No. _____

In the

Supreme Court of the United States

_____

Hugo Humberto Perez Rangel,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether Guideline error is necessarily harmless if the district court is presented with the Guideline range later vindicated on appeal and disclaims any effect of the Guidelines on the sentence imposed?

PARTIES TO THE PROCEEDING

Petitioner is Hugo Humberto Perez Rangel, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hugo Humberto Perez Rangel seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgement and sentence is attached as Appendix A. The unpublished opinion of the Court of Appeals is reported at *United States v. Perez Rangel*, 810 Fed. Appx. 319 (5th Cir. June 22, 2020)(unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 22, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52 reads as follows:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Section 3553(a) of Title 18 reads as follows:

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Section 3742 of Title 18 provides in relevant part:

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

Article III, Sec. 1 of the United States Constitution reads in relevant part:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Article III, Sec. 2 of the United States Constitution reads in relevant part:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the

United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

A. Introduction

The court below declined to review a substantial claim of Guideline error. *See* [Appendix B, at 2-3]; *United States v. Perez Rangel*, 810 Fed. Appx. 319, 320-321 (5th Cir. Feb. 13, 2020)(unpublished). Following its precedent, the Fifth Circuit held that any error shown would be harmless for the sole reason that the district court disclaimed any influence of the Guidelines on the sentence. *See* [Appendix B, at 2-3]; *Perez Rangel*, 810 Fed. Appx. at 320-321 (citing *United States v. Vega-Garcia*, 893 F.3d 326, 327 (5th Cir. 2018)).

Closer scrutiny of the district court's Guideline disclaimer, however, raises questions about whether the contested Guideline enhancement was genuinely irrelevant to the sentence imposed. The sentence imposed – 54 months -- is a remarkably unlikely result to achieve independent of the Guideline range. Yet it falls within the Guideline range believed applicable by the district court. Indeed, it is explicitly derived from that range. The judge first selected 56 months as "a sentence in the mid guidelines range," and then subtracted two months to account for administrative custody. (Record in the Court of Appeals, at 121).

In at least four other circuits, the district court's disclaimer probably would not be taken at face value. *See United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011); *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir.2013); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015); *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008). The attitude of the Fifth Circuit toward such

Guideline disclaimers seriously jeopardizes the critical role of the Guidelines in standardizing federal sentencing. See *United States v. Gomez-Jimenez*, 750 F.3d 370, 390 (4th Cir. 2014)(Gregory, J., concurring and dissenting). It also reduces the incentive to make objections, and encourages advisory opinions. This Court should grant certiorari.

B. Presentence Litigation

Petitioner pleaded guilty to one count of illegally re-entering the country following removal. *See* (Record in the Court of Appeals, at 35-38). This offense arose from a December 4, 2017, arrest by the Dallas Police Department, and a subsequent encounter with immigration authorities no later than June 4, 2018. *See* (Record in the Court of Appeals, at 135).

After Petitioner's plea, a Presentence Report (PSR) calculated a Guideline range of 33-41 months imprisonment. *See* (Record in the Court of Appeals, at 144). It assessed a four level enhancement under USSG §2L1.2(b)(2) for a 2009 felony evading arrest conviction that Petitioner sustained before his first order of removal. *See* (Record in the Court of Appeals, at 137). It also assessed a separate four-level enhancement under USSG §2L1.2(b)(3)(B) for a subsequent felony DWI conviction. *See* (Record in the Court of Appeals, at 137). That enhancement applies:

> [i]f, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in--
>
> ***
>
> (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels...

USSG §2L1.2(b)(3)(2018).

As respects this DWI conviction and USSG §2L1.2(b)(3), the PSR showed that Petitioner was first ordered removed to Mexico in 2011, but that he sustained this DWI conviction in 2016. *See* (Record in the Court of Appeals, at 135). According to the PSR, he received "ten years imprisonment, suspended for 5 years probation" for this offense. (Record in the Court of Appeals, at 135). He was removed in 2016, before re-entering and suffering revocation of his probated sentence. *See* (Record in the Court of Appeals, at 135). Upon that revocation, he received two years imprisonment. *See* (Record in the Court of Appeals, at 135). In other words, his probation and revocation sentences for this DWI straddled a removal from the country.

