IN THE SUPREME COURT OF THE UNITED STATES

DOROTEO ZAMBRANO-RUIZ,

PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the Court address the division of circuit authority over the Court's application of plain-error review in *Molina-Martinez v. United States* when confronted with a silent record on a plain, Guidelines error?

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Petitioner, Doroteo Zambrano-Ruiz, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed the sentence for violation of 8 U.S.C. § 1326. *See* Appendix A (*United States v. Zambrano-Ruiz,* 768 F. App'x 615 (9th Cir. 2019)).

JURISDICTION

On April 11, 2019, the Ninth Circuit affirmed the sentence. *See* Appendix A. The Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS[1]

18 U.S.C. § 3553
Fed. R. Crim. P. 52
U.S.S.G. § 5D1.1

STATEMENT OF THE CASE

A. Introduction

This Petition concerns the operation of plain-error review in applying the U.S. Sentencing Guidelines, an issue the Court recently addressed in *Molina-Martinez v. United States,* 136 S. Ct. 1338 (2016); subsequently extended in *Rosales-Mireles v. United States,* 138 S. Ct. 1897 (2018); and followed that rationale in *Hughes v. United States,* 138 S. Ct. 1765 (2018). Those cases highlight the continuing importance of a proper consideration of the Guidelines as the "starting point" and "lodestar" "for most federal sentencing proceedings," *Molina-Martinez*, 136 S. Ct. at 1346, "even in an advisory capacity." *Rosales-Mireles*, 138 S. Ct. at 1904.

Their crucial role gives misapplication of the Guidelines a unique status regarding the operation of plain-error review. Resolving circuit divergences, the Court found in *Molina-Martinez* that error in applying the Guidelines will, "[a]bsent unusual circumstances," satisfy the third, prejudice prong of the plain-error test in *United States v. Olano*, 507 U.S. 725 (1993). 136 S. Ct. at 1347. Then, in *Rosales-Mireles*, 138 S. Ct. at 1909, the Court built on the reasoning in *Molina-Martinez* to hold that prejudicial, Guideline error "is precisely the type of error that ordinarily

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[1] The text of these provisions is laid out in Appendix B, pursuant to Sup. Ct. R. 14.1(f).

warrants relief under [Fed. R. Crim. P.] 52(b)," 138 S. Ct. at 1907, and so will "seriously affect the fairness, integrity, and public reputation of judicial proceedings," meeting the fourth prong of plain error as well. *Id.* at 1911. This centrality of the Guidelines as the benchmark for sentencing informed the decision in *Hughes*, holding that even a stipulated-sentence plea under Rule 11(c)(1)(C) looked to the Guidelines sufficiently to be "based on" them for purposes of a retroactive sentence reduction. *See* 138 S. Ct. at 1775-77 (citing *Molina-Martinez*).

But despite the absence of any "unusual circumstances" here, the Ninth Circuit defied these holdings in finding no prejudicial, Guidelines error. It did so by reconstructing a basis for the upward variance on supervised release from an essentially silent record, a circumstance the Court showed particular concern for. *See Molina-Martinez*, 136 S. Ct. at 1347. In this way, the Ninth Circuit not only defies the holdings of *Molina-Martinez*, but also diverges from the analysis in other courts, like the Fifth Circuit in *United States v. Sanchez-Arvizu*, 893 F.3d 312 (2018) (per curiam). The Ninth Circuit overlooks that it is the *sentencing judge's* articulation of non-Guideline reasoning that matters under *Molina-Martinez*, not *reviewing judges'* post-hoc characterization of the record.

Accordingly, the Ninth Circuit decision creates rifts with the Court's recent treatment of the Guidelines, while diverging from the holdings of a sister circuit. To foreclose further misapplication of this Court's precedents, the Petition should be granted.

