No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID VILLEGAS PEREZNEGRON,
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

In *United States v. Olano*, 507 U.S. 725 (1993), this Court held that an appellate court's discretion to correct unpreserved errors under Federal Rule of Criminal Procedure 52(b) is governed by a four-prong test. If a defendant establishes (1) "error," that is (2) "plain," and that (3) "affect[s] substantial rights," then the court of appeals "should correct" the error if it (4) "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732, 736.

The courts of appeals are split over the standard for satisfying *Olano*'s fourth prong where a defendant has established a plain denial of the right to presentence allocution that affects substantial rights. Seven circuits hold that, absent rare circumstances, such an error ordinarily warrants correction. Two circuits, in contrast, condition relief in this context on the defendant's ability to proffer a hypothetical allocution statement that the court of appeals deems persuasive. Applying that rule in this case, the Fifth Circuit concluded that, despite suffering a plain and prejudicial denial of the right to speak at sentencing, petitioner had proposed an insufficiently persuasive allocution statement on appeal, and so had failed to satisfy *Olano*'s fourth prong.

The question presented is:

Whether the plain and prejudicial denial of the right to allocution is an error that ordinarily warrants correction under the fourth prong of plain-error review, irrespective of the defendant's ability to proffer a persuasive, hypothetical allocution statement on appeal.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. David Villegas Pereznegron*, No. 4:20-cr-71-1, United States District Court for the Southern District of Texas. Judgment entered December 11, 2020.

- *United States v. David Villegas Pereznegron*, No. 20-20644, United States Court of Appeals for the Fifth Circuit. Judgment entered June 9, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Villegas Pereznegron petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-8a) is unreported but available at 2022 WL 2073831.

JURISDICTION

The court of appeals entered judgment on June 9, 2022. Pet. App. 1a. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. Federal Rule of Criminal Procedure 32(i) provides in relevant part:

(i) Sentencing.

* * *

(4) Opportunity to Speak.

(A) By a party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

* * * *

2. Federal Rule of Criminal Procedure 52(b) provides:

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

STATEMENT OF THE CASE

A. Legal background

1. "Before imposing sentence" on a criminal defendant, a federal district court must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii). In *Green v. United States*, 365 U.S. 301 (1961), eight Justices interpreted this rule as codifying the "common-law right," recognized "[a]s early as 1689," of "allocution"—that is, "to speak before imposition of sentence." *Id.* at 304 (plurality); *see Hill v. United States*, 368 U.S. 424, 426 (1962) (noting that "eight members of the [*Green*] Court concurred in th[is] view," leaving "no doubt as to what the rule commands"). The rule "embodies the practice of the English-speaking world for three centuries or more" by affording "every convicted defendant an opportunity to make, in person and not merely through counsel, a statement in his own behalf presenting any information he wishes in mitigation of punishment." *Green*, 365 U.S. at 307, 311 (Black, J., dissenting). And the premise of that "ancient" practice, and the modern rule protecting it, is the recognition that, in terms of potential impact on the judge tasked with passing punishment, there is no substitute for the voice of the person whose liberty is on the line: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green*, 365 U.S. at 304; *accord id*. at 311 (Black, J., dissenting).

2. The question presented in this case concerns the intersection of the defendant's allocution right under Rule 32 and the discretionary authority a separate rule—Federal Rule

of Criminal Procedure 52(b)—bestows upon the courts of appeals to remedy "plain error." Rule 52(b) requires the defendant to establish (1) an "error," that (2) is "plain," and that (3) "affect[s] substantial rights." *United States v. Olano*, 507 U.S. 725, 732 (1993). If those three conditions are met, then the court of appeals "should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (quoting *Olano*, 507 U.S. at 736).

In the sentencing context, Rule 52(b)'s third prong requires the defendant to "show a reasonable probability that, but for the error, the outcome of the proceeding"—i.e., the sentence—"would have been different." *Id.* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82 (2004)). In *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), this Court clarified that where a defendant has made this showing as to sentencing error—there, a miscalculation of the federal Sentencing Guidelines—the "possibility of additional jail time" is the type of circumstance that "warrants serious consideration in [the] determination whether to exercise discretion under Rule 52(b)," *id.* at 1907, and will ordinarily have the requisite effect on the fairness, integrity, or public reputation of judicial proceedings if left uncorrected. *See id.* at 1907-10.

B. Factual and procedural background

1. Petitioner David Villegas Pereznegron is a 52-year-old Mexican citizen who, after residing in Houston, Texas for many years, was removed from the United States for the first and only time in November of 2012. C.A. Record on Appeal (ROA).30-31, 49, 55.

That deportation followed petitioner's first felony—and, at the time, fourth overall—conviction for driving while intoxicated. Pet. App. 2a. In the ensuing years, petitioner got a handle on his "alcoholism problem" and maintained sobriety for several "years." C.A. ROA.77-78. Petitioner also returned to the United States, living in Houston without permission, but also without further incident. C.A. ROA.31, 54, 71. That changed in June of 2019: petitioner relapsed, was charged with and convicted of his second felony DWI offense, and received a three-year sentence. Pet. App. 2a; C.A. ROA.73, 77-78. Federal authorities learned of petitioner's return and charged him with illegally reentering the country in violation of 8 U.S.C. § 1326, and petitioner pleaded guilty to that offense. Pet. App. 2a.

