No. 18-7739

In the Supreme Court of the United States

GONZALO HOLGUIN-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the National Association of Criminal Defense Lawyers (NACDL) and the National Association of Federal Defenders (NAFD).[*]

NACDL, founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for

[*] Pursuant to Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief and copies of their letters of consent are on file with the Clerk's Office.

those accused of crime or misconduct. It has a membership of many thousands of direct members and approximately 40,000 affiliated members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NAFD, formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court.

Amici file numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. As particularly relevant here, amici's members practicing in the Fifth Circuit have substantial experience with the operation of the court of appeals' post-sentence objection rule. This brief draws on that practical experience in explaining why the Fifth Circuit's rule is unsound.

SUMMARY OF ARGUMENT

The Fifth Circuit's post-sentence objection requirement is an archaic exercise that serves only to impede meaningful appellate review of criminal defendants' sentences. Congress enacted Federal Rule of Criminal Procedure 51 to eliminate the requirement that defendants submit "exceptions" to trial court rulings as a condition of appeal because, in light of evolving courtroom

technology, that requirement served no purpose other than to frustrate litigants' appellate rights. More than a decade's worth of experience in the Fifth Circuit confirms that its post-sentence objection requirement suffers from exactly the same flaws.

I. The purpose of Rule 51 was to eliminate the requirement that defendants "except" to an adverse trial court ruling to preserve a challenge to that ruling on appeal. That practice developed in the thirteenth century—well before the advent of court reporters and trial transcripts—in response to concerns that common law judges, vested with exclusive control of the trial record, would omit any reference to adverse rulings in the record to insulate their decisions from appellate review. In providing for a "bill of exceptions," the English Parliament sought to make the appellate process fairer by affording the parties an opportunity to preserve issues for appeal. But this process eventually became outdated as the use of stenographers became widespread and reviewing courts could determine for themselves whether issues had been preserved by reviewing verbatim transcripts of the proceedings. Congress responded to the criticism and ridicule of this common law vestige by eliminating it altogether when it promulgated the Federal Rules of Civil and Criminal Procedure.

II. More than ten years of experience in the Fifth Circuit confirms the post-sentence objection requirement is redundant and needlessly prejudices criminal defendants. In amici's experience, the requirement does not result in better-informed or more efficient sentencing. Rather, it insulates erroneous rulings from review by "erect[ing] a more substantial hurdle to reversal of a sentence than does the reasonableness standard." *United States* v. *Peltier*, 505 F.3d 389, 391 (5th Cir. 2007).

ARGUMENT

Federal Rule of Criminal Procedure 51(a) provides in plain terms that "[e]xceptions to rulings or orders of the court are unnecessary." The Fifth Circuit's post-sentence objection requirement turns that straightforward command upside down. By requiring a criminal defendant to object that his sentence is substantively unreasonable when he has *already* argued for a shorter sentence, the Fifth Circuit has "effectively resurrected the archaic exception requirement that the drafters of Rule 51 abandoned 75 years ago." U.S. Br. at 27. The history animating Rule 51, as well as amici's experience litigating in the Fifth Circuit, shows that this requirement is a fruitless exercise that exalts form over substance and creates an unjustifiable barrier to appellate review.

I. CONGRESS ABANDONED THE REQUIREMENT OF "EXCEPTING" TO ADVERSE TRIAL COURT RULINGS BECAUSE IT SERVES NO PURPOSE IN THE MODERN ERA OTHER THAN NEEDLESSLY FRUSTRATING MEANINGFUL APPELLATE REVIEW

1. The practice of preparing a "bill of exceptions" to a trial court's rulings developed in response to practical problems faced by parties in early common law courts when they sought appellate review.

a. "[A]ncient common law" practice allowed trial court judges to effectively insulate their decisions from appellate scrutiny. *Nalle* v. *Oyster*, 230 U.S. 165, 176 (1913). Parties had no control over the official record of proceedings in the trial court. Rather, the record was "drawn up under the direction of the Court, and it was under their exclusive control." John Raymond, *The Bill of Exceptions; Being a Short Account of Its Origin and Nature* 4 (1848). Regardless how important an issue was to

the parties, they "had no power of themselves to cause any entry on [the record] to be made." *Ibid.* Judicial practice at the trial level "was not in general to allow any entry to be made [in the record] of any matter overruled or disallowed by [the court], or any statement of the fact of its having been overruled or disallowed." *Ibid.* "This defect of procedure constituted a dangerous power in the hands of an ignorant, a corrupt or an arbitrary judge." W.E. Bainbridge, *Bills of Exceptions*, 32 Cent. L.J. 243, 243 (1891).