B. The District Court Proceedings

Petitioner is a Mexican citizen who came to the United States in his early twenties to work. In the 1990s, he sustained convictions for drug use and for a threat with a firearm, all of which were too old to score criminal history points at the time of sentencing here. He had illegal entry convictions from 1999 and 2002 and a prior illegal re-entry in 2012; the first conviction was too stale to score. For the five years following his removal in 2012, Mr. Zambrano lived with and cared for his parents in Sinaloa, Mexico.

In February 2018, he was apprehended by Border Patrol agents in the United States about six miles from a port of entry. He pled guilty to the charge of illegal re-entry under 8 U.S.C. § 1326.

Probation's presentencing report calculated an offense level that included increases due to a prior immigration felony and removal following a felony with a five-year sentence. It also noted reductions for acceptance of responsibility and Fast Track, yielding a final range of 41 to 51 months, recommending the low end and no supervised release, citing U.S.S.G. § 5D1.1(c).

Mr. Zambrano objected to the inclusion and characterization of certain prior convictions and arrests. In particular, he argued that the conviction used to justify a +10 increase under § 2L1.2(b)(3)(A) had been vacated pursuant to a writ of habeas corpus in 2006. He also denied two reported arrests had occurred. Also, an arrest relating to "explosives" was in fact based on illegal fireworks possession. Accordingly, he calculated a Total Offense Level of 10 in Criminal History Category III. After the

Fast Track reduction, the range was 6 to 12 months, and he recommended the low end, with no supervised release in accordance with § 5D1.1(c).

The Government's sentencing chart made the same calculations, but recommended the high end. Without any calculation or explanation of the choice, it called for one year of supervised release.

At the sentencing hearing, the district court sustained all the objections relating to the prior convictions. Defense counsel then argued that Mr. Zambrano's record was therefore not as serious as appeared at first glance, given the correct criminal history score was lower and the actual nature of the offenses more mitigated than their labels portend.

But the district court was more concerned with the reduction for Fast Track under § 5K3.1. It stated, "I'm not necessarily on board with the fast track at all. I mean, this is the fourth felony conviction and he'd been a beneficiary before. I don't know how many times he's been deported. The probation indicates three."

Counsel insisted Mr. Zambrano's immediate return following his release and removal in 2011 was a natural reaction for someone who had been incarcerated and away from Mexico for a decade and separated from his family in the United States. But the court insisted, "Whatever his reasons are, they're not good reasons." Counsel noted that Mr. Zambrano had also remained in Mexico for five years following his 2012 removal, until family-support obligations pressured him to seek a better income than he could earn in Sinaloa.

But the court rejoined that "he had no right to come back in anymore" and

"whatever his motivations were this time, you know, whatever his aspirations were, they don't really count that much." Counsel argued that Mr. Zambrano's acknowledgement of his lack of entitlement to return lay behind his decision to "resolve[ ] this case so quickly. He pled. I talked to him about, I thought there were potential issues with the deport, I wanted to fight it and he said, no. I did this, I admit it." He therefore desired to "resolve it as quickly as possible."

Although the court acknowledged his staying in Mexico for five years reflected favorably, it was still "frustrated," because, despite serving custody, "you keep coming back. You can't come here anymore, it's as simple as that."

The court then calculated the custodial Guidelines, without Fast Track, at 10 to 16 months. Noting the Guidelines for re-entry had changed, it intended to impose a within-range sentence and "not to vary, either up or down." It imposed the high end of 16 months.

Then, without calculating the Guideline range for the offense or further explanation, it stated it "finds supervised release in Mr. Zambrano's case will be a deterrent to him returning," imposing the statutory maximum of three years.

C. The Appellate Decision

On appeal, Mr. Zambrano argued, *inter alia*, that the district court had erred in imposing supervised release, as it failed to justify a three-year, upward variance over the recommendation under § 5D1.1(c). He argued the judge did not make the required finding that an "added measure of deterrence" was needed "on the facts and

circumstances of [the] particular case." § 5D1.1 cmt. n.5. Nor did he justify the extent of the variance, which went up from the advisory zero months to the statutory maximum term for this offense.