2. Prior to the federal guilty-plea proceeding, anticipating that the district court would opt to proceed immediately to sentencing without the benefit of a presentence report,[1] petitioner's trial counsel filed a sentencing memorandum that included letters from two of petitioner's four daughters and pictures of a house the family had secured for him in Mexico as exhibits. *See* C.A. ROA.74-83. The memorandum referenced the letters as evidence of petitioner's "good character and plan" to "stay in Mexico" and urged the court to consider a sentence below the applicable Sentencing Guidelines range on account of the "17-month period" petitioner had served in state prison prior to being transferred to federal custody that would not be credited toward the reentry sentence. C.A. ROA.74. At the later

[1] The federal rules permit sentencing to go forward in the absence of a presentence investigation and report, provided that the district court "finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record." Fed. R. Crim. P. 32(c)(1)(A)(ii).

guilty-plea hearing, the district court accepted petitioner's plea and, as anticipated, opted to move directly to sentencing. Pet. App. 2a. Despite the absence of a presentence report, the parties agreed, as did the court, that the applicable Guidelines range rested at 46 to 57 months. *Id.*

Having transitioned to the sentencing phase of the hearing, the district court invited the parties to offer their respective thoughts on the appropriate prison term. C.A. ROA.56. The prosecutor highlighted petitioner's history of drinking and driving and urged the court to select a term at "any place within," but not below, the Guidelines range. C.A. ROA.56-57; *see* Pet. App. 2a. Defense counsel responded by acknowledging the "undeniable" alcohol issues before moving on to reprise several topics covered in the memorandum, including petitioner's intent to remain in Mexico, the downward-variance request, and the extent to which the state DWI conviction influenced the Guidelines calculations. C.A. ROA.57-58; *see* Pet. App. 2a.

In response to defense counsel's statements, the district court expressed a number of concerns revolving primarily around petitioner's history of alcohol-influenced driving. Pet. App. 3a-4a, 6a-7a; *see* C.A. ROA.58-61. At the conclusion of these remarks, the district court sentenced petitioner to 48 months' imprisonment, advised him of his appellate rights, and adjourned the hearing. Apart from a handful of targeted questions eliciting short, specific answers,[2] the court did not invite petitioner to say anything on his own behalf, or

[2] *See, e.g.*, C.A. ROA.59 (Q: "Do you have a Texas driver's license?" A: "No, Your Honor.").

communicate that any such option existed, either before or after pronouncing sentence. Pet. App. 2a.

3. a. On appeal, petitioner argued that the district court had failed to afford him the opportunity to allocute before imposing sentence, and that this obvious deviation from Rule 32(i)(4)(A)(ii) warranted correction on plain-error review. Pet. C.A. Br. 11-23.

Consistent with Fifth Circuit precedent, *see infra*, at 12-13, petitioner endeavored to satisfy plain error's fourth prong by describing several things "he would have discussed if allowed to allocute that could have impacted the sentencing decision." Pet. C.A. Br. 17; *see generally id.* at 17-22. Toward that end, petitioner explained that, "[i]f given the opportunity," he "would have attempted to rebut the district court's assumption that his most recent drinking-and-driving incident sprang from disrespect for, or a feeling of entitlement to, support from his family by explaining that, in fact, the incident resulted from a relapse in a decades-long battle with alcoholism." *Id.* at 19. "In a similar vein," petitioner wrote, he "would have taken the opportunity to rebut the district court's accusation that his drinking operated as a license to 'tak[e] advantage' and 'mooch' off of his daughters, explaining that, to the contrary, he was a supportive and loving father who sincerely regretted that his daughters had ever had to support him in his fight against alcoholism." *Id.* And "[f]inally," petitioner offered, "having attempted to dispel the district court's misperceptions of the genesis of his regression to alcohol-influenced driving and his true, reciprocal relationship of love and support with his daughters," he "would have attempted to assure the court of his intent to permanently remain in Mexico upon serving the instant sentence." *Id.* at 20.

As to each of these subjects, petitioner highlighted specific portions of his daughters' letters as corroborating the things he might say. Pet. C.A. Br. at 19-20. Had he been permitted to "elaborate beyond what his daughters and counsel had said and written on his behalf," petitioner contended, that "added information could reasonably have led the district court to reevaluate the key assumptions driving its sentencing decision." *Id.* at 21-22. Although petitioner urged the court of appeals to find reversible plain error under its governing standard, he preserved for this Court's review, and set out in great detail, his foreclosed contention that the Fifth Circuit's standard for exercising Rule 52(b) discretion in the context of allocution error—particularly its demand for a hypothetical allocution statement consisting of information beyond that covered by counsel—is incorrect, and that he would be entitled to relief under the correct standard. *See* Pet. C.A. Br. 23-34.

b. The court of appeals affirmed in a split decision. *See* Pet. App. 1a-8a. The panel agreed that petitioner had been denied the right to presentence allocution, that the error was obvious, and that the error affected substantial rights. Pet. App. 3a ("We need only address prong four because [petitioner]'s claim fails there."); *id.* at 5a (Elrod, J., dissenting) ("All agree that the district court erred, that the error was obvious, and that the obvious error harms [petitioner]'s substantial rights."). The panel majority deemed petitioner's proposed allocution unpersuasive, however, and so declined to correct the plain error under the fourth prong. *See id.* at 3a-4a.