The bill of exceptions was a response to the "arbitrary power" of common law judges to shape the record on appeal however they wished. Raymond, *supra*, at 4–5. In 1285, the English Parliament granted all litigants a right to file a bill that cataloged the issues on which the trial court had ruled against the litigant and thereby preserved those issues for further review. *See* Statutes of Westminster the Second 1285, 13 Edw. 1, c. 31 (Eng. & Wales); *see also* Frank Warren Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict*, 24 Yale L. J. 127, 131–32 (1914). Through a bill of exceptions, a litigant could himself "state the ground of his complaint" and, provided his bill was authenticated and sealed by the judge, "this statement was to be taken by the Court above as part of the record." Raymond, *supra*, at 5.

b. In the Founding Era, American courts in all states substantially adopted the English practice, and continued the practice even after Parliament had abandoned it. Bainbridge, *supra*, at 244. Parliament abolished bills of exceptions with the Judicature Act of 1873. *See* Samuel O. Clark, Jr., *English Appellate Procedure*, 39 Yale L.J. 76, 86 (1929). But the American practice through the early twentieth century continued to require exceptions "to each and every adverse ruling of the court . . . in order

to lay the foundation for a review on error of the rulings." *See* 10 Albert H. Putney, *Popular Law Library*, § 133 at 299 (1908). The "usual practice" was "to request the judge to note down in writing the exceptions" contemporaneously with rulings to which a party objected and, at the conclusion of the proceedings, "hand him the bill of exceptions" for "correction from his notes." Bainbridge, *supra*, at 244.

Federal appellate courts would not consider an issue unless it had been preserved in a bill of exceptions. In a leading case, this Court declined to consider an objection that was recorded in the lower court's minutes, but not reiterated in a bill of exceptions, because doing so "would overturn the unbroken practice in courts of error from the passage of the Statute of Westminster to the present time." *Pomeroy's Lessee* v. *State Bank of Ind.*, 1 Wall. 592, 600 (1864); *see also, e.g., Inglee* v. *Coolidge*, 2 Wheat. 363, 368 (1817) (dismissing petition where record included "the report of the judge who tried the cause" but lacked bill of exceptions); *Bergdahl* v. *People*, 61 P. 228, 230 (Colo. 1900) (denial of motion to quash information, though noted in transcript, was not reviewable because not included in bill of exceptions); *Gill* v. *People*, 42 Ill. 321, 323–24 (1866) (denial of motion for new trial, though noted in clerk's record, was not reviewable absent bill of exceptions). Unless the alleged error was evident on the face of the record—in the judgment or indictment, for example—a failure to except to the issue insulated the error from appellate review. *See, e.g.*, *Macker's Heirs* v. *Thomas*, 7 Wheat. 530, 532–33 (1822); *Baker* v. *People*, 105 Ill. 452, 454–55 (1882).

2. As courtroom technology evolved, the exception requirement came under substantial criticism as an unnecessary relic. Particularly as use of court reporters

became widespread—and verbatim transcripts for all proceedings became the new norm—the bill of exceptions "was no longer necessary for appellate courts to effectively review cases." Benjamin K. Raybin, *Objection: Your Honor Is Being Unreasonable!—Law and Policy Opposing the Federal Sentencing Order Objection Requirement*, 63 Vand. L. Rev. 235, 252 (2010); *see also* Court Reporter Act, Pub. L. No. 78-222, 58 Stat. 5 (1944) (requiring appointment of court reporters for each district court). Thus, as the Advisory Committee on the new federal rules of civil procedure convened in 1938 to explain its proposed reforms, the Committee's secretary observed that "if there is any one thing that has provoked criticism and ridicule of courts and lawyers it is the refusal to consider questions of vital importance, on motion for new trial or appeal, *merely because of the failure to note an exception*." *Federal Rules of Civil Procedure: Proceedings of the Institute at Washington, D.C. and of the Symposium at New York City* 123–24 (Edward H. Hammond, ed. 1939) (hereinafter Federal Rules Proceedings) (emphasis added).

3. Congress enacted new federal rules that responded to these criticisms.

a. In 1938, the Advisory Committee proposed, and Congress adopted, Rule 46 of the Federal Rules of Civil Procedure. As the secretary of the Committee explained, "[t]he purpose of Rule 46 is to get away from the necessity of going through a mere ritual in order to make it possible to be heard" in favor of an approach that was "founded on common sense." *Id.* at 124. The abolition of the bill of exceptions was heralded by scholars of civil procedure as an "important step in the right direction." Werner Ilsen, *The Preliminary Draft of Federal Rules of Civil Procedure*, 11 St. John's L. Rev. 212, 242 (1937) (observing that

under the rule "it will be sufficient for all purposes for which an exception was heretofore necessary that an objecting party shall . . . make known to the court the action which he desires the court to take").

