

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 GONZALO HOLGUIN-HERNANDEZ,)
4 Petitioner,)
5 v.) No. 18-7739
6 UNITED STATES,)
7 Respondent.)
8 - - - - -
9 Washington, D.C.
10 Tuesday, December 10, 2019
11
12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the
14 United States at 11:13 a.m.
15 APPEARANCES:
16 KENDALL TURNER, ESQ., Washington, D.C. ;
17 on behalf of the Petitioner.
18 MORGAN L. RATNER, Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C. ;
20 on behalf of the Respondent in support of vacatur.
21 K. WINN ALLEN, ESQ., Washington, D.C. ;
22 for the Court-appointed amicus curiae in support
23 of the judgment below.
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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-7739, Holguin-Hernandez versus United States.

Ms. Turner.

ORAL ARGUMENT OF KENDALL TURNER

ON BEHALF OF THE PETITIONER

MS. TURNER: Thank you, Mr. Chief Justice, and may it please the Court:

Rule 51 tells parties to criminal proceedings how to preserve claims of error for appeal. A party does so by telling the court what action the party wants the court to take when a ruling is made or sought. There's no need to tell the court twice.

In every federal court of appeals except the Fifth Circuit, this rule means what it says in the context of sentencing proceedings. Specifically, it means that a criminal defendant who argues for a particular sentence in district court preserves for appeal a challenge to a longer sentence.

In the Fifth Circuit, however, a criminal defendant, like Petitioner here, must

1 argue for a particular sentence in district
2 court during the sentencing hearing and must
3 object to any longer sentence as substantively
4 unreasonable after the sentence issues. That
5 post-sentencing objection requirement flouts
6 Rule 51, which expressly says that exceptions
7 are not required.

8 Nor is there any practical merit to
9 the Fifth Circuit's rule. In fact, there's no
10 evidence that a district court has ever
11 reconsidered a sentence in light of a
12 post-sentencing objection. And that makes
13 sense. The sentencing court will have just
14 heard and rejected the same arguments in issuing
15 a sentence.

16 Recognizing that the Fifth Circuit's
17 rule is indefensible, the government does not
18 defend it. Instead, it supports amicus -- or
19 Petitioner here. An amicus tries to defend the
20 judgment below on alternative grounds.
21 According to amicus, a party must identify the
22 length beyond which a sentence is substantively
23 unreasonable.

24 But substantive reasonableness is not
25 a free-standing requirement under the Sentencing

1 Reform Act. It is simply a standard of
2 appellate review. And there is no need for
3 parties to frame their claims in terms of that
4 standard of appellate review while they are
5 still in district court, just as they need not
6 frame their objections to evidentiary rulings in
7 terms of abuse of discretion or to factual
8 findings in terms of clear error while they are
9 still in the trial court.

10 Because Petitioner here adequately
11 preserved his challenge to the length of his
12 sentence, this Court should reverse.

13 I'm open to questions. But, if you
14 have none, there are really two problems.

15 JUSTICE ALITO: Well, I'll ask --

16 JUSTICE GINSBURG: The defense said --

17 JUSTICE ALITO: -- I'll ask --

18 JUSTICE GINSBURG: Counsel -- counsel
19 argued for the preferred -- the defendant's
20 preferred sentence. Didn't say that anything
21 other than that would be excessive.

22 MS. TURNER: That's correct, Justice
23 Ginsburg. And that is fine to put the court on
24 notice of his claim that his sentence is too
25 long.

1 And there are sort of two parts to my
2 answer. The first is that the better reading of
3 Section 3553(a) is that the district court's
4 task is to identify the particular sentence that
5 is sufficient but not greater than necessary to
6 serve the statute's objectives. And "sufficient
7 but not greater than necessary" necessarily
8 means that there is a sentence that is
9 sufficient but not greater than necessary. If
10 one -- if 10 months is sufficient, 15 months is
11 obviously greater. So, by asking the court for
12 a particular sentence, the party puts the
13 district court on notice of their objections to
14 any other sentence.

15 But even if you don't agree with that
16 reading of Section 3553(a), there is no need to
17 inform the court of all possible actions it
18 might take. There's no -- there's no basis for
19 that requirement in Rule 51 and in other areas
20 of the law where there are -- or a district
21 court can take a range of actions. For example,
22 in the context of Rule 11 sanctions or a length
23 of continuance or reasonable attorneys' fees, a
24 party simply has to ask for the result it wants.
25 It doesn't have to identify all possible actions

1 the district court might take to preserve that
2 claim for appeal.

3 CHIEF JUSTICE ROBERTS: But, I mean,
4 let's say the -- the defendant says I think my
5 sentence should be, you know, two years, and the
6 district court says in its decision: Well, I
7 think I'm going to sentence you to two years and
8 six months because I think you've, you know,
9 misunderstood this particular provision about,
10 you know, history or deterrence or -- or
11 whichever.

12 And is the district court supposed to
13 appreciate, and the court of appeals, if the
14 defendant does nothing else, that he thinks it's
15 substantively unreasonable for the district
16 court to have added those six months, for a
17 reason that the -- may not even have been
18 addressed by the defendant in his submission?

19 MS. TURNER: So two points, Your
20 Honor. The first is that, you know, the
21 district court doesn't really have to appreciate
22 that it is substantively unreasonable because,
23 again, that's just the appellate standard of
24 review. The district court just has to
25 understand that the party objects to the

1 particular sentence. But also --

2 CHIEF JUSTICE ROBERTS: Well, but --
3 but I don't know how the district court knows
4 that if you don't require an objection after the
5 district court has explained why he's adding the
6 six months. As far as he knows, well, maybe
7 that's okay with the defendant; he wanted two
8 years, but he can't really say that it's
9 unreasonable to get two years and six months.
10 Particularly since I pointed out to him
11 precisely why I'm adding those six months.

12 MS. TURNER: So, again, we think the
13 better view of Section 3553(a) is that it really
14 instructs the district court to identify a
15 particular sentence, and so, by identifying a
16 particular sentence, the defendant necessarily
17 communicates that other sentences -- that he
18 doesn't agree with other sentences.

19 And while it's true that a defendant
20 might not have identified every factor in
21 Section 3553(a) in requesting a particular
22 sentence -- you know, there are only five, I
23 think -- and district courts and defense
24 attorneys are familiar with those factors and
25 there's no need to specifically run through

1 them.