The majority reasoned that petitioner "ha[d] not made the required showing" because "'[m]ost of the arguments [Villegas] claims he would have made were raised either

by'" the "letters" his family submitted "'or defense counsel at the sentencing hearing, and [Villegas] does not provide any new mitigating information in his appellate brief.'" *Id.* at 3a-4a (quoting *United States v. Chavez-Perez*, 844 F.3d 540, 545 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 2215 (2017)) (court of appeals' alterations). "For example," observed the panel majority, the sentencing transcript revealed that the district court "read the [family's] letters" and that "counsel also addressed portions of the letters," but the sentencing judge had "made clear that nothing *in those letters* or the information *from Villegas's family* would change the sentence." *Id.* at 4a (emphasis added). "Under current precedent," the majority thus concluded, petitioner's "claim fail[ed] at prong four." *Id.*

c. Judge Elrod dissented. Pet. App. 5a-8a. Like the majority, Judge Elrod noted petitioner's compliance with the Fifth Circuit's requirement to "offer[] a proposed allocution" statement on appeal. *Id.* at 5a. Unlike the majority, however, she concluded that the information in the proffered allocution "could [have] possibly persuade[d]" the district court "to impose a lower sentence." *Id.* In Judge Elrod's view, the fact that "counsel partially addressed the same issues [petitioner] himself would have addressed," *id.*, and the fact that "the [family's] letters and the proposed allocution contain some overlapping information," were "not fatal to" his plain-error claim. *Id.* at 7a.

"In any event," Judge Elrod admonished, "'[t]he most persuasive counsel'—or family members, I would add—'may not be able to speak for a defendant as the defendant might, with halting eloquence, speak of himself.'" Pet. App. 7a (quoting *Green*, 365 U.S. at 304). The absence of petitioner's voice was particularly troubling here, Judge Elrod

flagged, where the "district court's conjecture about [him] went largely unchecked," and "[w]hat started as a discussion about [petitioner]'s criminal history veered into assumptions about [his] family members, then veered into the psychological impact on [petitioner]'s family caused by his drinking, which veered into calling [petitioner] a 'mooch' for how he treated his family." *Id.* at 6a (quoting C.A. ROA.61). Because she viewed petitioner's proposed allocution as containing information that "'could have provided deeper, more personal insight into the arguments counsel raised and could have more fully addressed the court's concerns about his past,'" *id.* at 8a (quoting *United States v. Aguirre-Romero*, 680 F. App'x 291, 297 (5th Cir. 2017)), Judge Elrod believed that petitioner had done "enough" to satisfy the Fifth Circuit's fourth-prong standard and would have reversed. *Id.*

REASONS FOR GRANTING THE PETITION

I. The question presented is the subject of a mature and acknowledged split among the circuits.

The question whether the plain and prejudicial denial of presentence allocution is the type of error that ordinarily merits an exercise of Rule 52(b) corrective discretion, irrespective of the defendant's ability to proffer a persuasive, hypothetical allocution statement on appeal, is the subject of an acknowledged circuit split. At least seven circuits hold that, absent rare situations, a plain allocution error that affects substantial rights satisfies Rule 52(b)'s discretionary fourth prong in the ordinary case. Three other circuits similarly hold that allocution error is reversible in all but exceptional circumstances, but either have not had occasion to address that rule in the plain-error context, or have deemed it unnecessary to do so. In contrast to all of these courts, two circuits, including the Fifth, hold that, in order to obtain relief from a plain and likely harmful allocution error, the defendant must propose a detailed and persuasive allocution statement in his appellate brief. This Court alone can resolve the conflict. It should do so in petitioner's case.

1. The Fifth and the Eighth Circuits condition plain-error relief from the denial of presentence allocution on the defendant's ability to proffer a hypothetical allocution statement that must (1) contain new information that was neither addressed by counsel nor considered by the district court though other sources at sentencing, and (2) persuade the court of appeals that the district court would be moved to grant a lower sentence.

a. In this case, the Fifth Circuit adhered to its longstanding rule that allocution error, though plain and reasonably likely to have influenced the sentencing decision, will not be deemed to have seriously affected the fairness, integrity, or public reputation of judicial proceedings unless the defendant is able "'to show some objective basis that would have moved the trial court to grant a lower sentence.'" Pet. App. 3a (quoting *United States v. Magwood*, 445 F.3d 826, 830 (5th Cir. 2006)). Grounded in the idea that plain error should be remedied only where necessary to prevent a "miscarriage of justice," *Magwood*, 445 F.3d at 830, this standard requires a defendant to proffer, in his appellate briefing, a proposed statement specifying "what he would have allocuted to that might have mitigated his sentence" had he been afforded the opportunity. *Id*. "[I]f the defendant fails to explain what exactly he or she would have said during allocution that might mitigate the sentence, then the case is one of those 'limited class of cases' in which" the court of appeals "will decline to exercise [its] discretion to correct the error." *United States v. Avila-Cortez*, 582 F.3d 602, 606 (5th Cir. 2009) (quoting *United States v. Reyna*, 358 F.3d 344, 350 (5th Cir. 2004) (en banc)); *see Chavez-Perez*, 844 F.3d at 545 (reaffirming need to proffer proposed allocution); *United States v. Figueroa-Coello*, 920 F.3d 260, 265-66 (5th Cir. 2019) (same); Pet. App. 3a-4a (same).

