No. 18-7739

IN THE

Supreme Court of the United States

GONZALO HOLGUIN-HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant who argues in the district court for a lower sentence must formally object after pronouncement of his sentence to preserve a claim for appeal that his sentence is substantively unreasonable.

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BRIEF FOR PETITIONER

Petitioner Gonzalo Holguin-Hernandez respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 746 F. App'x 403 and reprinted in the Joint Appendix (J.A.) at 1–3. The order of the district court resentencing petitioner is unpublished and reprinted at J.A. 4–5. The transcript of the district court's oral resentencing ruling is reprinted at J.A. 6–12.

JURISDICTION

The court of appeals issued its decision on December 27, 2018. J.A. 1. The petition for a writ of certiorari was filed on January 22, 2019 and granted on June 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 51 provides:

Rule 51. Preserving Claimed Error.

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the

grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Federal Rule of Criminal Procedure 52 provides:

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Legal Background

This case concerns the rules that govern a federal defendant's ability to challenge the length of his sentence on appeal. To understand how the particular question presented arises, it is helpful to reprise the origins of the current federal sentencing system.

Created as a result of the Sentencing Reform Act of 1984, the U.S. Sentencing Guidelines articulate uniform policies for sentencing individuals and organizations convicted of felonies and serious misdemeanors. Although the Guidelines were enacted as binding, this Court held in *United States v. Booker*, 543 U.S. 220 (2005), that treating the Guidelines' directives as mandatory violated the Sixth Amendment right to a jury trial. *Id.* at 258. This Court accordingly severed and excised the statutory provision

deeming the Guidelines mandatory, *id.* at 259, rendering them advisory instead.

Under this advisory system, federal law "requires judges to take account of the Guidelines together with other sentencing goals" identified in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 259–60. Section 3553(a), in turn, requires judges to follow what is known as the "parsimony principle," *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017)—that is, to "impose a sentence sufficient, *but not greater than necessary*, to comply" with several broad sentencing purposes. 18 U.S.C. § 3553(a) (emphasis added). Those purposes include the need for the sentence to "reflect the seriousness of the offense," "to afford adequate deterrence," and "to promote respect for the law." *Id.* § 3553(a)(2).

The *Booker* Court's excision of the statutory provisions that had made the Guidelines mandatory also required the Court to excise the provision that set forth the standard of appellate review of sentencing orders. 543 U.S. at 260. The Court concluded, however, that, even without "*explicitly* set[ting] forth a standard of review," the federal sentencing statute "*implicitly*" provided "a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].'" *Id.* at 260–61 (quoting 18 U.S.C. § 3742(e)(3) (1994 ed.)) (emphasis in original). In particular, when the defendant claims on appeal that the district court imposed a sentence that is too long (or the government claims that the sentence is too short), the appellate court must "determine whether the sentence 'is unreasonable' with regard to § 3553(a)." 543 U.S. at 261. This "*appellate*"

standard of review is tantamount to asking whether "the trial court abused its discretion." *Rita v. United States*, 551 U.S. 338, 351 (2007) (emphasis in original); *see also Gall v. United States*, 552 U.S. 38, 46, 51 (2007); *Kimbrough v. United States*, 552 U.S. 85, 110–11 (2007).

In every federal court of appeals to address the issue except the Fifth Circuit, a defendant who argues in the district court for a shorter sentence than he received preserves a claim for appeal that his sentence is substantively unreasonable. *See infra* at p.10 (collecting cases). In the Fifth Circuit, however, a defendant seeking to preserve the ability to challenge the substantive reasonableness of his sentence on appeal must not only argue during the sentencing hearing that Section 3553(a) requires a shorter sentence but also must object to his sentence after its imposition on the ground that it is substantively unreasonable. *See, e.g.*, *United States v. Peltier*, 505 F.3d 389, 392 (5th Cir. 2007) (reprinted at J.A. 32–43). The question presented in this case is whether that post-sentencing objection requirement is appropriate.