2 Similarly, in other contexts, other
3 areas of the law, there's no need to -- for --
4 to -- example, when someone -- when a district
5 court makes an evidentiary ruling that a party
6 disagrees with, the party doesn't have to say
7 this is an abuse of discretion, even if the
8 district court identifies reasons --

9 CHIEF JUSTICE ROBERTS: Yeah, but, I
10 mean, it could end up to particularly odd
11 results. I mean, without a particular
12 objection, the district judge might, you know,
13 be sitting there in the court of appeals and the
14 brief that is filed is, you know, 40 pages
15 objecting to, you know, a particular provision.
16 And the district court says: Well, that's not
17 what I was looking at at all. I was looking at
18 something else.

19 MS. TURNER: In this -- in this
20 hypothetical, the party is raising different
21 arguments on appeal, is that --

22 CHIEF JUSTICE ROBERTS: Well, the
23 whole point, I -- I guess, of a post-decision
24 objection --

25 MS. TURNER: Yes.

1 CHIEF JUSTICE ROBERTS: -- is that it
2 puts people on notice as to what the defendant
3 is objecting to. And that can shape, you know,
4 whether it's subsequent proceedings in the
5 district court or appellate review, when,
6 instead, if you just say, well, so long as it's
7 more than the defendant asked for, in a regime
8 where there are a lot of factors -- I'd count
9 more than five despite the subsections -- it's
10 particularly helpful to the process that people
11 know what the concern really is going forward.

12 MS. TURNER: But, again, that is just
13 the appellate standard of review. And Rule 51
14 is explicit in saying that post-ruling
15 objections are not required if you have already
16 informed the court of the action that you wish
17 it to take. And there's no reason to -- to
18 alter that approach in the sentencing context.

19 JUSTICE ALITO: Do you think that
20 under the so-called parsimony principle, there
21 is one precise sentence in every case that
22 serves all the interests of sentencing but
23 doesn't do so to an excessive extent?

24 MS. TURNER: That is the district
25 court's task, is to find the sentence the

1 district court determines is sufficient but not
2 --

3 JUSTICE ALITO: And there's just one.
4 So it's -- let's say it's 11 months, that is the
5 -- that is the sentence called for by the
6 Sentencing Reform Act, not 10, not 12. Eleven.

7 MS. TURNER: So it's not that there is
8 some Platonically correct sentence. But the
9 district court's task is to determine the
10 sentence that, in its view, is sufficient but
11 not greater than necessary. And that's, you
12 know, inherent in sort of this parsimony
13 principle. I mean, that's what that language
14 means. If 10 months is sufficient but not
15 greater than necessary, 10 months and one day is
16 greater than necessary.

17 JUSTICE ALITO: Well, if that -- if it
18 is not the case that there -- the parsimony
19 principle identifies one particular, precise
20 sentence that is the correct sentence, then
21 saying -- then for defense counsel to say 11 --
22 I -- I -- I urge you to sentence my client to no
23 more than 11 months, that's different from
24 saying that a -- a sentence of 12 months would
25 be outside the range of reasonableness --

1 MS. TURNER: Again, Your Honor, it --

2 JUSTICE ALITO: -- which is what would
3 have to be shown on appeal.

4 MS. TURNER: -- it -- you know, it is
5 sort of a different argument on appeal, but it
6 is no different than, again, if you were on
7 appeal and you had to argue that the district
8 court's ruling was an abuse of discretion,
9 you -- you don't have to make that abuse of
10 discretion argument in district court, even
11 though that is how you would have to frame your
12 argument on appeal. It's exactly the same here.

13 And we're just asking for those same
14 rules to apply in this context.

15 JUSTICE ALITO: What if --

16 JUSTICE SOTOMAYOR: Ms. Kendall -- I'm
17 sorry.

18 JUSTICE ALITO: What if defense --
19 just along the same lines very quickly.

20 What if defense counsel says, look, I
21 understand that the -- the guidelines range is
22 10 to 12 months and I -- and I know that that's
23 presumptively reasonable and I'm not going to
24 argue with that, but I urge you to sentence my
25 client to no more than 10. And the judge says,

1 well, I'm sorry, I'm going to choose 11.

2 Can the defense counsel then argue on
3 appeal 11 was unreasonable?

4 MS. TURNER: If the defense counsel
5 has said -- has said that 10 to 12 would be
6 acceptable or if he's only asked for 10?

7 JUSTICE ALITO: He says, I understand
8 that's the range and that's a reasonable range,
9 but I think the appropriate sentence here is 10.

10 MS. TURNER: So, if -- if the defense
11 counsel simply identified the guidelines range
12 and then asked for a particular sentence, then,
13 yes, I think that defense counsel could argue on
14 appeal that 11 months was substantively
15 unreasonable.

16 However, if a district court -- or if
17 a defense counsel said something like, anything
18 in the 10 to 12 months range is fine with us and
19 we think that's -- you can do that, in that
20 case, arguably, he has not preserved an
21 objection to an 11-month sentence, but it -- you
22 know, it would depend on the context of what
23 exactly defense counsel had said.

24 And there's no reason to craft unique
25 rules in this context.

1 JUSTICE SOTOMAYOR: Ms. Kendall, the
2 amici seems in my mind to be arguing not
3 differently than you are, that you don't need to
4 make necessarily an objection after the fact in
5 all circumstances.

6 He seems to be arguing that the
7 circumstances, though, in which you don't have
8 to renew afterward are those where you lay forth
9 the reasons for why you want something, and so
10 that you merely saying, I think 10 months is
11 enough is not enough, that that doesn't put the
12 district court on notice of the reasons you
13 think 10 months are enough.

14 And so that he's basically, I think,
15 he'll speak for himself, obviously, but assuming
16 his argument in my question, that you need to
17 put the district court on some sort of notice
18 what the basis is for you believing that 10 or
19 12 or 11 months is the right number, and that if
20 you don't do that, then you do need to -- you
21 haven't preserved your objection adequately.

22 How do you address that argument?

23 MS. TURNER: So as a -- just as a
24 first point and a practical matter, it is
25 vanishingly rare that a defense attorney will

1 have not filed objections to the PSR and will
2 simply stand up and say, Section 3553(a)
3 requires a shorter sentence and sit down.

4 JUSTICE SOTOMAYOR: I -- I agree with
5 you. It -- it never happened in my experience,
6 but it doesn't mean it can't. And so the
7 question is for a reviewing court, when it gets
8 that situation, what is it looking at --

9 MS. TURNER: So --

10 JUSTICE SOTOMAYOR: -- to make a
11 judgment as to whether or not the objection was
12 adequately preserved when it wasn't restated at
13 the end? I'm sorry.