The panel applied the plain-error standard, holding,

> the district court's explanation for a three-year term of supervised release was adequate because it specifically found that imposing such a term "w[ould] be a deterrent to [Ruiz's] returning." Throughout the sentencing hearing, the court repeatedly vocalized its concerns about Ruiz's recidivism and problematic immigration history. Therefore, Ruiz's supervised release term was lawful.

Zambrano-Ruiz, 768 F. App'x at 617 (citing *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) ("[A]dequate explanation in some cases may ... be inferred from the PSR or the record as a whole.")).

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO RESTORE CIRCUIT CONSISTENCY ON THE APPLICATION OF PLAIN-ERROR REVIEW AS SET OUT IN *MOLINA-MARTINEZ*

The principal reasons the Court should grant this Petition are that the Ninth Circuit's holding conflicts with the protocols for plain error in Guideline application articulated in *Molina-Martinez*, with the Court's rationales there and in subsequent cases, and with the application of those principles in a sister circuit.

The Court has recently clarified how plain-error review operates in the context of a misapplication of the U.S. Sentencing Guidelines. *Molina-Martinez* held that in "most instances," "[a]bsent unusual circumstances," plain error in applying the Guidelines resulting in a higher sentence "will suffice to show an effect on a

defendant's substantial rights." 136 S. Ct. at 1347. Consequently, defendants "should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Id.* at 1346. In the typical case, then, misapplication of the Guidelines will satisfy the third prong of *Olano*. Here, the judge's failure to comply with § 5D1.1(c) resulted in a greatly increased supervisory sentence, making this the precise sort of error *Molina-Martinez* states satisfies prong three.

The Ninth Circuit analyzed Mr. Zambrano's case under the plain-error standard. *See* 768 F. App'x at 617. But it held the record discussion sufficed to show adequate explanation for deviating from the Guideline recommendation of zero months of supervised release for deportable aliens like Mr. Zambrano. *See id.* Citing the district court's discussion of deterrence as to the *custodial sentence*, the memorandum maintains "that [Mr. Zambrano's] supervised release term was lawful." *Id.* However, at the time of imposing the statutory maximum (a three-year, upward variance from the Guideline recommendation), the district court said only it "will be a deterrent," not the finding required under § 5D1.1 cmt. n.5 that "an added measure of deterrence and protection" was necessary, above and beyond the deterrence and protection accorded by the custodial sentence and the threat of a new illegal re-entry prosecution upon return. The court's statement was deficient to satisfy the parameters of § 5D1.1 or to justify the extent of the variance under *Gall v. United States,* 552 U.S. 38, 50 (2007).

The Ninth Circuit's treatment of a virtually silent record on imposition of supervised release is contrary to *Molina-Martinez* and Fifth Circuit precedent on when record evidence can provide the "unusual circumstances" overcoming a typically prejudicial error. Review is warranted to stem a divergence from the *Molina-Martinez* line of cases, whose holdings affect the scope of the "lodestar" of federal, criminal sentencing procedure. 136 S. Ct. at 1346.

A. In *Molina-Martinez* and Subsequent Decisions, the Court Has Clarified the Keystone Role of the Guidelines, Which Significantly Affects the Operation of the Plain-Error Standard Applied to Federal Sentencing

Molina-Martinez concerned review of an unnoticed, Guideline error that resulted in a higher sentence than the advisory recommendation. Addressing a divergence in the circuits how such error is analyzed, the Court first stressed that case law reiterates "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." 136 S. Ct. at 1346. Their crucial status affects how one applies the plain-error analysis under Fed. R. Crim. P. 52(b). *See id.* Once the first two prongs of *Olano* (error which is plain) are met, the nature of a Guideline error impacts the third prong on effects to substantial rights. *See* 507 U.S. at 734. Thus, "when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Molina-Martinez,* 136 S. Ct. at 1346. So, "[i]n most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect,

higher Guidelines range has demonstrated a reasonable probability of a different outcome. And, again in most cases, that will suffice for relief if the other requirements of Rule 52(b) are met." *Id.*