To persuade the court of appeals that correction is in order, the defendant's hypothetical allocution statement must address and rebut concerns the district court expressed at sentencing, *see Figueroa-Coello*, 920 F.3d at 266 (citing *Chavez-Perez*, 844 F.3d at 545), be consistent with information related in the presentence report, *see id.* at 267, and cite

"specific facts or additional details" beyond those related by counsel below that, in the appellate court's view, "would probably have changed [the district court's] mind." *Id.* at 266. And, as petitioner's case shows, the "'new mitigating information'" included in the proposed allocution, Pet. App. 3a-4a (quoting *Chavez-Perez*, 844 F.3d at 545), must not retread on details placed before the district court through other sources—such as letters submitted by family members on the defendant's behalf. *Id.* at 4a. Unless these prerequisites are met, the Fifth Circuit "will decline to correct the error," *Figueroa-Coello*, 920 F.3d at 265, on the premise that the defendant has "failed to show a 'miscarriage of justice' requiring remand." *Id.* at 266 (quoting *Magwood*, 445 F.3d at 830).

b. One other circuit, the Eighth, has adopted the Fifth Circuit's hypothetical-statement convention. *See United States v. Thurmond*, 914 F.3d 612, 614-15 (8th Cir. 2019); *United States v. Fleetwood*, 794 F.3d 1004, 1007 (8th Cir. 2015).

In *Thurmond*, the Eight Circuit pretermitted the question whether the defendant had been denied allocution on a particular topic in light of its conclusion that, even so, the defendant could not satisfy the criteria for plain-error correction. *See* 914 F.3d at 614. The appellate court emphasized that the defendant "d[id] 'not furnish any information about what he would have allocuted to that might have mitigated his sentence.'" *Id.* at 614-15 (quoting *Magwood*, 445 F.3d at 830). As it would in the Fifth Circuit, the defendant's "failure to state either what would have been said during allocution or how it would have affected the sentence" convinced the court of appeals that he had "not shown there is error that seriously affects the fairness, integrity, or public reputation of judicial proceedings."

Id. at 615. Indeed, the Eighth Circuit bolstered this conclusion by invoking the Fifth Circuit's admonition that if the defendant "fails to explain what exactly he or she would have said during allocution that might mitigate the sentence, then the case is one of those 'limited class of cases' in which we will decline to exercise our discretion to correct the error." *Id.* (quoting *Avila-Cortez*, 582 F.3d at 606); *see also Fleetwood*, 794 F.3d at 1007 (relying on the defendant's failure to offer a proposed allocution on appeal as grounds for declining to exercise plain-error discretion, and citing and quoting *Magwood*, 445 F.3d at 830, as authority).

2. In contrast to the Fifth and Eighth Circuits, the Third, Fourth, Seventh, Ninth, Eleventh, and D.C. Circuits hold that, absent rare circumstances, allocution error that is both plain and prejudicial warrants correction in the ordinary case. *See United States v. Abney*, 957 F.3d 241, 252-54 (D.C. Cir. 2020); *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1141-44 (10th Cir. 2017) (en banc); *United States v. Daniels*, 760 F.3d 920, 926 (9th Cir. 2014); *United States v. Perez*, 661 F.3d 568, 586 (11th Cir. 2011); *United States v. Muhammad*, 478 F.3d 247, 250-51 (4th Cir. 2007); *United States v. Luepke*, 495 F.3d 443, 451-52 (7th Cir. 2007); *United States v. Adams*, 252 F.3d 276, 288-89 (3d Cir. 2001).

a. The Tenth Circuit has provided the most thorough explication of the rule. Notably, several Tenth Circuit panels initially embraced the Fifth Circuit's approach, declining to correct plain allocution errors for want of a compelling proposed allocution on appeal. *See Bustamante-Conchas*, 850 F.3d at 1143 (citing, among other cases, *United States v. Craig*, 794 F.3d 1234, 1239 (10th Cir. 2015); *United States v. Mendoza-Lopez*, 669 F.3d 1148,

1154 (10th Cir. 2012)). In *Bustamante-Conchas*, the Tenth Circuit traced this line of cases to "the Fifth Circuit's" *Magwood* decision, from which "the Fifth Circuit ha[d] developed [its] rule" to that effect. *Bustamante-Conchas*, 850 F.3d at 1143 (citing *Magwood*, 445 F.3d at 830; *United States v. Palacios*, 844 F.3d 527, 532-33 (5th Cir. 2016)). Sitting en banc, the Tenth Circuit took the opportunity to "reject the proposition that a defendant must proffer an allocution statement to obtain relief, and expressly overrule[d]" its "prior cases suggesting that such a proffer is relevant" to plain error's discretionary prong.[3] *Id.* at 1144.

