

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

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In The  
Supreme Court of the United States

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JAVIER GARIBAY MENDOZA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Under *Gall v. United States*, 552 U.S. 38, 50 (2007), a district court imposing an outside-Guidelines sentence “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” “[A] major departure [from the Guidelines] should be supported by a more significant justification than a minor one.” *Id.* at 51.

The question here is: When a court varies upward from the Guidelines, like the court did for Mr. Mendoza, can the court fulfill its procedural obligations without explaining its disagreements with the Guidelines’ policy and without an individualized assessment of all the 18 U.S.C. § 3553(a) factors?

## **RELATED PROCEEDINGS**

*United States v. Mendoza*, No. 22-50079 (9th Cir. May 23, 2023).

*United States v. Javier Garibay Mendoza*, No. 3:21-cr-01498-BEN-1 (S.D. Cal. Apr. 11, 2022).

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Javier Garibay Mendoza respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

**INTRODUCTION**

This case tests the Court’s procedural requirement under *Gall v. United States*, 552 U.S. 38, 50 (2007), that “a major departure [from the Guidelines] should be supported by a more significant justification than a minor one.” For Mr. Mendoza, when pronouncing a sentence nearly double the high-end of the applicable Guidelines, the district court did not provide meaningful explanation under the § 3553(a) factors as to why it disagreed with the applicable Guidelines or why the

specific degree of variance was necessary. Instead, the district court stated, generally, that the guidelines did not “fairly, accurately, and adequately” account for Mr. Mendoza’s criminal history. Appendix to the Petition (“Pet. App.”) 4a. With little analysis, the Ninth Circuit concluded the district court provided adequate explanation to impose the near double-the-Guidelines sentence, even though the district court “base[d] the sentence” substantially on only one § 3553(a) factor—criminal history. Pet. App. 4a.

In the last 15 years, courts of appeals have applied *Gall*’s procedural standard inconsistently. The Ninth, Tenth, and Eleventh Circuits appear to require less explanation for variances, allowing district judges to get away with outside-Guidelines sentences with little explanation of disagreements with the Guidelines or how the sentence comports with the § 3553(a) factors. On the other hand, the First, Third, Fourth, and Eighth Circuits require a more thorough explanation. But the circuits often apply *Gall*’s procedural standard inconsistently even within their own circuit cases. Some even describe *Gall* as having a “murky” procedural standard and appear to merge *Gall*’s procedural and substantive standards to review whether a variant sentence may stand. These inter- and intra-circuit inconsistencies have significant consequences: The approach taken from one circuit or one panel from one circuit can be the difference between a remand and an affirmance for cases with similar fact patterns.

The circuit split undermines the Court’s concern in *Gall*, that adequate explanation is necessary especially in cases where there is a major departure from



the Guidelines. *Gall*, 552 U.S. at 50. This case offers an excellent vehicle to resolve the split—the issue is preserved and outcome determinative. The Ninth Circuit’s inconsistent approach to *Gall* is wrong and damages the public perception of fair sentencing. Fortunately, the Third Circuit’s approach in *United States v. Merced*, 603 F.3d 203, 220–21 (3rd Cir. 2010), and the Fourth Circuit’s approach in *United States v. Morace*, 594 F.3d 340, 343–51 (4th Cir. 2010), offer straightforward and easy-to-follow interpretations of *Gall*’s procedural mandate that would alleviate the circuit split, without damaging *Gall*.

The Court should intervene to reconcile these circuit divisions undermining the Court’s mandate to adequately explain deviations from the Guidelines.

### **OPINION BELOW**

The Ninth Circuit affirmed Mr. Mendoza’s 48-month sentence, observing, in relevant part, that the district court adequately explained the above-Guidelines sentence. Pet. App. 3a–5a.

### **JURISDICTION**

The Court of Appeals affirmed Mr. Mendoza’s sentence by memorandum on May 23, 2023. Pet. App. 3a–5a. It then denied Mr. Mendoza’s petition for rehearing and rehearing en banc on September 8, 2023. Pet. App. 2a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

### **RELEVANT STATUTORY PROVISIONS AND RULES**

Section 3553 of Title 18 of the U.S. Code provides factors for a court to consider in determining the particular sentence to be imposed. 18 U.S.C. § 3553(a).