The government objected to the PSR on the grounds that Petitioner should have received an eight-level enhancement for his DWI conviction under USSG §2L1.2(b)(3)(B). *See* (Record in the Court of Appeals, at 149-155). The court would ultimately sustain that objection, and that ruling is the basis for this appeal. *See* (Record in the Court of Appeals, at 85-96).

C. The Sentencing Hearing

At sentencing, the defense opposed the additional four levels. Defense counsel contended that the 2016 Guidelines required the sentencing court to disregard certain revocation sentences when determining whether to apply the adjustments in USSG §2L1.2(b)(3). *See* (Record in the Court of Appeals, at 90-94). Specifically, she maintained that revocation sentences were to be disregarded if probation had been imposed prior to a revocation that followed the defendant's removal from the country,

i.e. when probation and revocation straddled a removal. *See* (Record in the Court of Appeals, at 90-94). In support, she introduced as a formal exhibit the Sentencing Commission's Reason for Amendment Commentary to Amendment 809. *See* (Record in the Court of Appeals, at 128-130); USSG Manual, Appx. C, Amdt 809, Reason for Amendment (2018) ("Reason for Amendment 809"), *available at* https://www.ussc.gov/guidelines/amendment/809, *last visited November 16, 2020*. This Commentary, she noted, said that *United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017), required sentencing courts to disregard such straddling revocations when applying USSG §2L1.2(b)(2). *See* (Record in the Court of Appeals, at 92). Further, she noted that the Commission said as to *Franco-Galvan* that its "logic would apply to enhancements under subsection (b)(3)." (Record in the Court of Appeals, at 92). Because the 2016 version of the Guidelines did not apply the eight-level enhancement, she argued that application of the 2018 version, which did apply eight levels, represented an *ex post facto* violation. *See* (Record in the Court of Appeals, at 90-94).

The district court considered the objection at length, but overruled it. *See* (Record in the Court of Appeals, at 85-96). It calculated a Guideline range of 51-63 months imprisonment, and selected 56 months as "a sentence in the mid guidelines range." (Record in the Court of Appeals, at 121). It then reduced that sentence to 54 months to account for administrative custody. *See* (Record in the Court of Appeals, at 121).

The defense renewed several objections to the sentence. *See* (Record in the Court of Appeals, at 123-124). In response, the district court noted the defendant's 6 removals, and said that it "will impose this sentence whether it ruled in favor of the defense as to the 4-level versus 8-level enhancement or ruled against the defense." (Record in the Court of Appeals, at 125).

D. Appellate Proceedings

On appeal, Petitioner maintained that the district court's Guideline determination had contravened the *ex post facto* clause. He again noted the Fifth Circuit's prior holding in *United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017), that sentencing courts applying the 2016 Guidelines should disregard revocation sentences imposed after an intervening removal when calculating the required sentence lengths under USSG §2L1.2(b)(2). And he offered two reasons that *Franco-Galvan* should also apply to the 2016 version of USSG §2L1.2(b)(3).

First, the Commission amended USSG §2L1.2(b)(3) in 2018 to state explicitly that such revocation sentences are counted under both USSG §§2L1.2(b)(2) and (b)(3). *See* USSC App. C, Amendment 809 (Nov. 1, 2018). And it is a basic rule of statutory construction that amendments are presumed to have real and substantial effect. *See Husky Intern. Electronics, Inc. v. Ritz*, __U.S.__, 136 S.Ct. 1581, 1586 (2016)(quoting *United States v. Quality Stores, Inc.*, 572 U.S. 141, 148-149 (2014))(cleaned up); *accord Stone v. INS*, 514 U.S. 386, 397 (1995).

Second, he noted the Commission's statement that the logic of *Franco-Galvan* applies equally to enhancements under Subsection (b)(3) as to those under (b)(2).

Reason for Amendment 809, ¶6. Because Petitioner was found before the effective date of the 2018 Amendment, he contended that the *ex post facto* clause of the federal constitution entitled him to application of the earlier version. *See Peugh v. United States*, 569 U.S. 530 (2013).

Petitioner acknowledged that the district court said the sentence would be the same under different Guidelines. But as the court's selection of sentence was patently influenced by the Guideline it believed applicable, *see* (Record in the Court of Appeals, at 121), he maintained that the government could not show harmlessness. And he pointed out that this showing was required beyond a reasonable doubt, owing to the constitutional nature of the error. *See Chapman v. California*, 386 U.S. 18 (1967).