Instead, the en banc court adopted the rule it understood the majority of circuits to embrace: "absent some unusual circumstance," the "complete denial of allocution at a defendant's sentencing hearing will satisfy the fourth prong of the plain-error test." *Id.* at 1142. The Tenth Circuit took care to emphasize that this rule is not a "per se" approach, acknowledging that "there are rare circumstances" in which correction will be inappropriate, such as where a defendant is not wholly denied the chance to allocute, or was afforded the opportunity to fully allocute at a prior hearing before the same judge. *See id*. at 1142-43 (citing examples). Finding no such circumstances present there, the court applied the majority rule and afforded plain-error relief. *Id.* at 1144.

[3] The Tenth Circuit also concluded that such a statement is irrelevant to the third prong's prejudice inquiry, reasoning that "[j]ust as the Guidelines are ordinarily expected to have some impact on a sentence, there is at least a reasonable probability that allocution matters in the usual case," and this "is so even if defendants do not identify the particular statements they wished to make." *Bustamante-Conchas*, 850 F.3d at 1139 (citing *Molina-Martinez v. United States*, 578 U.S. 189, 136 S. Ct. 1338, 1347 (2016)).

The Tenth Circuit also emphasized that the conclusion that plain allocution error ordinarily satisfies the fourth prong does not rest solely on the reasonable likelihood of a lower sentence found under prong three. "Even in instances in which a significantly lesser sentence is unlikely," the court reasoned, correcting the denial of allocution serves "other public values," like giving the defendant an "opportunity to participate in the sentencing process" and providing answers and closure to victims. *Id.* at 1142. Where "a court imprisons a person without hearing the defendant's voice," the Tenth Circuit observed, "the public may question whether that defendant received the individualized assessment of personal characteristics and circumstances that Congress has mandated." *Id.*

b. That result, and the reasoning behind it, accords with the other circuits that likewise deem plain and prejudicial allocution error to merit correction in most cases.

These courts recognize that the right of allocution is both "ancient in origin" and "the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process." *Adams*, 252 F.3d at 288 (3d Cir.); *see Daniels*, 760 F.3d at 926 (9th Cir.) ("The right to allocute, and to be told that allocution is an option, is both important to the person being sentenced and fundamental to our criminal justice system."). That is true, these courts reason, in part due to the fair probability that the defendant's words may change the result. *See Perez*, 661 F.3d at 586 (11th Cir.) ("[F]ailing to give a defendant the opportunity to speak to the court directly when it might affect his sentence is manifestly unjust." (quoted source omitted)); *United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994) (explaining that where "the possibility remains that an exercise of the right of allocution

could have led to a sentence less than that received, we are of the firm opinion that fairness and integrity of the court proceedings would be brought into serious disrepute were we to allow the sentence to stand").

But it is just as true, these courts recognize, because correcting allocution error serves other core values essential to preserving the fairness, integrity, and public-reputation pillars of fourth prong. As the D.C. Circuit has poignantly expressed:

> Even where the judge's sentence remains unaffected, ensuring the defendant's right to make a statement bolsters the integrity of the judicial process by having the judge listen to and thereby openly recognize the defendant as a fellow human being whose liberty is at stake. Allocution disrupts the reality or appearance of 'assembly-line justice,' and thus its denial is no less threatening to the integrity of our judicial system—and, indeed, perhaps more so—when the sentence appears to be a foregone conclusion.

Abney, 957 F.3d at 253 (quoting *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991)); *accord Bustamante-Conchas*, 850 F.3d at 1143. Thus, while these circuits note the possibility that "some rare indication from the face of the record" may suggest that failing to afford Rule 32's allocution right "did not implicate these core values" in a particular case, *Luepke*, 495 F.3d at 452 (7th Cir.), they nevertheless maintain that "there may be few, if any, cases in which" the right's "unremedied denial would not undermine the fairness of the judicial process." *Abney*, 957 F.3d at 254; *see Luepke*, 495 F.3d at 451 (registering "belie[f] that, in the vast majority of cases, the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process").

Of particular relevance to the issue here, several circuits that adhere to the majority rule have, as did the en banc Tenth Circuit, rejected the proposition that it is appropriate

for appellate courts undertaking the plain-error inquiry to "speculate about the persuasive force of a hypothetical allocution." *Bustamante-Conchas*, 850 F.3d at 1139. The Seventh Circuit has emphasized that it will neither "speculat[e] about what the defendant might have said had the [allocution] right been properly afforded him," *Luepke*, 495 F.3d at 451, nor "speculate as to the persuasive[ness]" of "anything [the defendant] may have said" to the district court. *United States v. O'Hallaren*, 505 F.3d 633, 636 (7th Cir. 2007). "Even if [it] were to speculate as to" the defendant's "persuasive abilities," the Seventh Circuit has further noted, it "certainly could not say with any assurance that the denial of his right to allocution did not affect [the] sentence." *O'Hallaren*, 505 F.3d at 636. Similarly, in exercising its corrective discretion in *Daniels*, the Ninth Circuit observed that it "d[id] not know what [the defendant] might have said if the district court offered him a chance to speak before imposing its sentence" but stressed that "whether he would have said something to elicit a lower sentence is of no moment." *Daniels*, 760 F.3d at 926.