14 MS. TURNER: Thank you.

15 The Court's simply applying the same
16 fair notice standard that it applies in every
17 other context to determine whether a factual --
18 an argument is preserved. It's the test that
19 this Court laid out in Beech Aircraft.

20 And anything more specific, requiring
21 very specific facts and circumstances, as amicus
22 tends to suggest, is unwise because it would
23 create new problems for this Court to resolve,
24 such as if someone argued in district court that
25 his client was sick and deserved a shorter

1 sentence and then argued on appeal that he was
2 going to die and deserved a shorter sentence,
3 the Court would have to determine whether that
4 was the same fact and circumstance.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Ratner.

8 ORAL ARGUMENT OF MORGAN L. RATNER
9 ON BEHALF OF THE RESPONDENT
10 IN SUPPORT OF VACATUR

11 MS. RATNER: Mr. Chief Justice, and
12 may it please the Court:

13 I want to be very clear about what is
14 and is not preserved when a defendant argues for
15 a lower sentence than he receives. There are
16 three key points.

17 First, a defendant who argues for a
18 lower sentence does preserve the claim that the
19 district court unreasonably declined to grant
20 the leniency requested.

21 Second, a defendant does not preserve
22 any procedural challenges or any challenges,
23 however labeled, that go to something other than
24 the length of the sentence.

25 And, third, a defendant who argues for

1 leniency on one ground in the district court
2 does not preserve a claim for leniency on a
3 different ground.

4 Those three points all come from the
5 same overarching principle that parties need to
6 give the district court an opportunity to
7 consider and resolve their claims. But, under
8 Rule 51, they need to give the district court
9 one opportunity, not two. And that's
10 fundamentally where the court below erred.

11 I think that Petitioner has
12 highlighted some of the problems.

13 JUSTICE KAVANAUGH: On your -- on your
14 first two points, in my experience, a
15 substantive unreasonableness claim is almost
16 always coupled with a procedural failure to
17 explain claim. And you're saying you don't need
18 to object for the first, but you do need to
19 object for the second, when they're almost
20 always coupled.

21 MS. RATNER: So let me make this very
22 clear. We think Rule 51 applies equally to both
23 of those. We think that as a practical matter,
24 the first half of Rule 51, the affirmative
25 request, is often going to be the way that

1 substantive reasonableness claims are preserved,
2 whereas, as a practical matter, the second half
3 of Rule 51 is often going to be the way the
4 procedural reasonableness claims are preserved.

5 And that's just because of the way
6 sentencing hearings occur. So the whole point
7 of a sentence hearing -- sentencing hearing is
8 for parties to advocate to the Court what they
9 think the appropriate sentence is. They put the
10 district court then on notice of those
11 arguments.

12 By contrast, a party isn't going to
13 have the opportunity to tell the district court
14 in advance, we think you've given an
15 insufficient explanation until they've actually
16 heard the explanation. And so it's just because
17 of that practical reason that those are -- are
18 going to tend to be after-the-fact objections
19 instead of in-advance requests.

20 And that we -- we really do think is
21 the key point here, that we're not asking for
22 any sort of exception for Rule 51. It applies
23 the same in the sentencing context as outside
24 the sentencing context. It applies to
25 substantive reasonableness claims and procedural

1 reasonableness claims.

2 We're just asking, is this particular
3 claim one that the district court has already
4 had an opportunity to consider?

5 And --

6 JUSTICE ALITO: On your -- on your
7 third point about providing the ground for
8 the -- the -- the claim on -- on appeal, by
9 that, do you mean just a citation to the -- a
10 general category of -- of sentencing
11 consideration, or do you mean a specific
12 argument or pointing out specific facts?

13 What do you mean?

14 MS. RATNER: We mean that the
15 circumstances that the defendant feels are
16 important under Section 3553(a) in order to
17 entitle him to the lower sentence he's asking
18 for.

19 And so, to -- to give a simple
20 hypothetical, a defendant who is in the district
21 court and says: I deserve a below-guidelines
22 sentence because of my family background and
23 mitigating circumstances in my family history,
24 has not preserved a claim for appeal that he
25 deserves a below-guidelines sentence because of

1 his reduced role in the offense.

2 That hasn't fairly put the district
3 court on notice of the substance of his claim,
4 and so that can't be thought of as having
5 sufficiently preserved the --

6 JUSTICE KAVANAUGH: But how --

7 JUSTICE KAGAN: I take it that you're
8 not suggesting that one of those grounds has to
9 be specifically linked to a statutory factor, is
10 that correct?

11 MS. RATNER: We aren't -- again, the
12 overarching question is going to be an issue of
13 fair notice. So, as a general matter, no, it's
14 not necessarily the case that those types of
15 factual circumstances have to be particularly
16 tied up to deterrence or the seriousness of the
17 offense or what have you.

18 I -- I could imagine a case where a
19 defendant's argument is so intimately tied to
20 one of those factors that it hasn't really given
21 the district court notice, fair notice, which,
22 again, we think is the touchstone, but in the
23 ordinary case, no, we don't think that that's
24 going to have to be tied up that neatly.

25 JUSTICE SOTOMAYOR: How do we write --

1 JUSTICE KAVANAUGH: In your --

2 JUSTICE SOTOMAYOR: I'm sorry.

3 JUSTICE KAVANAUGH: Go ahead.

4 JUSTICE SOTOMAYOR: How do we write
5 this opinion? Do we need to get into all of
6 this? Are you asking us to give a sort of
7 bible, this preserves enough, that doesn't
8 preserve enough?

9 Is it adequate for us just to say it's
10 too absolute a rule to require a specific
11 objection under all circumstances so long as a
12 defendant has given us a fair -- given the
13 district court notice of its grounds for a
14 particular different sentence than given, that
15 that's enough?

16 MS. RATNER: So, Justice Sotomayor, I
17 think you could write an opinion that says the
18 Fifth Circuit's rule is wrong; it's too absolute
19 a rule in requiring a post hoc objection. But I
20 do think there would be significant value in the
21 Court offering some clarity, not just --

22 JUSTICE SOTOMAYOR: For you,
23 obviously, but --

24 MS. RATNER: Well, I -- Justice
25 Sotomayor, the reason that I'm saying that is

1 that I think the courts of appeals have largely
2 got these questions correct. There's really
3 just one outlier in one direction or another.
4 And I do think there could be some potential in
5 this Court's decision here to introduce
6 confusion if it's not clear about just what
7 is -- what is and is not preserved when a
8 defendant makes these sorts of arguments.