B. Factual and Procedural Background

1. In 2016, petitioner Gonzalo Holguin-Hernandez was convicted in the U.S. District Court for the Western District of Texas of possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. § 841. J.A. 17. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. J.A. 19–20; *see* 18 U.S.C. § 3583(a).

2. While on supervised release in November 2017, petitioner was arrested and again charged in the U.S. District Court for the Western District of Texas with aiding and abetting the possession of marijuana with the intent to distribute it. Petitioner pleaded guilty. The district court sentenced him to 60 months' imprisonment—the statutorily required minimum sentence—on that new charge. *Id.* 10.

3. Meanwhile, the United States filed a petition to revoke petitioner's term of supervised release. J.A. 7. At the revocation hearing, the district court found that the facts supported the government's allegations in its revocation petition. *Id.* 9.

The district court next turned to determining petitioner's sentence for the violation of the terms of his supervised release. A provision of the Sentencing Reform Act, 18 U.S.C. § 3583(e), instructs sentencing courts in this context—as in ordinary sentencings—to consider the directives in Section 3553(a). *See, e.g.*, *United States v. Bear Robe*, 521 F.3d 909, 911 (8th Cir. 2008) (noting district court's "obligation to consider 18 U.S.C. § 3553(a)" in determining sentence for violation of terms of supervised release). The court thus started by calculating the Guidelines' recommended sentence. Based on the severity of the offense and petitioner's applicable criminal history category, the court found that the Guidelines' recommended range of punishment was 12 to 18 months. J.A. 9; U.S.S.G. § 7B1.4(a).

Drawing on other factors listed in Section 3553(a), petitioner asked the district court for a downward variance from the Guidelines' recommended sentence. J.A. 10. Defense counsel ex-

plained that the statutory mandatory-minimum sentence petitioner received for the new offense, tied exclusively to the quantity of drugs he was carrying, "overrepresent[ed] the role that he played" in the offense because a cartel had threatened him into carrying the drugs. *Id.* 9–10. She also argued, reflecting the parsimony principle, that a long sentence was inappropriate because "[i]t's an incredibly expensive proposition to keep a man like this in prison for five years much less for six or six and a half," and there was "no reason under [18 U.S.C. §] 3553" that a revocation sentence set to run consecutively with the five-year sentence for his underlying offense "would get his attention any better than five years does." J.A. 10. Consequently, she asked that the court "consider no additional time or certainly less than guidelines." *Id.*

The district court denied defense counsel's requests. It sentenced petitioner to 12 months of additional imprisonment for the violation, to run consecutively with the sentence for his new drug offense. J.A. 11. The district court acknowledged that defense counsel's arguments were "good," but said that he imposed the Guidelines-recommended sentence for the revocation because he "believe[d] the underlying case"—that is, petitioner's original case—"means something." *Id.*

4. Petitioner appealed to the Fifth Circuit. He contended that the 12-month revocation sentence, on top of his 60-month sentence, was substantively unreasonable because it was greater than necessary to account for the Section 3553(a) factors. Def. CA5 Br. at 6. Petitioner conceded that, because he "did not

object to the 12-month revocation sentence after its imposition," binding Fifth Circuit precedent provided that he had not adequately preserved this substantive unreasonableness argument. *Id.* at 8 (citing *United States v. Warren*, 720 F.3d 321, 326 (5th Cir. 2013)). But he argued that the Fifth Circuit was wrong to require a post-sentence objection on substantive reasonableness grounds. *Id.* at 8–9. In petitioner's view, so long as a defendant argued for a shorter sentence in the district court, he should not also have to object to the court's rejection of those arguments and imposition of a longer sentence.