The section provides that a “court shall impose a sentence sufficient, but not greater than necessary,” to comply with the purposes of punishment. *Id.* In determining a sentence, a court must consider:

1. “The nature and circumstances of the offense and the history and characteristics of the defendant,”
2. “The need for the sentence imposed,”
3. “The kinds of sentences available,”
4. “The kinds of sentence and the sentencing range,”
5. “Any pertinent policy statement,”
6. “The need for unwarranted sentence disparities,” and,
7. “The need to provide restitution to any victims of the offense.”

*Id.* That section also includes that a court, “at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c).

Section 3742 of Title 18 of the U.S. Code provides, in relevant part, that “[u]pon review of the record, the court of appeals shall determine whether the sentence [] was imposed in violation of law; [] was imposed as a result of an incorrect application of the sentencing guidelines; [and] is outside the applicable guideline range[.]” 18 U.S.C. § 3742(e).

### **STATEMENT OF THE CASE**

Javier Garibay Mendoza was 61 years old in 2021 when he was caught trying to cross the border without immigration status. After more serious convictions in

his youth, from 1996 onwards Mr. Mendoza received sentences totaling nearly 18 years of custody for just illegal reentry offenses. Pet. App. 36a. Most of these sentences were still captured in his Criminal History Score when he faced sentencing in 2022.

At sentencing, the parties jointly recommended a sentence of 15 months. This represented the low-end of Mr. Mendoza’s Guidelines range after incorporating a then standard two-level downward variance under 18 U.S.C. § 3553(a) to account for the judicial emergency during the pandemic and the severe conditions of confinement during this time. Without the requested variance, Mr. Mendoza’s Guidelines were 21–27 months, as agreed on by all parties and the court.

The district court rejected the joint request for a variance and nearly doubled the Guidelines range to sentence Mr. Mendoza to 48 months. Without any meaningful discussion of why it disagreed with the Guidelines’ policy, the court merely recited Mr. Mendoza’s criminal history and stated generally it did not believe the guidelines “fairly, accurately, and adequately” accounted for Mr. Mendoza’s history. Pet. App. 4a. After pronouncement of sentence, Mr. Mendoza objected to the district court’s failure to adequately explain its variance from the Guidelines.

On appeal, among several issues presented, Mr. Mendoza argued that the district court failed to adequately justify its above-Guidelines sentence. Pet. App. 4a. The Ninth Circuit disagreed and affirmed the sentence. Pet. App. 3a–5a. Without addressing *Gall*’s procedural mandate for “significant justification” for an

upward variance, the panel observed: “[t]he court correctly calculated the Guidelines range, but explained that it would not impose a sentence within the range because the Guidelines in this case did not ‘fairly, accurately, and adequately’ account for Mendoza’s history.” Pet. App. 4a. The panel stated that the “court’s explanation” reflects that it “bas[ed] the sentence” on Mr. Mendoza’s “extensive criminal history.” Pet. App. 4a. The panel did not address whether the district court properly rooted its upward sentence in view of the other § 3553(a) factors.

Mr. Mendoza petitions the Court for review.

### **REASONS FOR GRANTING THE WRIT**

After 15 years of attempting to apply *Gall*, the circuits remain divided on how its procedural standard works. Even within circuits, different panels are applying *Gall* differently. The inter- and intra-circuit split undermines this Court’s mandate and destabilizes the Guidelines’ hope for uniformity among federal sentences.

Mr. Mendoza’s case provides an excellent vehicle to resolve this turmoil. The case squarely presents the issue, and clarification of *Gall* is outcome determinative. The panel for Mr. Mendoza glossed over its analysis of *Gall* and provided very little description of why it believed the district court’s explanation adequately explained its disagreements with the Guidelines. Several circuits, like the Ninth Circuit, follow similar applications of *Gall* to seemingly not require a meaningful analysis of the § 3553(a) factors for a sentencing judge to justify its above-Guideline sentence, while other circuits require a more stringent analysis by the district court to

adequately explain varying from the Guidelines. These different applications of *Gall*'s procedural standard have resulted in different outcomes.