The court of appeals expressly declined to decide whether the Guidelines had been correctly determined. *See* [Appendix B, at 2-3]; *Perez Rangel*, 810 Fed. Appx. at 320-321. Instead, it affirmed on harmless error grounds, citing *United States v. Vega-Garcia*, 893 F.3d 326, 327 (5th Cir. 2018), for the proposition that an error is harmless if the proponent can "show that the district court considered both [Guidelines] ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way". [Appendix B, at 2]; *Perez Rangel*, 810 Fed. Appx. at 320 (brackets and parentheses in opinion below). Notably, the court applied precisely the same harmlessness test for the instant case, which involved an allegation of harmless error, as it had applied in cases of non-constitutional Guideline error. *See id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The court found both parts of its test – consideration of the range asserted to be correct on appeal, and a statement that the sentence would be the same -- met in the instant case. It commented:

> Considering the issue "in detail", the court first discussed the presentence investigation report's recommendations of a four-level enhancement (because of the ex post facto concern) and range of 33–41 months' imprisonment before concluding the eight-level enhancement applied, yielding a guidelines range of 51–63 months' imprisonment. In any event, after describing Perez' extensive pattern of recidivism and illegal border crossings, it unambiguously explained it would impose the same sentence of 54 months' imprisonment whether a four- or eight-level enhancement applied.

[Appendix B, at 3]; *Perez Rangel*, 810 Fed. Appx. at 320.

REASONS FOR GRANTING THE PETITION

The courts are divided as to the standards for evaluating harmlessness when the district court says that it would have imposed the same sentence irrespective of the Guidelines. The rule applied below undermines the function of the Guidelines in federal sentencing, undermines the incentive to object to Guideline error, and encourages improper advisory opinions.

Although advisory only, *see United States v. Booker*, 543 U.S. 220 (2005), the Guidelines play a central role in federal sentencing. The district court must begin each sentencing determination by correctly calculating them, and mistakes in their application constitute reversible error. *See Gall v. United States*, 552 U.S. 38, 49, 50 (2007). Indeed, this Court presumes that Guideline error affects the sentence imposed. *See Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016).

The Guidelines thus function as a "framework," *Molina-Martinez*, 136 S.Ct. at 1345, an "anchor," *id*. at 1349, a "lodestar, " *id*. at 1346, and a "benchmark and starting point," *Gall*, 552 U.S. at 49, in federal sentencing. That characterization is both doctrinal and empirical. From an empirical standpoint, most sentences fall within the Guidelines, and Guideline errors tend actually to affect the sentence imposed. *See Molina-Martinez*, 136 S.Ct. at 1346. Doctrinally, the central role of the Guidelines manifests in a presumption of reasonableness for within-Guideline sentences, *see Rita v. United States*, 551 U.S. 338, 341 (2007), in the defendant's *ex post facto* rights in the Guideline Manual, *see Peugh v. United States*, 569 U.S. 530 (2013), and in the sentencing court's duty to explain out-of-range sentences, *see Rita*, 551 U.S. at 357. The rule below for evaluating the harmlessness of preserved

Guideline error undermines their special role in federal sentencing. Moreover, it conflicts with the rule of several other courts of appeals.

A. The circuits are divided.

In the court below, Guideline error is necessarily harmless when:

1) the district court considered both ranges (the one now found incorrect and the one vindicated on appeal) and, 2) the court explained that it would give the same sentence under either range. *See United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017); *accord United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012)(citing *United States v. Duhon*, 541 F.3d 391, 396 (5th Cir.2008); *United States v. Bonilla*, 524 F.3d 647, 656 (5th Cir.2008)); *United States v. Rico*, 864 F.3d 381, 386 (5th Cir. 2017); *United States v. Thomas*, 793 Fed. Appx. 346, 346-347 (5th Cir. 2020)(unpublished); [Appendix B, at 2]; *Perez Rangel*, 810 Fed. Appx. at 320.

Significantly, the Fifth Circuit standard does not require any special explanation for a hypothetical variance. Rather, the rule simply requires "consideration" of the vindicated range and a statement that the sentence would have been the same. *See Guzman-Rendon*, 864 F.3d at 411; *Richardson*, 676 F.3d at 511; *Rico*, 864 F.3d at 386; *Thomas*, 793 Fed. Appx. at 346-347; [Appendix B, at 2]; *Perez Rangel*, 810 Fed. Appx. at 320.