The Fifth Circuit rejected petitioner's argument and affirmed the district court's sentencing order. Adhering to its precedent, the court of appeals reasoned that, because petitioner had not objected after sentencing that his sentence was substantively unreasonable, appellate review was "for plain error only." J.A. 2. Applying that test, the court of appeals then deemed the district court's 12-month consecutive revocation sentence free from "clear or obvious error." *Id.* In particular, the court of appeals noted that the sentence was "within the applicable advisory Guidelines policy statement ranges," and setting the sentence to run consecutively with the sentence for the underlying offense was "consistent with U.S.S.G. § 7B1.3(f), [policy statement]." *Id.*

5. This Court granted certiorari. 139 S. Ct. ___ (2019). Because the government agreed in its brief in opposition that the Fifth Circuit's post-sentencing objection requirement is illegitimate, and thus that the plain-error test should not have applied, *see* BIO

6–7, the Court subsequently appointed an amicus to defend the decision below. 139 S. Ct. ___ (2019).

SUMMARY OF THE ARGUMENT

A criminal defendant fully preserves for appeal a claim that his sentence is substantively unreasonable if he argues in the district court for a shorter sentence. He need not separately object to the longer sentence after it is imposed.

1. Federal Rule of Criminal Procedure 51 states that a party preserves a claim of error by informing the court, before it acts, of "the action the party wishes the court to take." Fed. R. Crim. Proc. 51(b). No separate objection after the court has ruled is required. Such an objection is called an "exception" and Rule 51 expressly provides that "[e]xceptions to rulings or orders of the court are unnecessary." *Id.* 51(a).

The plain text of Rule 51 dictates that, once a defendant argues to the district court that the sentencing factors enumerated in 18 U.S.C. § 3553(a) support a given sentence, he has preserved the issue for appeal. If the district court rejects his argument and imposes a longer sentence, he need not *also* object that the sentence is substantively unreasonable.

2. The Fifth Circuit has never attempted to square its post-sentence-objection requirement with Rule 51. Instead, it has tried to ground its rule in two other propositions. Neither withstands scrutiny.

First, the Fifth Circuit seems to assume that substantive reasonableness is a freestanding claim, distinct from argument that Section 3553(a) does not

permit the sentence at issue. But this Court has repeatedly made clear that substantive reasonableness is a nothing more than a *standard of appellate review*. It is a shorthand for whether the district court abused its discretion in applying the Section 3553(a) factors. Once that misconception is corrected, it becomes clear that the Fifth Circuit's rule is misguided. A litigant who argues for a particular action in district court need not later object that the court's contrary action constitutes an abuse of discretion in order to preserve such a claim for appeal.

Second, the Fifth Circuit has suggested that its post-sentencing objection rule is necessary to give district courts an opportunity to make informed decisions and correct errors. But those important goals are met as soon as defendants apprise district courts of their positions on how Section 3553(a) applies to their cases. There is nothing to be gained by requiring repetition of the same arguments after sentencing. If anything, there is much to be lost. Requiring parties to engage in empty formalism can only create traps for the unwary and further tax already busy district courts. Those are hallmarks of a malfunctioning criminal justice system, not a fair and efficient one—which is precisely why Rule 51 expressly renders such exceptions unnecessary.

ARGUMENT

Every court of appeals to consider the question except the Fifth Circuit has held that a defendant who argued in the district court for a shorter sentence than he received need not also object after the court imposes his sentence to preserve for appellate

review the claim that the sentence is substantively unreasonable. *See, e.g.*, *United States v. Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014); *United States v. Curry*, 461 F.3d 452, 459 (4th Cir. 2006); *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc); *United States v. Castro-Juarez*, 425 F.3d 430, 433–34 (7th Cir. 2005); *United States v. Wiley*, 509 F.3d 474, 476–77 (8th Cir. 2007); *United States v. Autrey*, 555 F.3d 864, 868–71 (9th Cir. 2009); *United States v. Torres-Duenas*, 461 F.3d 1178, 1182–83 (10th Cir. 2006); *United States v. Gonzalez-Mendez*, 545 F. App'x 848, 849 (11th Cir. 2013); *United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007); *see also United States v. Ortiz-Mercado*, 919 F.3d 686, 690–91 (1st Cir. 2019) (assuming without deciding "that an objection in the district court may not be required to preserve a challenge to the substantive reasonableness of a sentence"). These courts are correct.