Ultimately, circuits applying *Gall* loosely and allowing district courts to get away with little explanation and without justifying outside-Guidelines sentences with a tailored analysis of the § 3553(a) factors are wrong. Such interpretations of *Gall* fail to allow meaningful review by appellate courts in assessing what disagreements the sentencing judge had with the Guidelines and why it believed the § 3553(a) factors justified the variant sentence. Such loose interpretations of *Gall* fail to “promote the perception of fair sentencing.” 552 U.S. at 39. The Third and Fourth Circuits offer an easy-to-follow interpretation of *Gall* that correctly encapsulates the Court’s procedural mandate. The Third and Fourth Circuits’ approach reflects *Gall*'s mandate for sentencing courts to justify their outside-Guidelines sentences by explaining their disagreements with the Guidelines and meaningfully assessing the § 3553(a) factors.

For the reasons that follow, the Court should grant the petition.

**I. Circuits are divided on how much explanation satisfies *Gall*'s procedural requirement that a court adequately justify variances from the Guidelines.**

The circuits have long remained at odds about how much explanation is necessary for a sentencing court to adequately justify a variance from the Guidelines. The chaos can be linked back to how circuit judges read *Gall*.

In *Gall*, the Court explained the procedure of how sentencing courts must conduct sentencing. 552 U.S. at 49–50. *Gall* determined that if a court “decides

that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Id.* at 50. The Court observed that it was “uncontroversial that a major departure should be supported by a more significant justification than a minor one.” *Id.* After the sentencing court “settled on an appropriate sentence,” *Gall* added, “[the sentencing court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Id.*

Since *Gall*, circuits have been divided about how much explanation is necessary for outside-Guideline’s sentences. Without additional guidance from the Court since *Gall*, the circuits have applied *Gall*’s procedural mandate in wildly different ways. Some apply *Gall* and determine that even with little explanation rooted in the § 3553(a) factors, a sentencing court had justified its sentence. Others see *Gall* as requiring the sentencing courts to give more significant justification embedded in all § 3553(a) factors when assigning an outside-Guidelines sentence to a particular case.

If a decade and a half of disorder among circuits failed to create a workable and uniform reading of the *Gall* standard, only the Court can resolve this mess.

**A. The Ninth, Tenth, and Eleventh Circuits generally accept a court’s justification as adequate for beyond-Guidelines sentences with minimal explanation.**

The Ninth, Tenth, and Eleventh Circuits generally find adequate a sentencing court’s justification for variant sentences, even where the court did not

explain its sentence by meaningfully analyzing the § 3553(a) factors. Though their application of *Gall*'s procedural mandate may differ slightly, the analysis remains significantly the same: an appellant-defendant can rarely show that the sentencing judge's outside-Guidelines sentence was not adequately justified. Examples from these circuits help illustrate this point.

*1. Ninth Circuit.*

In the instant case, for example, Mr. Mendoza received a 48-month sentence, nearly double the applicable Guidelines range. As the Ninth Circuit observed, the district court emphasized at sentencing Mr. Mendoza's "extensive criminal history." Pet. App. 4a. Nevertheless, the district court made no mention of why, under § 3553(a) factors, the extent of the variance was necessary or what the court's policy disagreements were with the Guidelines. Instead, the district court made a general statement that the Guidelines did not "fairly, accurately, and adequately" account for Mr. Mendoza history. Pet. App. 4a. Despite the district court's focus almost exclusively on just one factor—criminal history—without discussion of the other § 3553(a) factors, the Ninth Circuit concluded that the sentencing court's "explanation is sufficient to permit appellate review." Pet. App. 4a.