9 As for what an opinion would look
10 like, we would -- we think that Judge -- Judge
11 Sutton's opinion for the en banc Sixth Circuit
12 in United States against Vonner navigates these
13 various issues. It describes how Rule 51
14 applies in these contexts and, again, doesn't
15 suggest that there are any exceptions to Rule 51
16 but explains how, as a practical matter, that
17 analysis is going to look a little different in
18 some contexts than others.

19 JUSTICE KAVANAUGH: Back to your
20 hypothetical with Justice Alito, I'm not sure
21 how appellate courts are supposed to do this
22 because it's not that it's not preserved; it's
23 that it's reviewed under plain error. So you
24 would have, say, family history reviewed under
25 substantive unreasonableness and reduced role in

1 the offense reviewed under plain error for one
2 inquiry of overall substantive unreasonableness,
3 when substantive unreasonableness, let me just
4 add this, itself, when you actually apply it in
5 practice, is a lot like plain error. Obvious
6 it's so deferential in most courts of appeals,
7 that kind of obvious errors when you say
8 substantive -- substantively unreasonable.

9 So I'm not sure how a judge can keep
10 all that straight.

11 MS. RATNER: Well, I think, in
12 practice, it hasn't been that complicated,
13 Justice Kavanaugh, and courts -- again, this is
14 the rule that we think is in play in --

15 JUSTICE KAVANAUGH: Well, I think that
16 supports --

17 MS. RATNER: -- most of the courts of
18 appeals. And --

19 JUSTICE KAVANAUGH: Keep going.

20 MS. RATNER: The way that that shakes
21 out is usually one of two ways. So, first, a
22 court of appeals might say, looking at all of
23 those circumstances that you preserved, we don't
24 see this as a substantively unreasonable
25 sentence or we don't see this as an abuse of

1 discretion. And then, if we look to the
2 circumstances you are raising for the first
3 time, nothing in there suggests that our
4 analysis of substantive reasonableness is plain
5 error. That's sort of option 1 they do.

6 Option 2, and -- and sort of going to
7 your second point that this is already a
8 deferential standard, we see fairly often courts
9 say, well, even assuming that all of this had
10 been preserved, it wouldn't be a substantively
11 unreasonable sentence, or it wouldn't be an
12 abuse of discretion.

13 JUSTICE KAVANAUGH: Would -- can you
14 imagine a sentence that's substantively
15 unreasonable but not plain error?

16 MS. RATNER: Yes, we do think that
17 there is a small sliver of daylight between
18 these standards. I --

19 JUSTICE KAVANAUGH: It's extremely
20 small?

21 MS. RATNER: It is very small. We
22 think that's exactly why, if this case is
23 vacated and remanded, we would advocate for the
24 same outcome under a substantive reasonable
25 review.

1 You might think of it as analogous to
2 double deference under AEDPA, that -- there's
3 already a deferential standard of review, but if
4 you were to add plain error on top, you'd get
5 sort of an extra little bit of deference.
6 Again, it probably wouldn't be dispositive in
7 most cases, and that's why it doesn't create
8 that many difficulties for courts in practice.

9 But, at the end of the day, the key
10 problem with the Fifth Circuit's rule here is
11 that it's requiring parties to say, in the
12 district court, the applicable appellate
13 standard of review. And that's just not
14 something that litigants are required to do in
15 any other context.

16 The district court's job, under Rita
17 and Kimbrough and Gall, is to decide the
18 sentence that is appropriate under the
19 Section 3553(a) factors. And reasonableness is
20 just not an inquiry that comes into play until
21 the case is appealed, and that's the inquiry
22 that the court of appeals will apply in the
23 first instance.

24 If there are no further questions, we
25 would ask the Court to vacate and remand.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Allen.

4 ORAL ARGUMENT OF K. WINN ALLEN
5 FOR THE COURT-APPOINTED AMICUS CURIAE
6 IN SUPPORT OF THE JUDGMENT BELOW

7 MR. ALLEN: Thank you, Mr. Chief
8 Justice, and may it please the Court:

9 The question in this case is what a
10 party must do in the district court to preserve
11 a substantive reasonableness argument for
12 appeal. In particular, under Rule 51, what must
13 a party argue and when must they argue it? Let
14 me start with the what.

15 To preserve a substantive
16 reasonableness argument, a party must argue two
17 things. One, they must make the distinct legal
18 argument that an imposed sentence is beyond the
19 range of choice a district court has under
20 3553(a) and, two, identify the facts and
21 circumstances supporting that argument.

22 Those are the legal and factual
23 grounds underpinning a substantive
24 reasonableness argument. And under the best
25 interpretation of Rule 51, a statement of

1 grounds is necessary to preserve a claim of
2 error.

3 Now let me turn to the when. In most
4 cases, these arguments are most sensibly made
5 after sentencing because it's only then that the
6 parties know the imposed sentence and the
7 district court's reasoning for it. And in most
8 cases, I think you need to know those things to
9 really determine whether you have a viable
10 substantive reasonableness argument to assert.

11 But, technically, nothing in Rule 51
12 stops a party from making those arguments prior
13 to imposition of a sentence, and so preservation
14 pre-sentencing is possible in certain cases.

15 The government appears to agree with
16 at least part of this rule, in particular, the
17 government agrees that a party must present the
18 district court with the facts and circumstances
19 supporting a substantive reasonableness argument
20 in order to rely -- rely on those same facts and
21 circumstances on appeal.

22 And, frankly, that does not seem to be
23 a controversial or novel proposition. A party
24 that never argued below that a sentence was
25 substantively impermissible, because, for

1 example, it created unwarranted sentencing
2 disparities, should not be able to advance that
3 same argument for the first time on appeal.

4 The somewhat harder question, and the
5 question on which I part ways with the -- with
6 the government, concerns the first part of the
7 rule. To preserve a substantive reasonableness
8 argument, is it simply enough to ask for a
9 shorter sentence in the district court, or must
10 a party do more than that?

11 And for several reasons, I think the
12 Fifth Circuit is correct to require parties to
13 do more. Most fundamentally, merely arguing for
14 a shorter sentence does not address the same
15 issue that is before the court of appeals on a
16 substantive reasonableness challenge.

17 The court of appeals will not evaluate
18 the reasonableness of the defendant's requested
19 sentence. Rather, the court will evaluate the
20 reasonableness of the imposed sentence. A party
21 seeking to preserve a substantive reasonableness
22 argument must present that same issue to the
23 district court, but --

24 JUSTICE KAVANAUGH: I think one of the
25 strongest things Ms. Turner said, in addition to

1 her legal arguments, was that, in practice, this
2 never produces a different result because the
3 judge, presumably, has already -- and in
4 reality, has already thought about what is the
5 reasonable sentence. So for them to object I
6 think that's unreasonable is going to go
7 nowhere. So why, in addition to the legal
8 points, as a practical matter require that?