To be sure, all other circuits evaluating harm will consider a district court's statements regarding the likely sentence under other Guideline ranges. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009); *United States v. Jass*, 569 F.3d 47 (2d Cir.2009); *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir.2013); *United*

States v. Hargrove, 701 F.3d 156, 161–63 (4th Cir. 2012); *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir.2009); *United States v. Waller*, 689 F.3d 947, 958 (8th Cir.2012); *United States v. Keene,* 470 F.3d 1347, 1349 (11th Cir.2006).

And at least two other courts follow forgiving rules akin to the Fifth Circuit's. The Fourth Circuit will deem Guideline error harmless if the district court says it would have imposed the same sentence, provided the variance is substantively reasonable. *See United States v. Prater*, 801 Fed. Appx 127, 128 (4th Cir. 2020)(unpublished); *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019); *United States v. Gomez-Jimenez*, 750 F.3d 370, 382-83 (4th Cir. 2014); *United States v. Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012). Similarly, the First Circuit will affirm erroneous sentences under an alternative rationale even if the justification is cursory. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009).

But not all circuits will take such statements at face value, provided only that the true range is somehow presented to the district court. Rather, the Third Circuit has repeatedly explained that hypothetical sentences should not be mere "afterthoughts" designed to protect the sentence from appellate review. *See United States v. Smalley*, 517 F.3d 208, 213–16 (3d Cir. 2008); *Zabielski*, 711 F.3d at 389. It has explained:

> [t]hough probative of harmless error, [a statement that the court would have imposed the same sentence] will not always suffice to show that an error in calculating the Guidelines range is harmless; indeed, a district court still must explain its reasons for imposing the sentence under either Guidelines range.

Zabielski, 711 F.3d at 389. This follows from the Circuit's recognition that harmless Guideline error is "the rare case." *Id.* at 387 (citing *United States v. Langford,* 516 F.3d 205, 218 (3rd Cir. 2008)(citing *United States v. Flores,* 454 F.3d 149, 162 (3rd Cir. 2006))). It also recognizes that affirmance of a perfunctory Guideline disclaimer may deprive the defendant of "any meaningful review of the reasonableness of the sentence." *Smalley*, 517 F.3d at 215.

For these reasons, the Third Circuit has vacated and remanded in spite of a district court's Guideline disclaimer where "the alternative sentence is a bare statement devoid of a justification for deviating" above the range. *Smalley*, 517 F.3d at 215. Indeed, it has done so in a case comparable to the one at bar: erroneous application of USSG §2B3.1(b)(2). *See id.*

Likewise, the Tenth Circuit, requires a "cogent explanation" for any claim that very different Guidelines will produce the same sentence, explaining:

> …it is hard for us to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation.

United States v. Peña-Hermosillo, 522 F.3d 1108, 1117 (10th Cir. 2008). In the absence of a thorough explanation for a Guideline disclaimer, that court is "inclined to suspect that the district court did not genuinely consider the correct guidelines calculation in reacting the alternative rationale." *Peña-Hermosillo*, 522 F.3d at 1117. Thus, the Tenth Circuit reversed a Guideline error in spite of a district court's Guideline disclaimer where its "cursory" reasoning made only "vague" reference to the 18 U.S.C. §3553(a) factors. *Id.*

The Second Circuit has affirmatively discouraged district courts from trying to determine the sentence that would have been imposed under hypothetical Guideline ranges. It warned that:

> a district court **generally should not try to answer the hypothetical question** of whether or not it definitely would impose the same sentence on remand if this Court found particular enhancements erroneous.

United States v. Feldman, 647 F.3d 450, 460 (2d Cir. 2011)(emphasis added). That court expressed concern that the purposes of appellate review would be defeated if all criminal sentences could "be exempted from procedural review with the use of a simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Feldman*, 647 F.3d at 460.

The Ninth Circuit has repeatedly issued similar warnings about Guideline disclaimers, namely that a "district judge's 'mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand.'" *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015)(quoting *Acosta–Chavez*, 727 F.3d 903, 910 (9th Cir. 2013)(quoting *United States v. Munoz–Camarena*, 631 F.3d 1028, 1031 (9th Cir.2011))(internal quotations omitted). It has thus twice remanded Guideline errors in spite of such alternative rationale. *See Garcia-Jimenez*, 807 F.3d at 1089–90; *Acosta–Chavez*, 727 F.3d at 910.