This accords with consistent, post-*Booker*[2] treatment of the Guidelines. The Court first described the continued primacy of the now-advisory Guidelines in *Rita v. United States,* 551 U.S. 338 (2007), which held that an appellate court may presume a within-Guideline sentence is reasonable, because of the institutional position of the Guidelines and the empirical work of the Sentencing Commission. *See id.* at 347-51. Because the Guidelines endeavor to embody the statutory, sentencing goals the process will "normally begin" with the proposed Guideline calculations. *Id.* at 351.

Subsequently, in *Gall,* the Court interpreted *Rita* to say that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," as "the Guidelines should be the starting point and the initial benchmark." 552 U.S. at 49; *see also Kimbrough v. United States,* 552 U.S. 85, 108 (2007) ("As explained in *Rita* and *Gall*, district courts **must** treat the Guidelines as the 'starting point and the initial benchmark' ") (emphasis added). Courts must *start* with a proper calculation, because it is to be used throughout as the "benchmark" for gauging the proposed sentence. "The fact that [18 U.S.C.] § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them

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[2] *United States v. Booker*, 543 U.S. 220 (2005).

throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. In other words, the Guideline policies must be continuously consulted as the touchstone for reasonableness. *See Peugh v. United States,* 569 U.S. 530, 541-42 (2013).

Molina-Martinez directly builds on this foundation by treating plain, Guidelines error as inherently prejudicial in the typical case, precisely because of the central role they play: "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez,* 136 S. Ct. at 1346. The crucial function of the Guidelines is what makes the error prejudicial in the usual case: "The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious." *Id.* at 1345.

Subsequently, *Rosales-Mireles* confirmed this central role of correct Guidelines application by extending the *Molina-Martinez* reasoning from the third prong of plain error to the fourth prong in most instances. The Court recognized that Guidelines error will usually satisfy the fourth prong of plain error (seriously impairs the fairness, integrity, or reputation of the process), because, again, the pivotal position of the Guidelines makes such error likely to have influenced the result, even when in an advisory role. *See* 138 S. Ct. at 1909. Thus, "Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as 'a meaningful benchmark' in the initial determination of a sentence and 'through the process of appellate review.' " *Id.* at 1904 (quoting *Peugh,* 569 U.S. at 541).

Rosales-Mireles held the risk of error resulting in excessive incarceration suffices to render Guidelines error generally a matter impugning the fairness and

integrity of the sentencing process. *See id.* at 1908 ("The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error."). Thus, supporting this view of plain error are the facts that (1) sentencing errors require less institutional effort to correct (*see id.*—"resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does"), and (2) leaving Guidelines error uncorrected creates inaccurate feedback to the Sentencing Commission's review and amendment process, as well as impairing effective functioning of the Bureau of Prisons. *See id.* & n.2 ("To realize those goals, it is important that sentencing proceedings actually reflect the nature of the offense and criminal history of the defendant, because the United States Sentencing Commission relies on data developed during sentencing proceedings, including information in the presentence investigation report, to determine whether revisions to the Guidelines are necessary. When sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined.") (citation omitted).

Finally, the Court recently applied the rationale of *Molina-Martinez* in *Hughes* to hold that, even in a stipulated-sentence plea under Fed. R. Crim. P. 11(c)(1)(C), the role of the Guidelines in determining and evaluating such a plea sufficed to hold that the sentence was "based on" the Guidelines in a way that made it eligible for a retroactive sentence reduction under § 3582(c)(2) and U.S.S.G. § 1B1.10. *See* 138 S.

Ct. at 1775 (quoting *Molina-Martinez*, 136 S. Ct. at 1345 that "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.").