3. Three circuits have yet to weigh in on the precise question presented here. The First, Second, and Sixth Circuits, like the seven circuits just discussed, hold that allocution error is reversible in all but exceptional circumstances, but have not directly addressed that rule's application under the rubric of plain error's fourth prong.

The First Circuit has long considered it "settled that a failure to comply with" Rule 32's allocution mandate "ordinarily requires vacation of the sentence imposed without a concomitant inquiry into prejudice," *United States v. De Alba Pagan*, 33 F.3d 125, 130 (1st Cir. 1994), while also allowing that this "is not necessarily so" in all circumstances, such

as "when the sentence is the minimum possible." *Id.* at 130 n.5. It is likewise well established in the Second Circuit that "[r]esentencing is generally required if a court does not comply with the [allocution] requirement[] of Rule 32." *United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996). In reaffirming this rule, the Second Circuit has stressed that "the appropriate response to an omission of presentence allocution implicates due regard for the appearance of fairness." *United States v. Gonzalez*, 529 F.3d 94, 97-98 (2d Cir. 2008).

The Sixth Circuit "review[s] an allegation of the complete denial of a right to allocute de novo," *United States v. Richardson*, 948 F.3d 733, 744 (6th Cir.), *cert. denied*, 141 S. Ct. 344 (2020), "[b]ut when the appellant alleges an improper limitation on his right to allocute—but failed to object below—[it] review[s] for plain error." *Id.* (citing *United States v. Carter*, 355 F.3d 920, 926 n.3 (6th Cir. 2004)). It also applies plain-error review to the unobjected-to denial of presentence allocution in the revocation context. *See United States v. Dowl*, 956 F.3d 904, 906 (6th Cir. 2020). The circuit has not yet opined on the contours of the fourth-prong inquiry in either of the latter contexts. But, as in the First and Second Circuits, the Sixth Circuit's longstanding rule is that the "[d]enial of allocution is reversible error" in most, but not all, cases. *United States v. Carter*, 355 F.3d 920, 926 (6th Cir. 2004). For example, in *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996), the court held, on de novo review, that "[a] trial court's failure to follow Rule 32's [allocution] mandate constitutes reversible error," *id.* at 627, but made clear that the rule was not categorical and that reversal would not be warranted where the defendant received the lowest possible sentence. *See id.*

4. The conflict over the standard for plain-error correction in the allocution context is deeply entrenched and ripe for review.

a. The split over the question presented will not abate without this Court's intervention. The Fifth Circuit first adopted its hypothetical-statement rule more than 16 years ago, and, as this case illustrates, continues to steadfastly apply that outlier approach while expressing no interest in revisiting it. Indeed, the rule is so well entrenched in Fifth Circuit law that the panel majority deemed its application in petitioner's case unworthy of publication, despite Judge Elrod's forceful dissent. The Eighth Circuit has persisted in following the Fifth Circuit's lead.

Meanwhile, although endorsing the hypothetical-statement rule for a time, the Tenth Circuit recently jettisoned that approach sitting en banc, *see Bustamante-Conchas*, 850 F.3d at 1143-44, thereby cementing that court's commitment to the view that has prevailed in the majority of circuits for decades. *See id.* at 1141-42. And the most recent circuit to weigh in, the D.C. Circuit, did so with full knowledge of the conflict. *See Abney*, 957 F.3d at 246-47, 253-54. This disagreement will not resolve itself.

b. The issue has also sufficiently percolated in the lower courts. Nine circuits have specifically addressed the denial of allocution in the context of plain-error review, staking out firm positions. The three circuits that have yet to answer the precise question presented, moreover, operate under well-established precedent that leads to the same result, and rests on largely the same reasoning, as the majority view. There is thus no reason to think that further percolation would sharpen this Court's review.

Allowing the split to persist, on the other hand, will continue to result in real-world harm. As long as the circuits remain divided, more individuals, like petitioner, will face the prospect of serving out their federal sentences without ever getting the opportunity to speak in mitigation to the judges who passed those sentences, based on the fortuity of geography and the happenstance of their appellate counsel's skill at crafting a hypothetical allocution statement that the court of appeals deems sufficiently compelling.

II. The Fifth Circuit's answer to the question presented is wrong.

This case also warrants review because the hypothetical-statement rule followed by the Fifth and Eighth Circuits is incorrect. Where, as here, the complete denial of the defendant's right to presentence allocution is plain and prejudicial, and no countervailing circumstances exist, that error also seriously affects the fairness, integrity, and public reputation of judicial proceedings in the ordinary case. Nothing in the text of Rule 52(b), its rationale, or this Court's precedents supports a requirement that the defendant proffer a specific and persuasive description of what he would have said, if not denied the opportunity to allocute, in order to secure plain-error relief.

