judicial proceedings. *United States v. Munoz-Fontanez*, 61 F.4th 212, 215 (1st Cir. 2023); *United States v. Rivera-Gonzalez*, 809 F.3d 706, 712 (1st Cir. 2016); *United*

*States v. Ware*, 577 F.3d 442, 454–53 (2d Cir. 2009); *United States v. Fama*, 636 F. App’x 45, 50 (2d Cir. 2016) (per curiam)

The Court should grant certiorari to remind district courts that *Gall* is still the law.

## CONCLUSION

FOR THESE REASONS, Perez asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO  
Federal Public Defender  
Western District of Texas  
727 E. César E. Chávez Blvd., B-207  
San Antonio, Texas 78206  
Tel.: (210) 472-6700  
Fax: (210) 472-4454

s/ Erik Anthony Hanshew  
ERIK ANTHONY HANSHEW  
Assistant Federal Public Defender

*Counsel of Record for Petitioner*

DATED: June 13, 2023