In reaching these conclusions, the Advisory Committee rejected a defense of the old regime remarkably similar to the Fifth Circuit's rationale for its post-sentence objection rule: that "[t]he function of an exception . . . is to bring pointedly to the attention of the trial judge the importance of the ruling from the standpoint of the lawyer, and to give the trial judge an opportunity to make further reflection regarding his ruling." Federal Rules Proceedings, *supra*, at 87 (statement of Judge W. Calvin Chestnut). As the leading procedural treatise notes, these appeals were rejected because, under the common-sensical approach that shaped the federal rules, "[i]f the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance." 3B Charles Alan Wright et al., *Federal Practice and Procedure: Criminal* § 842 (4th ed. 2019).[1]

b. There was hardly any debate about carrying over this common-sense change to the federal criminal context. While Civil Rule 46 had generated some public comment and criticism, the proposal for Criminal Rule 51 advanced without any significant debate. And while other proposed

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[1] Moreover, as discussed at pp. 9–13, *infra*, amici have been unable to find a single instance where a district judge reconsidered the sentence imposed in response to a substantive reasonableness objection by a defendant.

rules of criminal procedure received hundreds of comments, Rule 51 attracted only two letters during public comment—neither of them substantive. *See Drafting History of the Federal Rules of Criminal Procedure Including Comments, Recommendations, and Suggestions on Published Drafts of the Rules* (Madeleine J. Wilken & Nicholas Triffin, eds. 1991). Similarly, while other proposed rules underwent significant, substantive revisions in each draft, Rule 51 saw only one word edited between the first draft and the last. *Compare id.*, Vol. I at 196 (First Preliminary Draft, originally styled as Rule 47) *with id.*, Vol. VII at 187 (Final Rules as Adopted, styled as Rule 51).

II. EXPERIENCE IN THE FIFTH CIRCUIT CONFIRMS THAT ITS POST-SENTENCE OBJECTION RULE SUFFERS FROM THE SAME FLAWS AS THE DISCARDED "EXCEPTIONS" REQUIREMENT

A. The Fifth Circuit's Rule Does Not Enhance Judicial Decisionmaking

The Fifth Circuit's claim that its post-sentence objection rule serves a "critical function by encouraging informed decisionmaking and giving the district court an opportunity to correct errors before they are taken up on appeal," *United States* v. *Peltier*, 505 F.3d 389, 392 (5th Cir. 2007), is belied by actual experience in the district courts. A survey of amici's membership in the Fifth Circuit revealed no case in the 12 years since *Peltier* was decided where a district judge reconsidered the sentence imposed in response to a substantive reasonableness objection. Far from improving the sentencing process, the post-sentence objection requirement imposes an empty ritual that is both "redundant and futile," *United States* v. *Autery*, 555 F.3d 864, 871 (9th Cir. 2009), because, "like

the exception practice, [it] does not convey any additional information that might be necessary for appeal," U.S. Br. at 27.

At most sentencing hearings, defense counsel's post-pronouncement objection to the substantive unreasonableness of the sentence is a perfunctory exercise: Counsel makes the objection, and the sentencing judge either briefly notes and overrules the objection or simply ignores it altogether. Consider, for example, *United States* v. *Salizar-Proa*, where the district court immediately overruled defense counsel's post-sentence objection that restated a pre-sentence objection to an upward variance from the Guidelines:

> MR. SLOAN: Your Honor, at this time, we would interpose an objection to the court's sentence as being both procedurally and substantively unreasonable. Would note the court's sentence is six months short of being two times the maximum guideline range as set forth in the presentence report, and for the reasons I previously set forth in my allocution, would object to the—would object to the sentence.
>
> THE COURT: All right, sir. Overruled. You may stand aside.

Sent. Tr. 7:3–11, Crim. No. 10-46, ECF No. 40 (N.D. Tex. Jan. 7, 2011).