I. Rule 51 makes clear that a defendant need not object after the imposition of a sentence longer than he advocated to preserve a claim that his sentence is substantively unreasonable.

Federal Rule of Criminal Procedure 51 "tells parties how to preserve claims of error." *Puckett v. United States*, 556 U.S. 129, 135 (2009). In interpreting this Rule (or any rule or statute), this Court starts with the text, "and proceed[s] from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (internal citations omitted). "[W]hen

the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). That fundamental principle is all that is necessary to decide this case.

1. The text of Rule 51(b) is straightforward and unambiguous. It provides: "A party may preserve a claim of error by informing the court—when the court ruling or order is made *or* sought—of the action the party wishes the court to take, *or* the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. Proc. 51(b) (emphases added).

The key word here is "or." In its ordinary meaning, "or" is used to indicate "an alternative," such as "wolves or bears," "sick or well." *Or*, Webster's New International Dictionary (3d ed. 1993). In other words, "or" means one of two options, not both. *See United States v. Woods*, 571 U.S. 31, 45 (2013) (explaining that "the conjunction 'or' . . . is almost always disjunctive").

This Court's opinion in *United States v. Williams*, 504 U.S. 36 (1992), illustrates the point. There, the Court considered its rule precluding a grant of certiorari "only when 'the question presented was not pressed or passed upon below.'" *Id.* at 41. This Court explained that "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon"; it need not have been both pressed *and* passed upon. *Id.*; *see also, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("[T]he use of

'or' to join 'selling' and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity."); *First Nat'l Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122, 135 (1969) (explaining that, "since [the statute] is phrased in the disjunctive," it may be satisfied by "any one of the three services mentioned"). Put another way, statutes phrased in the disjunctive are satisfied when *either* option is satisfied; there is no need to satisfy both.

The implication for Rule 51 is clear. There are two alternative ways to preserve a claim of error for appeal. A party may inform the district court of the actions the party wishes the court to take "when the court ruling is . . . sought," *or* it may object after the ruling is "made." Fed. R. Crim. Proc. 51(b). A party need not do both.

As applied to this case, when a criminal defendant argues that Section 3553(a) supports a particular sentence, he has "inform[ed] the court . . . of the action [he] wishes the court to take" at the time "when the court ruling or order is . . . sought," Fed. R. Crim. Proc. 51(b). He need not also object after the court imposes a longer sentence. Accordingly, when, during his resentencing hearing, petitioner argued at length for a downward variance of no additional prison time, he preserved a claim for appeal that a longer sentence was substantively unreasonable.

2. The first part of Rule 51, Rule 51(a), confirms that petitioner did not need to object that his sentence was substantively unreasonable after it was imposed. Rule 51(a) provides: "Exceptions to rulings or orders of the court are unnecessary." Fed. R.

Crim. Proc. 51(a). An "exception" is a "complain[t] about a judicial choice after it has been made." *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009); *see also Exception*, Black's Law Dictionary (11th ed. 2019) ("*Exception* properly refers only to an objection made after an initial objection or proffer is made and overruled.").

This Rule, like Rule 51(b), means exactly what it says: A party, seeking to preserve a claim for appeal, who has already asked the district court to take a particular action need not *also* make a formal exception to a court's contrary decision after it is made. "The rule about exceptions is explicit: 'Exceptions to rulings or orders of the court are unnecessary.'" *Bartlett*, 567 F.3d at 910 (quoting Fed. R. Crim. Proc. 51(a)); *see also Exception*, Black's Law Dictionary (11th ed. 2019) ("In most courts, an exception is no longer required to preserve the initial objection.").