*2. Tenth Circuit.*

The Tenth Circuit's *United States v. Peña*, where Mr. Peña's 360-month sentence was nearly triple his Guidelines range, offers a similar example. 963 F.3d 1016, 1023 (10th Cir. 2020). In that case, the district court based its variance largely on Mr. Peña's prior criminal history and his conduct post-conviction. *Id.* On

appeal, Mr. Peña argued that the district court erred by “not considering all the information required by 18 U.S.C. § 3553(a),” including his personal history and characteristics. *Id.*

The circuit court disagreed. The Tenth Circuit analyzed that the district court “thoroughly discussed Mr. Peña’s history and characteristics” and “reviewed Mr. Peña’s presentence report, which include[d] the mitigating factors Mr. Peña raises on appeal.” *Id.* The circuit court emphasized that “[w]here the [sentencing] court considers a defendant’s history and characteristics, there is no procedural error.” *Id.* Ultimately, the Tenth Circuit concluded that the sentencing court did not procedurally err when imposing Mr. Peña’s sentence. *Id.*

### 3. *Eleventh Circuit.*

The Eleventh Circuit’s *United States v. Oudomsine*, where Mr. Oudomsine received a sentence of 36 months, which was nearly three times his Guidelines range, also tracks this minimalist approach. 57 F.4th 1262, 1265 (11th Cir. 2023). In pronouncing sentence, the district court emphasized Mr. Oudomsine’s criminal conduct and the need for deterrence. *Id.* Even though the sentencing court did not make a particularized assessment of the § 3553(a) factors, the circuit analyzed that the sentencing court had “considered” each of the § 3553(a) sentencing factors. *Id.* In the Eleventh Circuit’s view, the sentencing court “was not required to state on the record that it explicitly considered each § 3553(a) factor or discuss each factor.” *Id.* Thus, the circuit concluded, the sentencing court had given a “sufficiently specific and compelling basis for the upward variance.” *Id.* at 1266.



**B. The First, Third, Fourth, and Eighth Circuits require more explanation for variant sentences, demanding a court explain why it disagrees with the Guidelines under all § 3553(a) factors.**

On the other hand, the First, Third, Fourth, and Eighth Circuits apply a more aggressive procedural review, and require a more significant justification from sentencing courts that vary outside of the Guidelines.

*1. First Circuit.*

In the First Circuit’s *United States v. Crespo-Rios*, Mr. Crespo-Rios received a sentence of time-served, which was nearly 70 months lower than his Guidelines range. 787 F.3d 34, 38 (1st Cir. 2015). To justify its sentence, the sentencing court looked to Mr. Crespo-Rios’ criminal history, potential for rehabilitation and treatment, low risk of recidivism, and personal history. *Id.* at 36–37. Despite the district court’s review of several § 3553(a) factors, the circuit court concluded that the sentencing court did not adequately explain the sentence because it did not “adequately consider the other § 3553(a) factors.” *Id.* at 39. The First Circuit observed that the sentencing court “did not conduct an on-the-record evaluation of these [other § 3553(a)] factors” and remanded. *Id.* at 39–40.

*2. Third Circuit.*

In the Third Circuit’s *United States v. Grober*, the district court sentenced Mr. Grober to 60 months, far less than his guidelines range of 235-293 months. 624 F.3d 592 (3rd Cir. 2010). In its forty-six-page opinion following twelve days of proceedings, the district court analyzed its disagreements with the rationale behind

the applicable guidelines range and fully considered the § 3553(a) factors as applied to Mr. Grober. *Id.* at 601.

The Third Circuit explained what it believed was required by *Gall* for sentencing courts to adequately justify an outside-Guidelines sentence. The circuit directed that where a district court disagrees with the Guidelines’ range and policy, the district court “must explain why its policy judgment would serve the § 3553(a) sentencing goals better than the Sentencing Commission’s judgments,” and “should take into account all sentencing factors, not just one or two in isolation.” *Id.* at 600 (quoting *United States v. Merced*, 603 F.3d 203, 220–21 (3rd Cir. 2010)).

Ultimately, given the district court’s thorough analysis of its disagreements with the Guidelines’ policy and its review of all § 3553(a) factors, the Third Circuit concluded that the sentencing court provided sufficiently compelling justification for its sentence. *Id.* at 609.