Finally, the Seventh and Eighth Circuits have both suggested that not all Guideline disclaimers can be accepted at face value. *See United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009)(affirming after noting that the district court gave "a

detailed explanation of the basis for the parallel result; this was not just a conclusory comment tossed in for good measure."); *United States v. Ortiz*, 636 F.3d 389, 395 (8th Cir. 2011)(affirming and noting that the district court had not merely "pronounced a blanket identical alternative sentence to cover any potential guidelines calculation error asserted on appeal without also basing that sentence on an alternative guidelines calculation.").

Accordingly, the Fifth Circuit's standards for assessing harm in cases of Guideline error cannot be reconciled with those of several other courts of appeals. To accept a Guideline disclaimer, the Fifth Circuit simply requires some evidence that the true range was considered. But other courts either actively discourage such hypothetical sentences, *Feldman*, 647 F.3d at 460, or closely scrutinize their rationale, *see Zabielski*, 711 F.3d at 389; *Peña-Hermosillo*, 522 F.3d at 1117; *Garcia-Jimenez*, 807 F.3d at 1089.

B. The rule applied below presents a serious danger to the sound administration of justice.

As between the approaches discussed above, the more exacting standards of the Second, Third, Ninth, and Tenth Circuits better comport with the purposes of the Sentencing Reform Act, the Guidelines, Federal Rule of Criminal Procedure 52, and the precedent of this Court. The Guidelines seek to promote proportionality uniformity of sentence among similarly situated offenders. *See Rita*, 551 U.S. at 349; *Molina-Martinez*, 136 S.Ct. at 1342. And appellate review of Guideline questions is important to that goal. Review provides public information about the meaning of

Guidelines, resolving ambiguities that might afflict all litigants in the Circuit. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 151 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334 (describing the right to appellate review "essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."). This process also alerts the Sentencing Commission that an Amendment might be necessary. *See Rita*, 551 U.S. at 350; *Braxton v. United States*, 500 U.S. 344, 348 (1991).

The approach of the First, Fourth and Fifth Circuits jeopardizes this important function for appellate review, because it provides a way to avoid meaningful scrutiny of Guideline application questions. Many judges, after all, regard the Guidelines as complicated and cumbersome. *See United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005)(Carnes, J., concurring) ("The *Booker* decision did not free us from the task of applying the Sentencing Guidelines, some provisions of which are mind-numbingly complex and others of which are just mind-numbing."); *Molina-Martinez*, 136 S.Ct at 1342 ("The Guidelines are complex…"). District courts that do not wish to trouble with them, or that do not wish to trouble with them more than once, may be tempted to insulate all sentences from review by issuing a simple Guideline disclaimer. Indeed, distinguished circuit judges have encouraged such disclaimers precisely to avoid the need to avoid frustrating and difficult Guideline adjudications. *See Williams*, 431 F.3d at 773 (Carnes, J., concurring).

Widespread acceptance of Guideline disclaimers also diminish the anchoring force of the Guidelines in federal sentencing. Indeed, a concurring and dissenting

opinion of the Fourth Circuit has argued that this is already the condition of federal sentencing:

> The evolution of our harmless error jurisprudence has reached the point where **any procedural error may be ignored simply because the district court has asked us to ignore it**. In other words, so long as the court announces, without any explanation as to why, that it would impose the same sentence, the court may err with respect to any number of enhancements or calculations. More to the point, a defendant may be forced to suffer the court's errors without a chance at meaningful review**. *Gall* is essentially an academic exercise in this circuit now**, never to be put to practical use if district courts follow our encouragement to announce alternative, variant sentences. If the majority wishes to abdicate its responsibility to meaningfully review sentences for procedural error, the least it can do is acknowledge that **it has placed *Gall* in mothballs, available only to review those sentences where a district court fails to cover its mistakes with a few magic words**.

Gomez-Jimenez, 750 F.3d at 390 (Gregory, J., concurring and dissenting in part)(emphasis added).