3. Rule 51's historical development reinforces the conclusion that a defendant need not object that his sentence is substantively unreasonable to preserve a claim on appeal that it is longer than necessary. "By the ancient common law," parties could not challenge on appeal any alleged error that was not apparent from the face of the judgment, including errors that occurred during trial. *Nalle v. Oyster*, 230 U.S. 165, 176 (1913). Even after that restriction was rescinded, common-law practice still did not allow the entire trial record to be sent to the appellate court. *See* Frank Warren Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict*, 24 Yale L. J. 127, 132 (1914). Consequently, to preserve a claim for appeal, a party was required

to take an exception to an apparent error of law at trial, which the judge would note in his minutes. *Id.* at 131. The resulting bill of exceptions, signed by the trial judge, identified the allegedly erroneous rulings and the evidence necessary to assess those claims of error. *See id.* at 132; *see also Pomeroy's Lessee v. State Bank of Ind.*, 68 U.S. 592, 598–99 (1863) (describing the practice); *Arthurs v. Hart*, 58 U.S. 6, 9 (1854) (same).

In modern times, the practice of noting exceptions is unnecessary. Parties provide courts with their positions—and the reasons for their positions—during the proceedings, district courts evaluate and rule on these arguments then. And entire records are now available to the court of appeals "and show upon their face the facts upon which the question of law is raised." *Nalle*, 230 U.S. at 177–78. Therefore, the Committee that drafted the Federal Rules in the mid-twentieth century recognized that there is no longer any need for a party to reiterate its positions in trial court after the court issues a ruling contrary to its request. Doing so—that is, noting an exception—would be nothing more than an empty "ritual." Charles A. Wright et al., Fed. Practice & Procedure §§ 841, 2471 (3d ed. 2002).[1]

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[1] Although Section 2471 of this treatise concerns Federal Rule of Civil Procedure 46, that Rule tracks Federal Rule of Criminal Procedure 51, as Section 841 of the treatise makes clear. *See also* Fed. R. Crim. Proc. 51, Advisory Comm. Notes (1944) ("This rule is practically identical with Rule 46 of the Federal Rules of Civil Procedure. . . . It relates to a matter of trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion.").

In short, Rule 51 was enacted to "obviate[] the necessity for taking formal exception to matters occurring during the course of a trial," so long as the aggrieved party asked the district court "in some way" to take contrary action. *Hill v. United States*, 261 F.2d 483, 489 (9th Cir. 1958). Applying that principle to this case, Rule 51 dictates that petitioner did not need to take exception to the district court's resentencing order, for he had already asked for (and raised his arguments in favor of) a shorter sentence during the resentencing hearing.

II. The Fifth Circuit's reasons for imposing a post-sentencing objection requirement do not withstand scrutiny.

When adopting its requirement that a defendant who has already presented his arguments with respect to the appropriate sentence can preserve his substantive challenge to his sentence only by also objecting after sentence is imposed, the Fifth Circuit did not mention, much less engage with, Rule 51. *See United States v. Peltier*, 505 F.3d 389, 392 (5th Cir. 2007) (J.A. 32). Instead, the Fifth Circuit grounded its objection requirement in two other assumptions: First, the court of appeals assumed that a substantive unreasonableness argument is a free-standing claim, rather than simply the standard for reviewing whether the district court erred in imposing a longer sentence than the defendant requested. J.A. 34–37. Second, the Fifth Circuit maintained its approach is necessary to "encourag[e] informed decisionmaking and [to give] district courts an opportunity to correct errors before they are taken up on

appeal." J.A. 37. Each of these assumptions is mistaken.