### 3. *Fourth Circuit.*

In the Fourth Circuit’s *United States v. Morace*, the circuit court determined that Mr. Morace’s probationary sentence, when his Guidelines were 41 to 51 months, was insufficiently justified. 594 F.3d 340, 351 (4th Cir. 2010). There, the district court justified its sentence by looking to Mr. Morace’s lack of criminal history, his potential for rehabilitation, his military service, his college enrollment, deterrence, and the need to protect the public. *Id.* at 344. The circuit court emphasized, however, that, “[a]lthough each of these circumstances is commendable, there is nothing unusual about them.” *Id.* at 350. The circuit added,

“[g]iven the seemingly common circumstances of this case,” the district court “erred by failing to provide an adequate explanation of why a term of imprisonment is not warranted in light of applicable policy statements.” *Id.* The Fourth Circuit faulted the district court for its lack of any “specific explanation as to how [the] sentence comports with [the § 3553(a)] factors.” *Id.* at 351. As such, despite the district court reviewing the § 3553(a) factors, it failed to adequately explain its disagreements with the Guidelines’ policy. *Id.* at 351.

#### 4. *Eighth Circuit.*

In the Eighth Circuit’s *United States v. Martinez*, Mr. Martinez received a sentence of 262 months, when his Guidelines range was 121–151-month. 821 F.3d 984, 989 (8th Cir. 2016). To justify its sentence, the district court looked to Mr. Martinez’s criminal history, no longer scoring priors, and gang ties. *Id.* The circuit court, however, analyzed that neither Mr. Martinez’s criminal history, which was already accounted for in his Guidelines, or his gang ties, which did not “depict Martinez actively engaging in any violent behavior,” justified the degree of the upward variance. *Id.* at 989–90. The circuit court thus determined that the sentencing court gave “undue weight” to Mr. Martinez’s criminal history and did not sufficiently justify its “extreme deviation from the guideline range.” *Id.* at 990.

#### **C. Even within circuits, different panels have applied different standards.**

Unsurprisingly, even different panels within circuits have applied different readings of *Gall*.

Take the Eighth Circuit, for example. In *Martinez*, as discussed above, the circuit court remanded Mr. Martinez’s sentence, analyzing that the district court’s explanation for its sentence fell short as it gave “undue weight to Martinez’s violent past to justify its extreme deviation from the guideline range.” 821 F.3d at 990.

In a case with similar facts, *United States v. Johnson*, however, the Eighth Circuit came to an opposite conclusion. 916 F.3d 701, 704 (8th Cir. 2019). In *Johnson*, the district court sentenced Mr. Johnson to 204 months, which was nearly quadruple his Guidelines range. *Id.* at 702. To justify its sentence, the district court emphasized Mr. Johnson’s lengthy criminal history, crimes that no longer scored, jail conduct violations, and history of probation violations. *Id.* at 703. The district judge explained: “You know, my position is that you don’t get less time the more crimes you commit for deterrence to take effect.” *Id.* at 702. Despite the district court’s emphasis on a few of the § 3553(a) factors, the Eighth Circuit concluded it saw “no procedural error in the court’s consideration of the § 3553(a) factors” and gave “wide latitude” to the district court’s explanation to affirm the sentence. *Id.* at 702–03.

Then consider the Tenth Circuit. In *Peña*, as discussed above, the circuit court emphasized that “[w]here the court explicitly considers a defendant’s history and characteristics, there is no procedural error,” concluding that the district court’s above-Guidelines sentence was procedurally justified. 963 F.3d at 1023.

But, in its analysis in *United States v. Cookson*, the Tenth Circuit took a much more nuanced and aggressive approach. 922 F.3d 1079 (10th Cir. 2019). In

*Cookson*, Mr. Cookson received probation, where his Guidelines range was 97-121 months. *Id.* at 1082. In reaching this sentence, the district court emphasized Mr. Cookson’s drug rehabilitation, his allocution, his work experience, family support, impact of the conviction on Mr. Cookson’s future, his over-represented criminal history, the seriousness of the offense, adequate deterrence, protecting the public, and its policy disagreements with the Guidelines. *Id.* at 1086–87.