1. To start, the Fifth Circuit's formulation of the burden for justifying plain-error relief in the allocution context moves from a premise—that the defendant need "show some objective basis that would have moved the trial court to grant a lower sentence; otherwise, it can hardly be said that a miscarriage of justice has occurred," *Magwood*, 445 F.3d at 830—that this Court rejected as an incorrect interpretation of Rule 52(b) in *United States v. Olano*, 507 U.S. 725 (1993). As the Court observed in *Rosales-Mireles v. United States*,

138 S. Ct. 1897 (2018), "*Olano* rejected a narrower rule" for Rule 52(b)'s fourth, discretionary component "that would have called for relief only 'in those circumstances in which a miscarriage of justice would otherwise result.'" 138 S. Ct. at 1906 (quoting *Olano*, 507 U.S. at 736). Indeed, this Court went on to reject the "shocks the conscience" standard the Fifth Circuit had superimposed on the fourth prong in the context of plain and prejudicial Sentencing Guidelines miscalculations precisely because, "[l]ike the miscarriage-of-justice rule that the Court rejected in *Olano*," that standard was "unduly restrictive." *Id.* As with the erroneous shocks-the-conscious standard, the Fifth Circuit's requirement that a defendant plainly denied allocution must propose a specific and persuasive hypothetical statement on appeal to "show a 'miscarriage of justice' requiring remand," *Figueroa-Coello*, 920 F.3d at 266, "too narrowly confines the extent of a court of appeals' discretion" under Rule 52(b). *Rosales-Mireles*, 138 S. Ct. at 1906.

2. In view of this Court's precedent, the correct understanding of Rule 52(b)'s discretionary prong in this context recognizes that, "absent some unusual circumstance," the "complete denial of allocution at a defendant's sentencing hearing will satisfy the fourth prong of the plain-error test" in the ordinary case. *Bustamante-Conchas*, 850 F.3d at 1142. In adopting this updated formulation of the majority view, the en banc Tenth Circuit effectively presaged this Court's recognition in *Rosales-Mireles* that a "plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b)," 138 S. Ct. at 1907, and applied that reasoning to allocution error. It was correct to do so.

As with plain Guidelines errors, a plain allocution error that affects substantial rights ordinarily merits an exercise of plain-error discretion. In *Rosales-Mireles*, this Court made clear that errors tending to raise a reasonable probability of a longer prison sentence, as in the case of Guidelines miscalculations, *see Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016), necessarily warrant "serious consideration" in determining whether to exercise discretion under Rule 52(b), and will ordinarily undermine the fairness, integrity, and public reputation of judicial proceedings if left uncorrected. *Id.* at 1907. That was "particularly" so "in the context of a plain Guidelines error," this Court stressed, given "the role the district court plays in calculating the range and the relative ease of correcting the error." *Id.* at 1908. Leaving in place an error that is not costly to correct but that could have led to a higher sentence, the Court warned, exacts too great a toll on "the public legitimacy of our justice system" and its reliance on "procedures that are 'neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction.'" *Id.* (quoting Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215-16 (2012)).

Allocution errors share each of these qualities. Their prejudice likewise derives from the reasonable potential for a lower sentence. *See Bustamante-Conchas*, 850 F.3d at 1138-40 (so holding and detailing widespread circuit agreement, as well as citing anecdotal and empirical evidence corroborating, that allocution error's natural tendency to raise a fair prospect of a lesser sentence where possible). They, too, "ultimately result from judicial error." *Rosales-Mireles*, 138 S. Ct. at 1908. Correcting them taxes the same relatively minor

amount of resources—resentencing, after all, "is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Id.* (quoting *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005)). And leaving them unaddressed also "undermines 'the legitimacy of the sentencing process.'" *Bustamante-Conchas*, 850 F.3d at 1142 (quoting *Adams*, 252 F.3d at 288). Absent "countervailing factors," then, plain and prejudicial allocution error likewise "will seriously affect the fairness, integrity, and public reputation of judicial proceedings," and so warrant correction, in "the ordinary case." *Rosales-Mireles*, 138 S. Ct. at 1909, 1911; *accord Abney*, 957 F.3d at 254-55; *Bustamante-Conchas*, 850 F.3d at 1144; *Luepke*, 495 F.3d at 451.

3. This is true, moreover, irrespective of the defendant's ability to proffer additional evidence on appeal in the form of a hypothetical allocution that the court of appeals deems sufficiently mitigating. The Fifth Circuit's contrary standard "is not reflected in Rule 52(b) itself, nor in how this Court has applied the plain-error doctrine." *Rosales-Mireles*, 138 S. Ct. at 1907. And it is wrong.

A defendant's failure to provide a hypothetical statement on appeal—let alone one that complies with all of the conditions the Fifth Circuit demands in order to deem such a statement persuasive enough to merit reversal—is neither relevant to the Rule 52(b) inquiry, nor the kind of countervailing factor that should "satisfy [a] court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction." *Rosales-Mireles*, 138 S. Ct. 1909. A hypothetical allocution proposed on appeal necessarily relies on statements not presented below, and its use on appeal thus transgresses

"the fundamental tenet that appellate courts 'will not consider material outside the record before the district court.'" *Bustamante-Conchas*, 850 F.3d at 1144 (quoted source omitted). Appellate courts should not "speculate as to the persuasive ability of anything [the defendant] may have said in [a] statement to the court" that the defendant was never permitted to make. *O'Hallaren*, 505 F.3d at 636.