A. Substantive reasonableness is a standard of appellate review, not a freestanding claim.

The Fifth Circuit's treatment of substantive unreasonableness as a freestanding claim misunderstands the role that concept plays on appeal. Substantive reasonableness is simply a standard of review for appellate courts to determine whether a sentence is too long (or, if the government is raising such a claim, too short).[2]

1. District judges must impose sentences that are consistent with the federal sentencing statute, 18 U.S.C. § 3553(a). *See United States v. Booker*, 543 U.S. 220, 259–60 (2005). Section 3553(a) requires judges not only to consider the sentencing ranges recommended by the U.S. Sentencing Guidelines, but also to impose sentences that are sufficient, but no longer than necessary, to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and

[2] The Fifth Circuit's rule presumably applies equally to the government, when the government seeks to argue on appeal that a sentence is substantively unreasonable. *See Curry*, 461 F.3d at 459 (noting that government is subject to same preservation rules as criminal defendants when it seeks to challenge the substantive reasonableness of a defendant's sentence); *Autrey*, 555 F.3d at 870 n.4 (same).

medical care." *Id.* at 260 (citing 18 U.S.C. § 3553(a)(2)); *see also supra* pp.2–4.

Booker also set forth the rules for appeals from sentencing decisions, which apply "irrespective of whether the trial judge sentences within or outside of the Guidelines range." 543 U.S. at 260. The Court construed the Sentencing Reform Act to "imply[an] appellate standard of review" of "reasonableness." *Id.* at 261–62. The Court has stressed that this standard applies only to "appellate sentencing practice"—that is, "appellate court decisionmaking." *Booker*, 543 U.S. at 262–63; *see also Rita v. United States*, 551 U.S. 338, 351 (2007) (stressing that substantive reasonableness is exclusively an "*appellate*" standard of review) (emphasis in original).

Substantive reasonableness is thus not a free-standing claim, distinct from an argument that the Section 3553(a) factors require a shorter sentence. Instead, this Court has repeatedly made clear that a claim on appeal that a sentence is substantively unreasonable is simply an argument that "the trial court abused its discretion" by imposing an unduly harsh sentence. *Rita*, 551 U.S. at 351; *see also Gall v. United States*, 552 U.S. 38, 46 (2007) ("Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."); *id.* at 51 ("[T]he appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."); *id.* ("[T]he appellate court must review the sentence under an abuse-of-discretion standard."); *Kimbrough v. United*

States, 552 U.S. 85, 110–11 (2007) (explaining that "appellate inspection" involves asking "whether the sentence was reasonable—i.e., whether the District Judge abused his discretion in determining that the § 3553(a) factors supported" the sentence imposed).

The concept of "substantive unreasonableness," in other words, has no direct application in district courts. A district court's task is to impose a sentence that is proper under Section 3553(a). And when a defendant argues on appeal that his sentence is substantively unreasonable, he is in no way advancing a new claim. Instead, he is renewing the same argument he has made all along—that Section 3553(a) does not allow a sentence as long as the one the district court imposed—only this time, through the lens of a standard of review that applies on appeal. As Judges Garland and Sutton have succinctly put the point: Substantive reasonableness is nothing more than "the standard of *appellate* review" for the length of a sentence. *Bras*, 483 F.3d at 113 (emphasis in original); *accord Vonner*, 516 F.3d at 389 (en banc).

2. Parties are not required to frame objections to district court actions while cases are still in the district court according to the applicable standard of appellate review. For instance, if a district court rejects a party's request to find a particular fact, no one would suggest that the party must object that its contrary finding was clearly erroneous. *Cf.* Fed. R. Civ. Proc. 52(a)(6). And, most directly relevant here, a party need not argue that a trial court abused its discretion to preserve a claim on appeal that the dis-

trict court committed an error by rejecting the party's proposed course of action.

Examples abound. When, for instance, a district court determines that a prevailing party is entitled to attorney fees under Section 285 of the Patent Act because the case is "exceptional," such determinations are subject on appeal to an abuse-of-discretion standard. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). But a party opposing a fee award under this statute is not required to object in the district court that a fee-shifting decision is an abuse of discretion. Rather, the parties need only argue that the facts do not support a finding that the case is exceptional. *See id.* at 560. Accordingly, even though the party in *Highmark* did not object to the district court's fee-shifting determination on the grounds that it was an abuse of discretion, this Court treated the claim of alleged error as properly preserved.