In assessing the procedural reasonableness of Mr. Cookson’s sentence, the Tenth Circuit first acknowledged the “blurring of the line between procedural and substantive reasonableness when it comes to the district court’s explanation for a given sentence.” *Id.* at 1090. The Tenth Circuit observed that “explanation” serves a “dual purpose”: it aids the reviewing court to determine whether a procedural error exists and whether a sentence is reasonable based on “cogent and reasonable” explanation. *Id.* at 1091 (internal quotation marks omitted). Under this “dual purpose” approach, the Tenth Circuit concluded that Mr. Cookson’s probationary sentence was not adequately explained. *Id.* at 1096. Despite the host of reasons why the district court reached its outside-Guidelines sentence, the circuit court determined that the sentencing court did not justify its sentence and, instead, overemphasized Mr. Cookson’s personal history. *Id.* at 1092. Ultimately, the Tenth Circuit concluded that “[w]ithout any explanation from the district court on the weight it afforded the other § 3553(a) factors in granting Mr. Cookson such a large variance,” the variant sentence was not adequately justified. *Id.* at 1094.

**II. The division among the circuits, and within circuits, demands the Court’s attention to help judges apply *Gall* properly and to resolve disparate sentencing decisions.**

Different applications of *Gall*’s procedural mandate in different circuits (and within circuits) can—and have—lead to differing outcomes in similar cases. Take the facts at issue here. The district court in Mr. Mendoza’s case explained that “it would not impose a sentence within [the Guidelines] range because the Guidelines in this case did not ‘fairly, accurately, and adequately’ account for Mendoza’s history.” Pet. App. 4a. The Ninth Circuit nevertheless affirmed despite the district court’s reverence to just one § 3553(a) factor—criminal history. Pet. App. 4a.

Such reasoning from the district court would not suffice in the Third Circuit. Under the Third Circuit’s rule, a sentencing judge hoping to sentence Mr. Mendoza above Guidelines would have needed to “explain why its policy judgment would serve the § 3553(a) sentencing goals better than the Sentencing Commission’s judgments,” and needed to “take into account all sentencing factors, not just one or two in isolation.” *Grober*, 624 F.3d at 600 (internal quotation marks omitted). Under that standard, an appellate court would have concluded that the district court failed to provide adequate justification by looking at “one or two [factors] in isolation” in Mr. Mendoza’s case. *See id.*

In the Fourth Circuit, Mr. Mendoza’s sentence would also likely be remanded. In view of the circuit’s analysis in *Morace*, the district court’s reasoning for Mr. Mendoza’s sentencing would not have passed muster. As the *Morace* court would have likely determined, the sentencing court’s justification for Mr. Mendoza’s

sentence did not address how the court weighed the Guidelines’ policy regarding the applicable guidelines and what disagreements the sentencing court had with the Guidelines’ policy. *See Morace*, 594 F.3d at 351.

This demonstrates how inconsistent the circuits’ reading of *Gall* has become, and how different circuits and different panels would have viewed even Mr. Mendoza’s case. The circuits’ different readings of *Gall* have and will continue to result in opposite outcomes on similar facts. These loose applications of *Gall* erode the Court’s objective “to promote the perception of fair sentencing.” 552 U.S. at 39. The Court needs to provide guidance on how sentencing courts must apply *Gall* to adequately justify sentences to alleviate these discrepancies.

### **III. Mr. Mendoza presents the right vehicle to resolve the split.**

Mr. Mendoza’s case provides an excellent vehicle to resolve the circuit split for two reasons: the issue was preserved and is outcome determinative.

First, the issue is squarely presented. Mr. Mendoza objected to the issue below at sentencing and raised the issue on appeal. The appellate panel affirmed sentence and decided that the sentencing court’s “explanation is sufficient to permit appellate review.” Pet. App. 4a (quotation marks omitted).

Second, this case involves several of the issues that appear within the circuit split. As the Ninth Circuit analyzed, the sentencing court for Mr. Mendoza “base[d] the sentence . . . on his extensive criminal history.” Pet. App. 4a. As discussed above, should such a sentence and explanation be before a panel in, say, the Third Circuit or the Eleventh Circuit, each panel would likely lead to a different result.

The Third Circuit would likely find the explanation below inadequate and remand, while the Eleventh Circuit would likely reach the opposite result.