The *Molina-Martinez* line of cases confirms the keystone role served by consideration of the Guidelines in all federal sentencing. The proper implementation of that reasoning is an important question of law affecting thousands of cases nationwide every year. The Ninth Circuit's deviation from that reasoning therefore raises a "compelling reason" to grant review. Sup. Ct. R. 10.

B. The Ninth Circuit Approach Diverges from Both *Molina-Martinez* and Fifth Circuit Authority

It is clear from the Court's recent decisions that misapplication of the Guidelines is grave error and so "most often … sufficient" to satisfy both the third and fourth prongs of *Olano. Rosales-Mireles*, 138 S. Ct. at 1907. Although the Ninth Circuit applied the rule of plain error, it failed to follow *Molina-Martinez* under circumstances for which this Court noted particular concern. Because the Ninth Circuit's holding conflicts with the protocols for plain error in Guideline application articulated in *Molina-Martinez* and the application of those principles in a sister circuit, the Court should grant the Petition.

Mr. Zambrano argued on appeal the district court erred to impose the statutory-maximum term of supervised release, contrary to § 5D1.1(c). In § 5D1.1(c), the Sentencing Commission directed that "[t]he court should not ordinarily impose a

term of supervised release" when not statutorily required and the defendant is "a deportable alien who likely will be deported after imprisonment." However, if the court finds a need for "an **added** measure of deterrence" beyond that provided by a subsequent prosecution for illegal re-entry under 8 U.S.C. § 1326, then supervised release may be appropriate. *Id.* cmt. n.5 (emphasis added).

The central rationale behind § 5D1.1(c) is that an alien—typically deported after sustaining a federal, felony conviction—will "ordinarily" be deterred sufficiently (but not greater than necessary—§ 3553(a)) by the threat of a future prosecution for illegal re-entry, if he were to return, facing either a 10- or 20-year statutory maximum. *See* U.S.S.G. app. C amend. 756 reason for amendment (2011). Accordingly, when the district court found its within-Guideline, custodial sentence sufficient to deter, it follows Mr. Zambrano would also be deterred from illegally re-entering, as he would face a 20-year maximum under 8 U.S.C. § 1326(b)(2). The Sentencing Commission states that this is "ordinarily" sufficient and supervised release is "unnecessary." § 5D1.1 cmt. n.5. It is only when the court, "on the facts and circumstances of a particular case" finds a need for "an added measure of deterrence and protection" above these other devices that any supervised release is warranted. *Id.* But it does not state that this would automatically justify imposition of the statutory maximum term of supervision.

The judge below said only that supervised release "will be a deterrent to him returning" when it imposed three years, despite recommendations from the parties and Probation for much less, if any. Naturally, if the threat of custody for violation

deters at all, the court's observation that the threat of an additional three years "will be a deterrent" is tautological. But what the Guideline demands is a finding that "an *added* measure of deterrence" is *necessary* beyond the automatic deterrence and protection from the custody imposed and the threat of another 20 years for an illegal return. *See id.* But the court articulated only that supervision *will* deter, not why it was exceptionally needed in this case, particularly as it had already found a within-Guideline term of custody provided sufficient deterrence against a return. In essence, then, the court was silent why it imposed a functional, three-year, upward variance over the Guideline recommendation of zero months.

The Ninth Circuit did not find a lack of explanation for the variance. Instead, it looked to the court's discussion about the need to deter *as to the custodial sentence* as justifying heightened supervised release: "the district court's explanation for a three-year term of supervised release was adequate because it specifically found that imposing such a term 'w[ould] be a deterrent to [Ruiz's] returning.' Throughout the sentencing hearing, the court repeatedly vocalized its concerns about Ruiz's recidivism and problematic immigration history." *Zambrano-Ruiz*, 768 F. App'x at 617.