Similarly, where a party moves to introduce evidence and the district court deems it inadmissible, the party is not required to object that the district court has abused its discretion in excluding the evidence. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). Nor is a party required to raise post-ruling objections in district court in other contexts where district court determinations are subject to appellate review for abuse of discretion. *See also, e.g.*, *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990) (sanctions under Federal Rule of Civil Procedure 11); *Pierce v. Underwood,* 487 U.S. 552, 559 (1988) (determinations whether a litigating posi-

tion is "substantially justified" for purposes of fee-shifting under the Equal Access to Justice Act).

So too here. The defendant in *Rita* did not object in district court that his sentence was substantively unreasonable. *See* Tr. 62–69, *United States v. Rita*, No. 3:04-cr-00105-1 (W.D.N.C. June 7, 2005). Yet this Court reviewed the substantive reasonableness of the sentence at issue without applying the plain error standard. *Rita*, 551 U.S. at 359–60. Similarly, in *Gall* the government did not object in the district court that the sentence was substantively unreasonable. *See* Tr. 53–56, *United States v. Gall*, No. 4:04-cr-00116 (S.D. Iowa June 8, 2005). Yet this Court evaluated the substantive reasonableness of the sentences under the abuse of discretion standard. *See Gall*, 552 U.S. at 59–60.

3. Of course, defendants sometimes also argue on appeal that sentencing courts committed "procedural" error. 552 U.S. at 51. Examples of such arguments are that the district court "fail[ed] to calculate (or improperly calculate[d]) the Guidelines range, treat[ed] the Guidelines as mandatory, fail[ed] to consider the § 3553(a) factors, select[ed] a sentence based on clearly erroneous facts, or fail[ed] to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Id.* When a defendant has not asked the district court to take a certain procedural step, it might be necessary to object after the district court engages in a purported procedural irregularity to preserve such a claim for appeal. *See, e.g.*, *United States v. Lopez-Flores*, 444 F.3d 1218, 1221 (10th Cir. 2006) (applying plain error review to claim that

district court did not "adequately explain[] the sentence"); *United States v. Sylvester Norman Knows His Gun, III,* 438 F.3d 913, 918 (9th Cir. 2006) (applying plain error review where the defendant "did not object on the ground that the district court did not sufficiently address and apply the factors listed in § 3553(a)").

But whatever rules might govern the preservation of such procedural reasonableness arguments, procedural reasonableness is different from substantive reasonableness. When dealing with a claim of procedural error, the defendant may not have previously informed the district court of what he believes to be the proper procedural course. *See Lopez-Flores*, 444 F.3d at 1221. In fact, the defendant may have had no reason to do so because he believed the district court would follow proper procedures. An argument that a sentence is substantively unreasonable, by contrast, is simply an argument that the district court abused its discretion in applying Section 3553(a). *Id.*; *see also, e.g.*, *Flores-Mejia*, 759 F.3d at 256–57; *Autrey*, 555 F.3d at 869–70. And so long as a defendant told the district court that the Section 3553(a) factors support a shorter sentence than the court imposed, no post-sentencing objection is necessary to preserve that argument for appeal.

B. Post-sentencing objections to the length of a sentence are unnecessary to facilitate efficient and informed decision-making.

The Fifth Circuit is also wrong in suggesting (J.A. 37) that its post-sentencing objection rule is necessary to "encourag[e] informed decisionmaking and [to give] district courts an opportunity to correct er-

rors before they are taken up on appeal." If anything, the Fifth Circuit's post-objection requirement thwarts the goal of the efficient and fair administration of justice.