**IV. The inconsistent method taken by several circuits, including the Ninth, in applying *Gall* to variant sentences is wrong, and the Court should adopt the Third and Fourth Circuits' straightforward approach to avoid conflicting outcomes.**

The divergent and inconsistent approaches of the courts of appeals in applying *Gall*'s procedural rule warrant this Court's review no matter which standard prevails. Granting the petition is particularly important here as it gives the Court an opportunity to polish *Gall*'s procedural standard and ensure that sentencings are not administered in such uneven and inconsistent fashion.

But even more so, granting the petition is vital to establish a uniform review of sentencings by the Ninth Circuit to avoid conflicting results. It cannot be that an appellant-defendant reaches opposite results of either remand or affirmance simply because of how one panel or another construes *Gall*'s procedural requirement. Such inconsistencies in sentencings and appellate review break the Guidelines' basic function of making sentencings more uniform. *Molina-Martinez v. United States*, 578 U.S. 189, 192–93 (2016). It also breaks the Court's objective "to promote the perception of fair sentencing." *Gall*, 552 U.S. at 39.

To help with the mess, the Third and Fourth Circuits offer straightforward readings of *Gall*'s mandate that, if applied universally, will significantly help sentences reach consistency and prevent a deterioration of the Guidelines' purpose.

The Third Circuit in *Merced*, for example, provided easy-to-follow instructions for how to apply *Gall*'s procedural mandate to identify whether a



sentencing court has provided adequate explanation to justify an outside-Guidelines sentence. 603 F.3d at 221. *Merced* agreed that a sentencing court may vary from the Guidelines based on a policy disagreement, but only if the court “provides ‘sufficiently compelling reasons to justify it.’” *Id.* (quoting *Gall*, 552 U.S. at 50). As *Merced* explains, a “sufficiently compelling” explanation is grounded in the § 3553(a) factors. *Id.* *Merced* analyzed that should a court believe that a Guidelines’ sentence would not achieve § 3553(a)’s objectives, “then the court must explain why its policy judgment would serve the § 3553(a) sentencing goals better than the sentencing Commission’s judgments.” *Id.* In reviewing the § 3553(a) factors, a sentencing court “should take into account all of the sentencing factors, not just one or two of them in isolation.” *Id.*

The Fourth Circuit’s approach to applying *Gall*’s procedural mandate offers similar, easy-to-apply guidance. Where a court varies from the Guidelines, it must explain its sentencing “in light of applicable policy statements” and address “how [the] sentence comports with [the § 3553(a)] factors.” *Morace*, 594 F.3d at 350–51.

To put it simply, the two circuits offer the following straightforward rule to reading *Gall*’s procedural mandate: Where a sentencing court disagrees with the Guidelines, it should explain its disagreement with the Guidelines’ policy and address how its sentence comports with the § 3553(a) sentencing factors, without isolating just one or two factors to reach its conclusion.

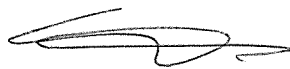
Adopting the Third and Fourth Circuits’ reading of *Gall*’s procedural mandate would lead to more consistency in sentencings. This reading does not

change *Gall*'s mandate in any way, but simply gives circuit courts and sentencing courts an easy-to-follow rule when reviewing and imposing outside-Guidelines sentences. Without a clear rule, like the one provided by the Third and Fourth Circuits, circuits will continue to reach inconsistent decisions based on the whims of the particular panel reviewing the particular case. Without a clear rule, the Guidelines' basic function of uniformity and public's perception of fair sentencing will continue to crumble.

### CONCLUSION

Accordingly, Mr. Mendoza's case deserves the Court's review. The circuits remain divided in their readings of *Gall* and have inconsistently accepted sentencing court's justifications in imposing outside-Guidelines' sentences. Such inconsistencies continue to eat away at the goal of uniformity envisioned by the Guidelines and continue to harm the perception of fair sentencing. Mr. Mendoza's case presents the perfect vehicle to resolve these inconsistencies. The issue is preserved, outcome-determinative, and demonstrates the Ninth Circuit's inconsistent reading of *Gall* is wrong. For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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