

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

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IN THE SUPREME COURT OF THE UNITED STATES

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FRANCISCO GUTIERREZ  
Petitioner

v.

UNITED STATES OF AMERICA  
Respondent

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

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**QUESTION PRESENTED**

Does law of the case apply to an appeal from a de novo resentencing on an open record?

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

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Petitioner, Francisco Gutierrez, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals, Case No. 21-50282.

## **OPINION BELOW**

The unpublished Memorandum decision of the Ninth Circuit Court of Appeals, was issued on April 26, 2023, and is attached as Appendix A.

## **JURISDICTION**

The jurisdiction of this Court is invoked under 28 USC §1254(1). The matter seeks redress from the Ninth Circuit Court of Appeals' April 26, 2023, Memorandum (Appendix A). Petitioner's petition for rehearing was denied June 14, 2023 (Appendix B).

## **CONSTITUTIONAL PRIVISIONS, TREATIES, STATUTES, ORDIANCES, AND REGULATIONS INVOLVED**

This case turns on the judicially created doctrine of law of the case.

## **LIST OF PROCEEDINGS**

This is Mr. Gutierrez' third appeal following a lengthy trial on criminal RICO conspiracy charges. *See United States v. Espudo, et. al.*, SDCA No. CR 12-0236-GPC. On October 25, 2013, he was originally sentenced to 240 months incarceration. Dkt. 1586. The first appellate panel of the Ninth Circuit Court of Appeals affirmed his conviction but remanded the case for resentencing on September 8, 2017. *See United States v. Barragan*, 871 F.3d 689, 696 (9<sup>th</sup> Cir. 2017).

On May 16, 2019, Mr. Gutierrez was resentenced to 189 months incarceration. Dkt. 2209. Mr. Gutierrez again appealed and on January 21, 2021, a second Panel of the Ninth Circuit reversed the sentence imposed on the initial

resentencing and remanded for a third resentencing. No. 19-50167, Dkt. 37-1, attached as Appendix C.

On April 26, 2023, a third (the “current”) Panel affirmed the sentence imposed on the third resentencing. No. 21-50282, Dkt. 35-1, attached as Appendix A. The current Panel did not reach the merits of Mr. Gutierrez’ sentencing claims, except to affirm that the proper standard of proof was preponderance of the evidence. Rather, it found all arguments were barred by the law of the case.

### **STATEMENT OF THE CASE**

Petitioner Gutierrez seeks this Court’s review of a question of exceptional importance: does law of the case apply to an appeal after resentencing on an open record?<sup>1</sup> In 2011, this Court held that the law of the case doctrine did not apply to district courts after a case was reversed on appeal and then remanded for de novo resentencing. *Pepper v. United States*, 562 U.S. 476, 507-08 (2011). Generally, if the Ninth Circuit reverses and remands for resentencing, it will “remand for resentencing on an open record—that is, without limitation on the evidence that the district court may consider.” *United States v. Matthews*, 278 F.3d 880, 885 (9<sup>th</sup> Cir. 2002) (en banc). Thus, the district court was not bound by law of the case.

That is because:

A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent. Because the district court’s original sentencing intent may be undermined by altering one portion of the calculus, an appellate court when reversing one part of a defendant’s sentence, “may vacate the entire sentence . . . so that, on remand, the trial court can

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<sup>1</sup> The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231, because the indictment charged Mr. Gutierrez with a federal criminal offense.

reconfigure the sentencing plan . . . to satisfy the sentencing factors in 18 U.S.C. § 3553(a).”

*Pepper*, 562 U.S. at 507-508. The open remand effectively “wiped the slate clean.” *Id.* at 507.

### **REASONS FOR GRANTING THE PETITION**

A new sentence is based on a clean slate. By applying the law of the case, the Ninth Circuit left Mr. Gutierrez’ new sentence unreviewed. Applying the equitable doctrine of law of the case to block review of an entirely new sentence is inconsistent with *Pepper* and a departure from the accepted and usual course of judicial proceedings. Accordingly, it calls for an exercise of this Court’s supervisory power, so granting the writ is appropriate pursuant to both Supreme Court Rules 10(a) and (c).

### **CONCLUSION**

For the foregoing reasons, Petitioner requests that this Court grant the petition for certiorari.

Dated: Aug. 28, 2023

Respectfully submitted,



Kenneth M. Miller  
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Francisco Gutierrez