But the district court expressly found that a *within-Guideline* sentence sufficed to satisfy deterrence and protection under 18 U.S.C. § 3553(a)(2)(B) & (C). Even if discussion of the custodial sentence under § 3553(a) transfers unfiltered to the supervisory factors under § 3583(c), it makes no sense that a finding that within-Guideline custody suffices to deter can support a finding that within-Guideline

supervision does not. The Ninth Circuit, instead of properly treating the judge's silence as called for in *Molina-Martinez*, decided to back-fill the record by pressing into service partially inapposite discussion on custody as if it translated directly to supervised release. That is all the more dubious, given the fact that the judge expressly found no reason to vary as to custody, but then did vary as to supervision.

The Ninth Circuit's reasoning is inconsistent with how the Court set out the standards for review in *Molina-Martinez*, treating Guidelines error as prejudicial "absent unusual circumstances" and subject only to exceptions where *the sentencing judge* articulated a proper basis for a non-Guideline sentence.

> There **may be instances** when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist. … The **record in a case may show**, for example, that the **district court thought** the sentence it chose was appropriate irrespective of the Guidelines range. **Judges may find** that some cases merit a **detailed explanation of the reasons** the selected sentence is appropriate. And **that explanation could make** it clear that **the judge** based the sentence he or she selected on factors independent of the Guidelines.

136 S. Ct. at 1346-47 (citations omitted; emphasis added).

The Court's focus on the *judge's* explanation is of particular pertinence to the claims in this case. That is because § 5D1.1 expressly disfavors the pro-forma imposition of supervised release on deportable aliens, unless the court makes a specific and particularized finding that supervised release would provide needed *additional* deterrence. § 5D1.1 cmt. n.5. So, Application Note 5 expressly requires a court consider supervised release only "if *the court determines* it would provide an added measure of deterrence and protection based on the facts and circumstances of

a particular case." *Id.* (emphasis added). However, if the record indicates no consideration of the requirements for justifying a variance under this Court's precedents, like *Gall*, 552 U.S. at 50 ("If [the judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."), the judge's very silence vitiates the exception cited in *Molina-Martinez*—there are no "selected … factors" on the record for the reviewing court to consult.

Here, the record indicates scant consideration of the requirements of § 5D1.1(c). The Probation Officer correctly applied § 5D1.1(c) and declined to recommend any supervised release. The defense likewise cited the Guideline provision as calling for no supervision for Mr. Zambrano. The prosecution's recommendation of one year came without any explanation of how that complied with § 5D1.1(c) or why it chose one year. The judge's comments at sentencing provided no indication of its awareness that any supervision was disfavored under § 5D1.1(c), as it never cited that Guideline. At most, it noted that its supervisory sentence "will be a deterrent." Thus, this case has all the hallmarks of a knee-jerk imposition from force of habit and does not exhibit the minimum of recognition for the presumption against supervised release. Accordingly, the exception to the plain-error treatment in *Molina-Martinez*—a detailed explanation showing intent to deviate from the Guidelines—is glaring in its absence here.

The Ninth Circuit's holding is divergent from *Molina-Martinez*, because the simple fact is, this is a case of an essentially silent record on why supervised release

was imposed and why the statutory maximum was warranted. The district judge said almost nothing pertaining to supervised release, obliging the panel to make the custody discussion serve double duty to provide a basis for heightened deterrence. But *Molina-Martinez* took a particular position on silent records that vitiates the Ninth Circuit's analysis.

Although the Court acknowledged there may be instances where the typical, prejudice presumption may be countered, citing as an example where the district court's "explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines," *Molina-Martinez,* 136 S. Ct. at 1347, "[w]here, however, **the record is silent** as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range **in most instances will suffice** to show an effect on the defendant's substantial rights." *Id.* (emphasis added). And "[a]bsent unusual circumstances, [appellants] will not be required to show more." *Id.*

Though a judge's "detailed explanation" may demonstrate a clear, extra-Guideline orientation to the sentence, here, the record displays a *lack of explanation* pertinent to the supervised-release sentence. Effectively, the panel's analysis requires Mr. Zambrano "show more" (*id.*) and "bar[s him] from relief on appeal simply because" the panel—not the district judge—finds "the sentencing outcome would [not] have been different had the correct range been used." *Id.* at 1346.