9 MR. ALLEN: A couple responses to
10 that, Justice Kavanaugh. First of all, I fully
11 concede that in most cases it probably won't
12 make much of a difference, but I think that's
13 more because of the very limited nature of
14 substantive reasonableness challenges than it is
15 because of the preservation rules.

16 Substantive reasonableness challenges
17 are very difficult to win because, most of the
18 time, district courts are sentencing well within
19 the discretion that they have. So I fully
20 concede that most of the time it won't make a
21 difference.

22 However, I don't think that means that
23 it won't always have some benefit. And I think
24 it will have benefit in those cases where a
25 substantive reasonableness argument is likely to

1 have the most viability. And that's a case in
2 which, for whatever reason, the imposed sentence
3 differs dramatically from the sentence that --
4 from the guidelines range and from the sentence
5 the parties have requested. For example, if a
6 defendant requests a 40-month sentence and the
7 government -- the court imposes a 200-month
8 sentence. And these cases do happen from time
9 to time in the courts of appeals.

10 In that circumstance, I think it's
11 likely that the -- that the district court has
12 used reasoning and rationales that the parties
13 might not theretofore have addressed or had an
14 opportunity to argue about. And so, in that
15 situation, there is some benefit, I think, to
16 having a party to -- to -- to apprise the court
17 to say: Your Honor, I think the sentence you
18 imposed is not only one I disagree with but is
19 so excessive, it's outside the range of
20 permissible sentences you could impose, and let
21 me explain to you why that is. Let me engage
22 with you on some of the reasoning you gave, why
23 the party thinks the court -- the court might
24 have put too much weight on an impermissible
25 factor, not enough weight on a very important

1 factor.

2 So the short answer is, in most cases,
3 it probably won't make much of a difference, but
4 in the cases where a substantive reasonableness
5 argument is likely to matter the most, it very
6 well could have -- could make a difference.

7 JUSTICE KAVANAUGH: In the case -- in
8 the hypo you raised, the counsel almost always
9 raise a procedural failure to explain.
10 Objection -- in your hypo -- Judge, you haven't
11 explained that sufficiently. Right?

12 MR. ALLEN: Correct. You know -- so
13 -- and I think that gets to two points. One is
14 I think what's procedural and what's substance
15 in this circumstance can get very difficult
16 sometimes, and it's an issue that the courts of
17 appeals have struggled with. For example, if
18 you disagree with the district court's
19 reasoning, is it a procedural problem because
20 the court failed to adequately explain it, or is
21 it a substantive problem because the court
22 explained it, you just disagree with the
23 reasoning the court gave? I think it could be
24 argued either way. And I think the courts of
25 appeals have sometimes struggled with what it

1 is.

2 JUSTICE KAVANAUGH: Well, they mostly
3 get funneled into procedural.

4 MR. ALLEN: A lot of times they do.
5 And, you know, as -- as this Court said very
6 clearly in Gall, you know, failure to adequately
7 explain a chosen sentence is a procedural
8 problem that I think everybody standing up here
9 arguing today agrees that if you think a
10 district court has not adequately explained its
11 chosen sentence, a party should object to that
12 in the district court and give the district
13 court judge an opportunity to correct it.

14 Well, if that's not true -- if that's
15 true, I guess it's hard for me to see why a
16 party shouldn't also object if they disagree
17 with some of the reasoning the district court
18 gave and that reasoning hadn't been discussed
19 previously in sentencing.

20 In that circumstance, it would seem to
21 serve the purposes of Rule 51 to have a rule
22 that asks the parties to apprise the court of --
23 of the -- that the court has used reasoning or
24 rationales that the parties disagree with, that
25 it believes are incorrect, that it believes are

1 impermissible and have the court -- have the
2 parties engage with the court on that to give
3 the district court an opportunity to address
4 that in the first instance, such that the court
5 of appeals aren't having to address it for the
6 first time on appeal.

7 I do think, in thinking about this,
8 the jury instruction analogy is somewhat
9 helpful, and I would concede that the jury
10 instructions are governed by a specific rule,
11 the Federal Rules of Criminal Procedure, Rule
12 30. But, in the jury instruction context, we do
13 require parties to object to a provided
14 instruction if they believe it's impermissible
15 and we require that even if they had previously
16 proposed an instruction to the district court
17 that has been rejected.

18 I think the same principle applies
19 here. Just because a party has requested a
20 particular sentence does not mean they've
21 necessarily and inevitably argued that the
22 actually imposed sentence is so excessive and so
23 extreme that it's outside the range of -- of --
24 of permissible sentences the court could have
25 imposed. The district court --

1 CHIEF JUSTICE ROBERTS: Is that -- is
2 that the standard, so excessive and so extreme?
3 I mean, the argument really is simply that it
4 doesn't comply with the factors in 3553, right?

5 MR. ALLEN: That is the -- you know,
6 that's the -- the argument on appeal -- the
7 excessive or extreme is my shorthand. That's
8 not the standard that a substantive
9 reasonableness is, but I think when you view
10 substantive reasonableness through the
11 deferential analysis that this Court has said
12 courts of appeals are to apply to district
13 courts, generally, what courts of appeals are
14 doing is saying, we think the sentence you've
15 imposed is outside the discretion you had to
16 impose the sentence based off the 33(a) factors
17 and the reasons you gave, the reasons just --
18 even though district courts have substantial
19 discretion, the reasons the court gave do not
20 support the sentence it imposed.

21 And so, yes, it's a -- it's -- the way
22 this Court put it in Gall, I believe, Mr. Chief
23 Justice, was, if there's an unusually harsh or
24 unusually lenient sentence that's not justified
25 by the reasons the district court gave.

1 JUSTICE KAGAN: But, Mr. Allen, in
2 saying what you just did, are you suggesting
3 that substantive reasonableness is the standard
4 that a district court should use in -- in
5 assessing what the proper punishment is?

6 MR. ALLEN: I don't think so, Justice
7 Kagan. What I -- I think my argument is not so
8 much that a district court should be asking
9 whether the sentence is substantively
10 unreasonable or a party should be saying it's
11 substantively unreasonable in the district
12 court. I think I'm asking that the -- the party
13 assert the grounds for that argument, the basis
14 for that argument in the district court.

15 And so, when you think about the
16 purposes of Rule 51, we want parties to argue
17 the same thing in the district court that
18 they're then going to argue -- go on to argue on
19 appeal.