1. It is true that Rule 51's preservation requirement and Rule 52(b)'s accompanying plain error doctrine are designed "to induce the timely raising of claims and objections, which gives the district court the opportunity to resolve them." *Puckett*, 556 U.S. at 134. In this way, the Rule "prevents a litigant from 'sand-bagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Id.* In other words, the "point of the plain-error rule" is to "require[] defense counsel to be on his toes." *United States v. Vonn*, 535 U.S. 55, 73 (2002); *see also Wainwright v. Sykes*, 433 U.S. 72, 89 (1977).

That rationale has no purchase here. As one court of appeals explained:

> [I]n a substantive reasonableness challenge, the parties have already fully argued the relevant issues (usually both in their briefs and in open court), and the court is already apprised of the parties' positions and what sentences the parties believe are appropriate. In such a case, requiring the parties to restate their views after sentencing would be both redundant and futile, and would not "further the sentencing process in any meaningful way."

Autrey, 555 F.3d at 871 (internal citations omitted).

It is thus not surprising that we are unaware of a single case in the twelve years the Fifth Circuit has had its rule that a district court has reconsidered its sentence in response to a substantive reasonableness objection. To the contrary, such objections, when made, have become nothing more than a meaningless exercise. "Since the district court will already have heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence," an objection from the defendant "protest[ing] the term handed down as unreasonable" is never more than an empty formality. *Castro-Juarez*, 425 F.3d at 433–34; *see also* BIO 6–7; *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997) (discussing Rule 51 in a different context and explaining that, where a party "argued its position to the district judge, who rejected it, a further exception after" the ruling would be "a mere formality, with no reasonable likelihood of convincing the court to change its mind on the issue").

2. If the Fifth Circuit's rule has any effects at all on the administration of justice, those effects are negative ones. The Fifth Circuit's rule creates an unwarranted procedural trap and threatens to dull the senses of busy trial judges.

Attorneys are trained to present their cases in an efficient manner and to respect judges' time. At sentencings, therefore, litigants are well advised to explain why they think a particular term of punishment is warranted and to make sure that the district judge weighs the Section 3553(a) factors. But after all that transpires, conscientious lawyers would not see any reason—let alone need—to "saddle busy dis-

trict courts with the burden of sitting through an objection" and recitation of the same arguments the judge just rejected. *Castro-Juarez*, 425 F.3d at 433–34. Accordingly, "[t]o insist that defendants object at sentencing to preserve appellate review for reasonableness would create a trap for unwary defendants." *Id.*; *cf. Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908–11 (2018) (rejecting Fifth Circuit's unduly burdensome articulation of the plain error standard because it was unnecessary to ensure district courts had "opportunities for error correction" (quotation marks omitted)).

The Fifth Circuit's post-sentencing objection requirement also threatens to dull district courts to those objections that are new and meritorious—and not simply formalistic repetition. An objection is supposed to halt proceedings and command a judge's attention. It is intended to suggest to the court that it has just overlooked or misapplied some legal principle. And to resolve such an objection, a court should expend not only time but also mental energy.

Creating a system in which parties must make objections that do nothing more than repeat arguments already made—and, thus, that have no chance of affecting outcomes—is at cross-purposes with these ideals. When judges have to endure purely ritualistic objections, they may be less likely to notice objections that are truly warranted. Such results "could not but undermine the criminal justice system's integrity." *Kaley v. United States*, 571 U.S. 320, 331 (2014).

* * *

This case marks the third time in four years that this Court has granted certiorari to consider the validity of a rule governing plain-error review of criminal sentences applied solely by the Fifth Circuit. *See Rosales-Mireles*, 138 S. Ct. at 1906; *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). In both prior cases, the Court rejected the Fifth Circuit's outlier rules as inconsistent with the text of the Federal Rules of Criminal Procedure and this Court's precedent. *Id.* The Court should once again bring the Fifth Circuit back into line with the rest of the country by abrogating its unique and unjustified post-sentencing objection requirement.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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