As a result, the Ninth Circuit's approach deviates from treatment in other circuits that adhere more faithfully to *Molina-Martinez*. The Fifth Circuit in

Sanchez-Arvizu does just that. There, the sentence for illegal re-entry was challenged on plain error. *See* 893 F.3d at 315. In assessing prejudice on the third prong, *Sanchez-Arvizu* applied the framework of *Molina-Martinez,* noting that the judge erroneously believed that a 16-level enhancement applied to the calculation. *See id.* at 315-16. Under *Molina-Martinez,* such an error itself demonstrated prejudice. *See id.* at 316. While noting the Court's exception for instances where the judge indicates an extra-Guideline orientation, that exception does not apply to a silent record and "[s]uch is the case here." *Id.*

Although the district judge there did discuss the prior conviction underlying the erroneous enhancement and applied the statutory sentencing factors, nothing showed the judge was contemplating going beyond the Guidelines recommendation; indeed, the judge confirmed he was not inclined to vary in either direction. *See id.* at 316-17. Thus, nothing contradicted the *Molina-Martinez* rule for prejudice. *See id.* at 317. The Fifth Circuit went on to apply *Rosales-Mireles* to the fourth prong, rejecting the Government's argument that the defendant's criminal history somehow made the procedural error less injurious to the fairness and integrity of the proceedings. *See id.* at 317-18.

The Fifth Circuit's handling of a silent record accords with *Molina-Martinez,* but not with the Ninth Circuit decision here. Unlike *Sanchez-Arvizu*, the Ninth Circuit did not look to the plainly Guideline-oriented nature of the sentencing judge's analysis. If it was legitimate to piggy-back the supervision ruling on the custodial discussion, the most obvious lesson to draw from the latter is that the district judge

expressly stated that a within-Guideline sentence sufficed. This record is just the antithesis of the exception described in *Molina-Martinez* and *Sanchez-Arvizu*: the judge overtly eschewed an intent to go beyond the Guidelines. As in the Fifth Circuit case, the sentencing discussion here revolved solely around the applicability *vel non* of certain custodial, Guidelines provisions. The judge here meticulously stayed *within* the advisory Guideline range as calculated, once he settled the Guidelines disputes. Likewise, no discussion of the statutory sentencing factors signalled an intent to vary from the Guidelines. Thus, in both cases the judge imposed a within-Guideline, custodial term. But in applying the *Molina-Martinez* treatment of a silent record, *Sanchez-Arvizu* came to one result, and the Ninth Circuit here to the opposite.

The Ninth Circuit's holding is out of synch with this Court's in *Molina-Martinez* on when a silent record avoids plain error. Nothing shows "unusual circumstances" apply here to vitiate the typical result that Guidelines error warrants relief. In light of the continuing, pervasive importance of correct application of the Guidelines highlighted by *Molina-Martinez* and *Rosales-Mireles,* affecting the cornerstone in every federal sentencing proceeding, this issue presents "compelling reasons" for this Court to grant review to address and head off an incipient, circuit-splitting conflict with Court precedent. Sup. Ct. R. 10.

C. Review Is Warranted to Avoid Further Deviation from the Line of Analysis Established in *Molina-Martinez*

The Court should act to forestall further distortion of the *Molina-Martinez* analysis as occurred in Petitioner's case. The Ninth Circuit has departed from the

protocols for analyzing plain error as set out in *Molina-Martinez,* particularly when faced with a silent record regarding the plain error. This divergence also creates conflict with the application of *Molina-Martinez* in a sister circuit. For both reasons, review should be granted on this Petition.