20 And the basis for a substantive
21 reasonableness argument, I think, are two
22 things. One is the sentence is -- is outside
23 the range of permissible sentences that could
24 have been imposed under 3553(a) in light of the
25 specific facts of the case and, two, the reasons

1 for why that's true.

2 And I think the rule that we've put to
3 the Court and the rule that I think the Fifth
4 Circuit applies is just asking parties to make
5 those same arguments in the district court.
6 That's going to be what they present to the
7 Fifth Circuit or a Court of Appeals when they
8 appeal it. We want parties to make those
9 same -- the exact same arguments in the district
10 court.

11 JUSTICE KAGAN: That doesn't seem to
12 be what the question presented is. I mean, yes,
13 there might be questions in a particular case,
14 you know, if you say the sentence should be X
15 because I cooperated with the government and
16 then the appeals court, you say, the sentence
17 should be X because I'm a very sick man, you
18 know, then you have an issue about what grounds
19 you presented.

20 But that's not the issue that's
21 presented by the Fifth Circuit's practice, is
22 it? The issue that's presented by the Fifth
23 Circuit's practice is this requirement that --
24 that in -- that after the sentence is given in
25 the district court, the defendant have to step

1 up and say, you know, I object to that, Your
2 Honor.

3 MR. ALLEN: So I don't think that's
4 actually what the Fifth Circuit's doing in
5 practice. And I think this is an important
6 point that might help the Court.

7 I think the Fifth Circuit's rule is
8 much more about what a party must say than when
9 a party must say it. We found no Fifth Circuit
10 case in which the Fifth Circuit has said the
11 timing of an objection is dispositive, that
12 where the Fifth Circuit said, you clearly
13 objected to the substantive reasonableness of
14 the sentence before imposition of a sentence,
15 but you didn't repeat it after --

16 JUSTICE KAGAN: If the Fifth Circuit
17 had the rule that I'm suggesting the Fifth
18 Circuit has and that you're saying it doesn't
19 have, the -- if the Fifth Circuit had that rule,
20 would it be a violation of the rules?

21 MR. ALLEN: I -- I -- I don't think
22 that would be the best reading of Rule 51 and
23 that's not the -- the approach we've put to the
24 Court. Again, I don't think the timing of the
25 objection should matter.

1 JUSTICE KAGAN: I hate to press that a
2 little bit --

3 MR. ALLEN: No, go ahead.

4 JUSTICE KAGAN: -- but not the best
5 reading of Rule 51?

6 MR. ALLEN: It -- it -- it --

7 JUSTICE KAGAN: Is that --

8 MR. ALLEN: -- it would be an
9 incorrect reading of Rule 51 --

10 JUSTICE KAGAN: Okay.

11 MR. ALLEN: -- to answer the question
12 directly. I don't think Rule 51 requires these
13 objections to be made at any specific point in
14 time during the sentencing proceeding. All they
15 require is that a party state the grounds at
16 some point. And the grounds are what I started
17 off articulating my argument with.

18 Now I think most sensibly, I think
19 these are arguments that should really be made
20 after sentencing because it's only then that you
21 know what your sentence is and what the district
22 court's reasons for it. And I think only then
23 would you be in a position to determine whether
24 you have a viable substantive reasonableness
25 argument to make. But --

1 CHIEF JUSTICE ROBERTS: Well, and
2 maybe not even then. I mean, the question of
3 what arguments you're going to raise on appeal
4 is not something that's immediately obvious when
5 -- when the sentence comes down. It's something
6 that usually requires some consideration, some
7 tactical analysis, all sorts of things.

8 So I wonder what specificity you're
9 requiring in this, I won't call it an exception
10 since that's a problem for you, but this
11 objection, this post hoc objection?

12 MR. ALLEN: So two responses to that,
13 Mr. Chief Justice. One is the concern about
14 having to think about arguments on your feet
15 isn't unique to the sentencing context,
16 obviously. There's all kinds of circumstances
17 in criminal trials and -- and other proceedings
18 where we do expect lawyers to be on their toes
19 in court and to raise arguments that -- that
20 come up to them on the spot.

21 CHIEF JUSTICE ROBERTS: Well, yeah,
22 but I'm not trying -- I don't mean think of
23 every argument you have. I mean, do some --
24 figure out, well, we do have an argument on this
25 point, but we don't think we're going to -- if

1 we don't win on this point, we don't think we'll
2 win on that, so we're only going to make this.
3 I mean, it's a little more nuanced than
4 objections during the course of the trial.

5 MR. ALLEN: Perhaps. But I also think
6 that parties do do a tremendous amount of work
7 going in to preparing for a sentencing
8 proceeding. You know, they review the PSR.
9 They know what they're going to go in and argue
10 for on behalf of their client and then they can
11 hear the district court's reasoning and
12 determine whether there's something in that
13 reasoning that they think is factually wrong or
14 the court is putting too much weight on an
15 inappropriate factor or not enough weight on a
16 factor that they think is very important.

17 So it might be more difficult in ---
18 in cases where sentencing proceedings go for an
19 entire day than it will be for a case like this
20 one, where it took five or six minutes. But I
21 don't think it's unreasonable to require parties
22 to do that, and, in fact, you know, it -- it --
23 it's what I think the purpose of Rule 51 is
24 intended to serve, which is to keep defense
25 counsel on their toes and to alert the court

1 that they think the court has made some error
2 that has caused it to reach an incorrect result,
3 so that the district court is considering that
4 in the first instance and that courts of appeals
5 aren't having to consider that.

6 JUSTICE KAVANAUGH: Most of the
7 grounds will have been identified in the
8 sentencing memos after the PSR and at the
9 sentencing hearing, presumably. If they've all
10 been identified there, do they -- do you have to
11 raise it again in your view, do you think that's
12 the best reading of --

13 MR. ALLEN: I don't think you have to
14 raise anything again. I -- I think that would
15 be an unreasonable reading of Rule 51. I think
16 you just have to preserve them at some point
17 during the entire process, so you don't have to
18 repeat arguments you might have raised in a
19 presentencing memo or raised earlier in the
20 proceeding.

21 I just think you have to apprise the
22 court at some point that the sentence that's
23 imposed is outside the range of permissible
24 sentences it could impose and explain why and
25 explain --

1 JUSTICE KAVANAUGH: Do you think
2 there's a lot of daylight between your position
3 and what the government has been saying?

4 MR. ALLEN: The only daylight I see is
5 in the first part of my rule. Remember, my rule
6 has two points: One is you have to make the
7 distinct legal argument that an imposed sentence
8 is beyond the range of permissible choice; and
9 then two is you have to state the facts and
10 circumstances.