Also typical is *United States* v. *Haberman*, where defense counsel sought to lodge "one quick objection for record purposes" "based on the grounds previously cited":

> THE COURT: . . . Okay. The defendant is remanded to custody, and the attorneys are

> excused.
>
> MR. WIRSKYE: Judge, before we go off the record can I lodge one quick objection for the record?
>
> THE COURT: Pardon?
>
> MR. WIRSKYE: Can I lodge one quick objection for record purposes?
>
> THE COURT: Well, I thought you already had. What—
>
> MR. WIRSKYE: I probably already have but in an abundance of caution—
>
> THE COURT: If you want to say something else, that's fine.
>
> MR. WIRSKYE: In abundance of caution, I'd respectfully object to the Court's sentence based on the grounds previously cited because we believe the sentence is unreasonable. That's all.
>
> THE COURT: The attorneys are excused, and the defendant is remanded [to] custody.

Sent. Tr. 21:4–21, Crim. No. 07-188, ECF No. 144 (N.D. Tex. May 16, 2008). As in *Haberman*, many judges see no need to rule on post-sentence objections given that the issues have already been ventilated. *See, e.g.*, Sent. Tr. 29:20–30:2, *United States* v. *Simmons*, Crim. No. 04-132, ECF No. 89 (S.D. Miss. Aug. 4, 2008) (district court saying "[a]ll right" after counsel makes post-sentence objection); Sent. Tr. 19:6–11, *United States* v. *Fraga* Crim. No. 11-686, ECF No. 46 (S.D. Tex. Mar. 6, 2012) (district court saying "thank you" in response to the objection); Sent. Tr. 6:24–7:2, *United States* v. *Valdes-*

Rodriguez, Crim. No. 10-1140, ECF No. 30 (S.D. Tex. Mar. 28, 2011) (same).

Indeed, at many sentencing hearings, the district court's response to a post-sentence objection confirms that the act of objecting is a pointless formality intended only to satisfy the Fifth Circuit's rule. In *United States* v. *Diehl*, for example, the district court merely assured defense counsel that his client's appellate rights were secure after counsel made a post-sentence objection reiterating his request for a below-Guidelines sentence:

> THE COURT: Is there anything further that the defendant wishes to say or present in this case at this time?
>
> MR. MORRIS: Yes, Your Honor. For the record, we object to the sentence that the Court has imposed as being substantively unreasonable and also procedurally unreasonable.
>
> THE COURT: The Court notes your objection. *Your record is protected*. . . .

Sent. Tr. 120:8–15, Crim. No. 10-297, ECF No. 135 (W.D. Tex. Oct. 24, 2011) (emphasis added).

The same dynamic played out in *United States* v. *Rodriguez*, where defense counsel lodged a post-sentence objection to an above-Guidelines sentence:

> THE COURT: . . . Now I remand him to the custody of the Marshal to begin service of his sentence with credit for time served.
>
> MR. STREVA: Excuse me, your Honor, if I may at this time, respectfully note my objection to the Court's sentence in that, under the facts and circumstances of this

> case, together with the memorandum I submitted, that an upward departure of that length is excessive in this matter and would note my objection.
>
> THE COURT: *It is noted for the record.*

Sent. Tr. 7:1–09, Crim. No. 08-196, ECF No. 25 (W.D. La. Jan. 15, 2009) (emphasis added).

In sum, a decade of experience shows that by insisting that defendants restate their position after sentencing, the Fifth Circuit has "saddle[d] busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case," and failed to enhance "the sentencing process in any meaningful way." *United States* v. *Castro-Juarez*, 425 F.3d 430, 434 (7th Cir. 2005); *United States* v. *Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007) (same).

B. The Fifth Circuit's Rule Thwarts Meaningful Appellate Review

If futility were not enough, the Fifth Circuit's post-sentence objection rule also injects two kinds of unfairness into the appellate process. A decade after the Fifth Circuit announced the rule, it remains unclear what a defendant must do to properly preserve the argument that his sentence is greater than necessary under Section 3553(a). And where an objection is deemed insufficient, the Fifth Circuit's rule undercuts the important role that Congress and this Court envisioned for appellate review under the Sentencing Reform Act.

1. Even where a defendant has made a post-pronouncement objection to the length of his sentence in the district court, there can be little assurance that the Fifth Circuit will ultimately find it adequate. Two cases illustrate the point. In *United States* v. *Regalado*, the

defendant argued on appeal that the district court's sentence was substantively unreasonable because it failed to weigh the Section 3553(a) factors appropriately. 768 F. App'x 270, 271 (5th Cir. 2019), pet. for cert. pending, No. 19-5355 (filed July 22, 2019). There was no dispute that "[a]fter imposition of sentence, [defense counsel] objected to the sentence as . . . contrary to the sentencing factors of 18 U.S.C. § 3553(a)." *Ibid.* Nevertheless, the panel *still* applied plain-error review "[b]ecause Regalado's objections were not sufficiently-specific." *Ibid.* According to the panel, Regalado did not meet the post-sentence objection requirement because he did not further identify the court's failure to "give appropriate weight to a particular sentencing factor." *Ibid.* The panel then upheld the sentence as not the product of "clear-or-obvious error." *Ibid.*