Further, the rule applied by the Fifth Circuit tends to discourage objections, undermining the policy of Federal of Criminal Procedure 52. In order to encourage objections, Rule 52 shifts the burden of persuasion on the question of prejudice when an appealing party fails to object to error. *See United States v. Olano*, 507 U.S. 725, 734 (1993). Thus, a sentence's proponent must show that a Guideline error had no effect on the sentence when its opponent has objected. *See Olano*, 507 U.S. at 734. But absent an objection, the appellant must show a reasonable probability that Guideline error affected the sentence. *See id.* This burden-shifting regime, like the rest of the plain error doctrine, tries to make it more difficult to obtain relief in the absence of objection. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

Recognizing that "sentencing judges often say little about the degree to which the Guidelines influenced their determination," however, this Court has permitted defendants appealing on plain error to rely on a presumption of prejudice from Guideline error. *See Molina-Martinez*, 136 S.Ct. at 1347. And a judge that makes no contested Guideline rulings is less likely to protect the sentence from appellate review with a Guideline disclaimer than one who hears an objection. A defendant who expects the judge to insulate a dubious Guideline ruling with an alternative sentence may therefore well conclude that appellate relief is more likely if he or she remains silent. That is particularly the case in the Fifth Circuit, where the mere presentation of an objection constitutes evidence that alternative ranges were considered by the district court. *See Thomas*, 793 Fed. Appx. at 347.

Finally, the practice of pronouncing judgment as to hypothetical circumstances raises serious concerns about advisory opinions. "It is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968)(quoting C. Wright, Federal Courts 34 (1963)). The prohibition on advisory opinions stems from separation of powers concerns and the duty of judicial restraint. *Flast*, 392 U.S. at 96-87. But it also stems from practical concerns:

> recogniz[ing] that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests."

Id. (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

The hypothetical decisions encouraged by the court below squarely implicate these concerns. After the district court has resolved the Guidelines, the parties are likely to frame their arguments about the appropriate sentence using the range stated by the court as a framework, benchmark, or lodestar. Thus, a defendant who believes himself or herself subject to an unacceptably high range may seek to *distinguish* himself or herself from the typical offender in this range. But a defendant who obtains a more favorable Guideline range – the one, by hypothesis, ultimately vindicated on appeal – may instead emphasize the *typicality* of the offense, and the advantages of Guideline sentencing generally.

A district court that issues a "hypothetical sentence" thus does so without the benefit of advocacy from parties who know what the range will actually be, to say nothing of the correct advice of the Sentencing Commission. If this does not implicate the Article III prohibition on advisory opinions, it at least reduces the level of confidence appropriate to hypothetical alternative sentences.

The approach of the First, Fourth, and Fifth Circuits seriously undermines the administration of justice, and ought to be reviewed.

C. The Court should grant certiorari in the present case.

The present case is an appropriate vehicle to address the conflict. Notably, the court below gave no suggestion that the Guidelines were correctly calculated. Rather it declined to reach the question, well illustrating the tendency of the Fifth Circuit's position to reduce appellate guidance about the meaning of the Guidelines. *See* [Appendix B, at 2-3]; *Perez Rangel*, 810 Fed. Appx. at 320-321. More importantly, this

means the sole basis for the decision below is the matter that has divided the courts of appeals.

Further, the opinion gives no indication that an alternative above-range sentence of 54 months would have been adequately justified by the comments of the district court. Rather, it simply accepted the district court's explanation because it was unambiguous, and because it followed consideration of the range pressed on appeal. *See* [Appendix B, at 1-3]; *Perez Rangel*, 810 Fed. Appx. at 320-321.

The district court did explain the features of the case that might have supported an upward variance from a higher range, namely the defendant's repeated re-entries into the country. *See* (Record in the Court of Appeals, at 125). But it could not plausibly explain, and did not try to explain, why these facts would lead it to a sentence of 54 months in particular. *See* (Record in the Court of Appeals, at 125). Nothing about six prior re-entries tends to suggest that number – rather that number manifestly comes from the Guidelines alleged by Petitioner to be in error. The district court explicitly chose a sentence within the middle of the range it believed applicable and then reduced it by two months to account for administrative custody. *See* (Record in the Court of Appeals, at 121).

The government's harmlessness contention becomes even more difficult when the Court recalls that its burden is to show harmlessness beyond a reasonable doubt -- the error in question is a violation of the *ex post facto* clause of the constitution. *See Chapman v. California*, 386 U.S. 18 (1967); [Appendix B, at 2]; *Perez Rangel*, 810 Fed. Appx. at 320. There is, to say the least, reasonable cause to doubt whether a decidedly

"un-round" mid-Guidelines sentence, explicitly chosen as such, would have been exactly the same under a different Guideline range. That the test of the court below found otherwise, and that it is wholly insensitive to radical shifts in the government's burden of persuasion, only further illustrates its flaws.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 18th day of November, 2020.

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