11 The government agrees with part 2. So
12 really all it is, I think, is my requirement to
13 require some more specificity that, hey, I'm
14 raising the grounds for a substantive
15 reasonableness argument as opposed to just
16 simply asking for a shorter sentence.

17 JUSTICE KAGAN: So if --

18 JUSTICE KAVANAUGH: And you --

19 JUSTICE KAGAN: Please.

20 JUSTICE KAVANAUGH: Go ahead.

21 JUSTICE KAGAN: No, go ahead.

22 JUSTICE KAVANAUGH: Go ahead.

23 JUSTICE KAGAN: This outside the
24 range, where -- where do you think that that
25 comes from? Because it seems to me that that

1 comes from the reasonableness, the substantive
2 reasonableness standard, which is an appellate
3 standard.

4 3553, which is the statute that's
5 directed to the trial judge, doesn't talk about
6 ranges. To the contrary, it talks about, you
7 know, there's a particular point.

8 And, of course, your particular point,
9 your particular sentence might be different from
10 somebody else's particular point and particular
11 sentence and the appellate court can say, you
12 know, both of those are within the range of
13 reasonableness.

14 But the range seems a task for the
15 appellate court and not for the district court.

16 MR. ALLEN: Well, so the way I read
17 this Court's decisions in Rita, Booker, and
18 Gall, that they all emphasize the extraordinary
19 amount of discretion that courts of -- that
20 district courts have in sentencing.

21 And I guess, Justice Kagan, I have
22 trouble envisioning, kind of imagining what that
23 discretion is if it's not discretion to pick
24 amongst a number of sentence all -- sentences,
25 all of which are sufficient but not greater than

1 necessary to serve the sentencing purposes.

2 I think those decisions seem to
3 recognize that you could have the same defendant
4 convicted of the same crime presented to three
5 different district court judges, all of whom --

6 JUSTICE KAGAN: Let me give --

7 MR. ALLEN: -- have different
8 sentences.

9 JUSTICE KAGAN: -- you an example from
10 a different context, and it's much like the one
11 that Ms. Turner gave. I mean, suppose we had
12 some decision which is subject to an abuse of
13 discretion standard.

14 What we wouldn't want to have happen
15 is for the trial court to be making that
16 decision and saying, I -- this is -- is this an
17 abuse of discretion? No, we would want the
18 trial court to be making the best decision that
19 the court can make and then leave it to the
20 appellate court to make -- to apply the abuse of
21 discretion standard.

22 And so too here, why isn't the
23 directive to the trial court to say: Pick the
24 sentence that's the appropriate -- the single
25 appropriate sentence you think under 3553, and

1 then it's for the appellate court to say whether
2 that falls within the range of reasonableness?

3 MR. ALLEN: So I -- I -- I want to be
4 very clear. I do think it's still the district
5 court's job to pick the sentence that's
6 sufficient but not greater than necessary. And
7 I -- I don't think courts should be thinking
8 about this in terms of what's reasonable or
9 abuse of discretion.

10 But I do think that -- that we still
11 want to require parties to speak up and object
12 if they believe that -- that the sentence the
13 district court has imposed is not just one that
14 they disagree with but one that has given rise
15 to a new argument that they're going to make on
16 appeal, which is that, Your Honor, the sentence
17 is not just one that I think is an exercise of
18 discretion that I disagree with; it's one that's
19 outside the range of discretion that I think
20 this Court has in the -- in the first instance.

21 JUSTICE KAGAN: But there are many
22 examples where that might occur, you know, you
23 ask the trial court to do something, it says no.
24 And then, in all these non-sentencing contexts,
25 do you have to say, you know, Your Honor, not

1 only is that not what I asked you to do, but
2 it's also an abuse of discretion?

3 MR. ALLEN: The short answer is no, I
4 don't think so in those other contexts. The
5 longer answer is I do think there are some
6 contexts in which we do require something
7 similar to what I'm asking for here. Jury
8 instructions is probably the best example,
9 because district court judges do have discretion
10 in how they shape jury instructions, and Rule 30
11 does require that if you think the district
12 court has kind of gone outside the bounds of
13 what it can do in the jury instruction context,
14 you do have to apprise the court of that.

15 I think sentencing should be a -- a
16 context in which we require something similar to
17 that because of the parsimony principle in
18 3553(a), because of the -- the significance --
19 the -- the -- you know, the significant guided
20 nature of the court's discretion and the
21 obligation -- special obligation the court has
22 to explain its sentencing -- sentence under
23 3553(c).

24 So the short answer is I would not
25 require the same requirement in those other

1 contexts. The reason we would -- I think we
2 should require it here is sentencing --
3 sentencing is meaningfully different.

4 JUSTICE KAVANAUGH: Even -- under the
5 Fifth Circuit's rule, even if you don't object,
6 it's going to be reviewed for plain error on
7 appeal. And I'll ask the same question I asked
8 Ms. Ratner, which is, can you imagine a sentence
9 that's substantively unreasonable but not plain
10 error? Because usually when judges find --
11 appellate judges find it's substantively
12 unreasonable, they're saying, wow, the district
13 judge really jumped the rails there.

14 MR. ALLEN: Yeah.

15 JUSTICE KAVANAUGH: And that sounds --
16 and that's the common reaction that -- to a
17 sentence that is found substantively
18 unreasonable, and that sounds like plain error.

19 MR. ALLEN: I agree with Ms. Ratner on
20 this. I -- I -- I think there is some daylight
21 between plain error and abuse of discretion,
22 probably not much. I do think many sentences
23 that are deemed substantively unreasonable will
24 like satisfy plain error review. But I don't
25 think the --

1 JUSTICE KAVANAUGH: It's exceedingly
2 rare for an appellate court to find a sentence
3 substantively unreasonable.

4 MR. ALLEN: It's exceedingly rare.
5 Yes, Justice Kavanaugh. But I don't think
6 that's an issue this Court should prejudge
7 because plain error review, as this Court has
8 said, is a very fact-intensive case-by-case
9 determination, and so I don't think the Court
10 should just say, well, every substantively
11 unreasonable sentence will be plain error. It
12 might well turn out to be the case --

13 JUSTICE KAVANAUGH: Yeah.

14 MR. ALLEN: -- but I don't think the
15 Court should prejudge that.

16 CHIEF JUSTICE ROBERTS: And by
17 substantively unreasonable, you mean nothing
18 more than an erroneous application of the 3553
19 standards, right?

20 MR. ALLEN: Well, correct, Mr. Chief
21 Justice, although it would have to be so
22 erroneous that it falls outside the range of
23 substantial discretion that we understand
24 district courts to have at sentencing. So it's
25 not just it's wrong.