This case is a proper vehicle for review. First, the Question Presented requires only a straightforward analysis. The Ninth Circuit's post-hoc analysis does not comport with *Molina-Martinez,* which looks primarily to "relevant statements of the judge" to show that he or she intended to apply *a non-Guideline sentence*. 136 S. Ct. at 1347. Here, there was no statement by the judge of the sort; rather, nothing in this record shows the *sentencing judge* had any awareness or intent to impose a sentence that "was appropriate irrespective of the Guidelines range," *Molina-Martinez,* 136 S. Ct. at 1346, or "selected [it] on factors independent of the Guidelines." *Id.* at 1347. Everything shows the contrary, so the record on why the court deviated from § 5D1.1(c) as to supervision is void.

Moreover, the error is harmful, since Petitioner remains subject to three years of supervised release, when the Guidelines presume he will get none.

Finally, this question begs resolution, as shown by the fact this is not the first time that misconstrual and misapplication of *Molina-Martinez* has arisen since 2016. A three-judge dissent to denial of rehearing in *United States v. Serrano-Mercado*, 828 F.3d 1, 1-5 (1st Cir. 2016), argued the majority's requirement of "*affirmative* evidence that [the defendant] would have received a more favorable sentence" was inconsistent with *Molina-Martinez*. *Id.* at 1 (Lipez, J., dissenting). The dissent noted *Molina-*

Martinez reduced the need for affirmative evidence of harm on the third prong of plain error in such cases, implicitly abrogating the First Circuit's approach. *See id.* at 2-4.

Serrano-Mercado demonstrates that questions about the scope and applicability of *Molina-Martinez* have arisen from the outset. The First Circuit dissent notes (*id.* at 4) the identity between the legal issue there and the one which *Molina-Martinez* specifically granted certiorari to review: the divergent views whether "the defendant, on appeal, must identify 'additional evidence' to show that use of the incorrect Guidelines range did in fact affect his sentence" versus "a district court's application of an incorrect Guidelines range can itself serve as evidence of an effect on substantial rights." 136 S. Ct. at 1341.

The Court denied review of the panel decision—at a point when *Molina-Martinez* was a very new case. *See Serrano-Mercado v. United States,* 137 S. Ct. 812 (2017). But now, two years hence, the Ninth Circuit has diverged from *Molina-Martinez,* as well as from the Fifth Circuit. A split has emerged. Also, *Serrano-Mercado* concerned an error in the categorical analysis of a predicate conviction that affected both the Guidelines and statutory requirements of the Armed Career Criminal Act. *See Serrano-Mercado*, 828 F.3d at 1-2 (Lipez, J., dissenting). Here, in contrast, the error lies *solely* in the misapplication of a uniquely Guidelines-derived policy against supervised release for deportable aliens. It is therefore a clearer, factual and procedural match to the *Molina-Martinez* holding. *See* Sup. Ct. R. 10(c). And because the record here was as silent as that in the Fifth Circuit's *Sanchez-*

Arvizu (*see* Part B *supra*), this case exhibits a split in authority threatening the uniform application of *Molina-Martinez. See* Sup. Ct. R. 10(a).

Thus, because Petitioner continues to be subject to the offending term of supervised release, the Court's analysis and ruling will matter. The Court's ruling will be fully dispositive of relief in this case. This case is therefore ideally positioned for a focused resolution of the Question Presented, which affects a myriad of criminal cases across the nation.

CONCLUSION

Because "the other requirements of Rule 52(b) are met," *Molina-Martinez,* 136 S. Ct. at 1346, and nothing "unusual" (*id.* at 1347) marks the Guideline error here, the four prongs of *Olano* are satisfied. The Court should grant review to address the Ninth Circuit's divergence from Court precedent and other-circuit applications of that precedent. Sup. Ct. R. 10(a) & (c).

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Respectfully submitted,

s/ James Fife

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