By contrast, in *United States* v. *Fraga*, the Fifth Circuit reviewed—under an ordinary abuse of discretion standard—the district court's weighing of the Section 3553(a) factors where defense counsel had made an essentially identical post-sentence objection that "the sentence is greater than necessary under the factors numerated in 18 USC 3553(a)." Sent. Tr. 19:9–10, Crim. No. 11-686, ECF No. 46 (S.D. Tex. Mar. 6, 2012). In that case, the Fifth Circuit did not demand further specificity as a predicate for review on a reasonableness standard—counsel's formulaic recitation of a post-pronouncement objection was enough. *See United States* v. *Fraga*, 704 F.3d 432, 439 (5th Cir. 2013).

There are other similar examples. In *United States* v. *Sanchez*, the panel determined that it would review a post-pronouncement objection to the "reasonableness" of the sentence only for plain error. 478 F. App'x 912, 913 (5th Cir. 2012); *see also United States* v. *Hayes*, 448 F.

App'x 469 (5th Cir. 2011) (general objection to "reasonableness" insufficient); *United States* v. *Combs*, 402 F. App'x 960 (5th Cir. 2010) (same). In *United States* v. *Valdes-Rodriguez*, however, the panel equivocated on the appropriate standard of review when confronted with an objection to the "reasonableness" of the sentence, but ultimately concluded that it passed muster under both plain error and abuse of discretion standards. 455 F. App'x 494, 496 (5th Cir. 2011). And in *United States* v. *Diehl*, where the defendant had objected to the sentence "as being substantively unreasonable," *see* p. 12, *supra*, the Fifth Circuit panel was content to review for abuse of discretion. *See* 775 F.3d 714, 719, 724 (5th Cir. 2015).

It would be one thing for the Fifth Circuit to demand specificity from an objection to the substantive reasonableness of a sentence were there some basis to conclude that doing so aids district courts in exercising their discretion under Section 3553(a). But there is no such basis. *See* pp. 9–13, *supra*; *see also* Pet. Br. at 21–24; U.S. Br. at 27–30. And against a backdrop where such objections are manifestly futile, the Fifth Circuit's insistence on parsing the language of substantive reasonableness objections ultimately succeeds only in creating yet another "trap for [the] unwary." *Castro-Juarez*, 425 F.3d at 433.[2]

2. The most pernicious effect of the Fifth Circuit's trap-setting rule is that it prevents meaningful review of criminal sentences. This Court recently rejected the Fifth Circuit's "unduly restrictive" articulation of the plain error standard because it "undermin[ed] the fairness,

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[2] Mr. Holguin-Hernandez's case does not raise the discrete question of whether a post-sentence objection may be warranted where a defendant raises a claim of procedural error. *See* Pet. Br. at 20–21.

integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error." *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1906, 1908 (2018).

The rule at issue here brings more cases within the purview of the plain error standard, which remains difficult to meet even after this Court's intervention. As the Fifth Circuit explained when establishing its post-sentence objection requirement, plain error review "erects a more substantial hurdle to reversal of a sentence than does the reasonableness standard." *Peltier*, 505 F.3d at 391. The proliferation of plain error review in the Fifth Circuit has thus insulated unreasonable sentences from meaningful appellate scrutiny. *See, e.g.*, *id.* at 393 (upholding on plain-error review sentence that "deviated strikingly far above the guidelines range" and "raise[d] concerns about its reasonableness").

* * * * *

The aspiration of this Court's remedial opinion in *Booker* was an appellate standard of review that would "iron out sentencing differences" in a way that was faithful to the Sentencing Reform Act's twin goals of "avoiding unwarranted sentencing disparities" while "maintaining sufficient flexibility to permit individualized sentences." *United States* v. *Booker*, 543 U.S. 220, 263–64 (2005) (internal quotation marks omitted). The Fifth Circuit's post-sentence objection rule serves neither purpose. Rather, it turns the clock back by resurrecting a practice that was rightly abandoned long ago. For 75 years, it has been clear that, once a party has stated its position, the Federal Rules of Criminal Procedure "do not require a litigant to complain about a judicial choice after it has been made." *United States* v. *Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009) (Easterbrook, then-C.J.). Because that is exactly what

the Fifth Circuit's post-sentence objection rule does, it should not stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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