1 JUSTICE KAVANAUGH: And the way
2 it's --

3 MR. ALLEN: It's very wrong.

4 JUSTICE KAVANAUGH: The way it's
5 articulated in many of the appellate courts is
6 very deferentially articulated.

7 MR. ALLEN: That's correct, Justice
8 Kavanaugh.

9 There's one question you asked that --
10 that I did want to address. You asked the
11 government of -- what would happen in a
12 situation where we -- you have some preserved
13 arguments and some unpreserved arguments and
14 some of which are subject to explain error and
15 some of which subject to harmless error review,
16 for example.

17 That does come up in other
18 circumstances. We were looking into this. It
19 -- it comes up in cumulative error circumstance
20 where parties are arguing cumulative error,
21 there were a number of errors below, some of
22 which preserved, some of which were not. It can
23 come up in the ineffective assistance of counsel
24 area, where you argued that counsel was
25 ineffective for some reasons but not others.

1 The short answer is it's -- it can be
2 difficult, but courts of appeals have found ways
3 to deal with it. And the way they do it is
4 typically what Ms. Ratner said, they start by
5 looking at the preserved errors, sort through
6 those to see whether there's any grounds to
7 reverse on that, and then go to the -- to the
8 unpreserved errors.

9 But I guess the point I would make is
10 courts of appeals have found a way to deal with
11 it. They haven't just said, oh, just because --
12 you know, because we have this problem, we're
13 just going to assume everything is preserved and
14 -- and go on to -- to consider it.

15 A couple more points, Mr. Chief
16 Justice. One thing this Court had said in Gall
17 I think is helpful in thinking about this. This
18 Court said in Gall that if a district court
19 judge determines that an outside guideline
20 sentence is warranted, he must "consider the
21 extent of the deviation and ensure that the
22 justification is sufficiently compelling to
23 support the degree of the variance."

24 Well, I think, in most cases, you
25 won't know whether the district court's

1 justification is sufficiently compelling until
2 you hear the court's sentence and the reasons
3 for it. It's only then whether you can assess
4 whether the justifications are sufficient to
5 support the unusually harsh or unusually lenient
6 sentence.

7 And if it's not, I -- I think it's
8 reasonable, I think, to require a party to
9 object and explain to the court why that's true.
10 And I think that's something that Rule 51
11 reasonably requires in -- in asking parties to
12 preserve their grounds for the argument.

13 If there are no further questions, let
14 me leave the Court with one final thought in
15 thinking about this case. I think it's
16 beneficial to consider not the run-of-the-mill
17 sentencing case but the sentencing proceeding in
18 which a -- a substantive reasonableness argument
19 is likely to have the most viability.

20 And that's when an imposed sentence
21 differs dramatically from the guidelines range
22 and likely the sentence that the parties have
23 been advocating before it. In that
24 circumstance, I think it's important to craft a
25 rule that asks the parties to engage with the

1 district court about the sentence it imposed and
2 the reasons that it gave for doing so.
3 Otherwise, courts of appeals will have to
4 address that -- that -- address those issues in
5 the first instance.

6 The better rule, I think, is if a
7 party believes that an imposed sentence is so
8 excessive that it's beyond the range of choice
9 that 3553(a) allows, they should make that
10 specific argument to the district court and
11 identify the facts and circumstances supporting
12 it.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Two minutes, Ms. Ratner. I'm sorry,
16 Ms. Turner.

17 REBUTTAL ARGUMENT OF KENDALL TURNER
18 ON BEHALF OF THE PETITIONER

19 MS. TURNER: Thank you, Mr. Chief
20 Justice.

21 The amicus's test is trying to fix a
22 problem that does not exist. Nine courts of
23 appeals show that the Fifth Circuit's rule is
24 not necessary to the effective functioning of
25 courts. Not only is it not necessary to the

1 effective functioning of courts, it is
2 inconsistent with Rule 51 in two ways.

3 First is insofar as it requires a
4 post-sentencing objection that is inconsistent
5 with both part (a) and part (b) of the rule,
6 which express -- part (b) expressly makes clear
7 that exceptions are not required.

8 Second, to frame the argument in terms
9 of substantive reasonableness or the other
10 articulations that my friend used, outside the
11 range of reasonableness, abuse of discretion,
12 that's just the appellate standard of review.
13 And there is no need to frame objections in
14 district court in terms -- in those terms.

15 And, second, Rule 51 just says that
16 parties are required to tell the court what
17 action the party wants the court to take.

18 This facts-and-circumstances argument
19 is, as Justice Kagan remarked, outside the
20 question presented. But just to briefly say a
21 few things, all we are asking this Court to do
22 is to leave it to -- to lower courts to apply
23 the same fair notice standard that they apply in
24 other contexts in this context, and the grounds
25 language that my friend is relying on is not

1 found anywhere in Rule 51. It is only --

2 JUSTICE SOTOMAYOR: Where do you
3 disagree with the government? Where do you
4 disagree with the government?

5 MS. TURNER: The -- well, I think the
6 government's position and our position is -- are
7 very close. I think --

8 JUSTICE SOTOMAYOR: Where is the
9 window where it's not?

10 MS. TURNER: Where we might disagree
11 is about where arguments are preserved, when a
12 district court has fair notice. I think we both
13 agree that the fair notice standard applies, but
14 we might find more arguments -- that the
15 district court had more -- had fair notice of
16 more arguments than the -- than the government
17 is willing to concede.

18 So, for example, here, I think they --
19 they are not -- don't expressly address the
20 public dangerousness argument that we raised
21 below. But that's an area where we disagree.

22 But, as I was saying, in Rule 46,
23 there is this grounds language. It is not
24 present in Rule 51, and Rule 51 postdates Rule
25 46. So the rule enactors clearly knew how to

1 require that if they wanted to. But even if you
2 think there is some sort of grounds requirement
3 in Rule 51 that's sort of implied, all that
4 means is that the party needs to preserve the
5 legal grounds on which they are relying. It
6 does not mean they have to preserve every fact
7 and circumstance.

8 Finally, as I mentioned earlier in
9 response to Justice Sotomayor's questions, this
10 facts-and-circumstances test would mire the
11 courts in very fact-bound disputes.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Allen, this Court appointed you to
16 brief and argue this case as an amicus curiae in
17 support of the judgment below. You have ably
18 discharged that responsibility, for which we are
19 grateful.

20 The case is submitted.

21 (Whereupon, at 12:00 p.m., the case
22 was submitted.)

23

24

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