Even if inclined to set aside this principle, an appellate court is poorly positioned "to weigh the persuasive value of a proffer[ed]" allocution statement. *Bustamante-Conchas*, 850 F.3d at 1144. Courts have long recognized—as far back as the common law—that "it is not only the content of the defendant's words that can influence a court, but also the way he says them," *United States v. Noel*, 581 F.3d 490, 503 (7th Cir. 2009), and that "much of the value of an allocution statement lies in its ability to convey sincere remorse." *Bustamante-Conchas*, 850 F.3d at 1144; *accord Green*, 365 U.S. at 304. But because "sincerity and credibility are difficult to discern from a cold record," a "written statement presented to an appellate court cannot fulfill this important sentencing function." *Bustamante-Conchas*, 850 F.3d at 1144. The fact that appellate judges are unmoved by such a statement does not ensure the preservation of the fairness, integrity, and public perception of a sentencing proceeding at which the "chance for the defendant's own voice and perspective to be heard" was erroneously denied. *Abney*, 957 F.3d at 254. Indeed, the unworkability and arbitrariness of conditioning plain-error relief on the appellate court's "speculat[ion] about the persuasive force of a hypothetical allocution," *Bustamante-Conchas*, 850 F.3d at 1139,

was on full display in petitioner's case. Two members of the presiding panel found petitioner's proposed statements lacking, believing the statements to offer nothing the court below had not already heard. Pet. App. 3a-4a. Yet the same statements struck Judge Elrod as compelling—and "new"—enough to justify affording petitioner the opportunity to voice them. *Id.* at 6a-7a (Elrod, J., dissenting).

III. The question presented is worthy of this Court's review, and petitioner's case is a good vehicle.

1. The proper interpretation and administration of Rule 52(b)'s discretionary prong in the context of allocution error is a subject that warrants this Court's review.

a. The question presented is undeniably important. The right to allocution recognized by Rule 32 is "ancient in law," *United States v. Behrens*, 375 U.S. 162, 165 (1963), "fundamental to our criminal justice system," *Daniels*, 760 F.3d at 926, and "bolsters the integrity of the judicial process by having the judge listen to and thereby openly recognize the defendant as a fellow human being whose liberty is at stake." *Abney*, 957 F.3d at 253. Claims seeking redress from the denial of that right—especially, as is the case here, its complete denial—are overwhelmingly likely to implicate Rule 52(b), as the many reported cases discussed above illustrate. The question whether such a denial merits plain-error correction frequently recurs, particularly in the Fifth Circuit.[4] And the circuits' acknowledged

[4] *See, e.g.*, *United States v. Lazaro-Lopez*, 768 F. App'x 257, 260-61 (5th Cir. 2019); *Figueroa-Coello*, 920 F.3d at 266; *United States v. Aguirre-Romero*, 680 F. App'x 291, 296 (5th Cir. 2017); *United States v. Frye*, 681 F. App'x 301, 302 (5th Cir. 2017); *Palacios*, 844 F.3d at 531-32; *Chavez-Perez*, 844 F.3d at 544-45; *United States v. Hoover*, 664 F. App'x 363, 366 (5th Cir. 2016); *United States v. Perez*, 460 F. App'x 294, 301 (5th Cir. 2012); *United States v. Zaleta*, 458 F. App'x 369, 373 (5th Cir. 2012); *United States v. Legg*, 439 F. App'x 312, 313 (5th Cir. 2011); *Avila-Cortez*, 582 F.3d at 606-07; *United States v. Martinez*,

disagreement over the question presented results in disparate treatment of similarly situated criminal defendants based on geographic fortuity.

b. This Court has also repeatedly granted certiorari to correct outlier interpretations of Rule 52(b). Petitioner's case calls upon the Court to do so once again.

In three cases in recent years, this Court has granted review, and has reversed, in response to the development of an unduly restrictive, outlier interpretation of Rule 52(b) in the courts of appeals. In *Molina-Martinez*, the Court rejected as inconsistent with "the text of Rule 52(b)" and "the Court's precedents" a requirement that a defendant whose sentence was anchored to a plainly incorrect Guidelines range had to muster "additional evidence," beyond that fact, to establish that the error affected his substantial rights as required under the third prong. *See* 578 U.S. at 197-98. In *Rosales-Mireles*, the Court proceeded to reject an articulation of *Olano*'s fourth prong that "too narrowly confine[d]" discretionary relief from plain Guidelines errors to those that "shocked the conscious." *See* 138 S. Ct. at 1906. And, most recently, the Court summarily reversed an "outlier practice" holding that unpreserved errors of fact, as opposed to errors of law, could never be "plain error" within the meaning of Rule 52(b). *See Davis v. United States*, 140 S. Ct. 1060, 1061-62 (2020).

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281 F. App'x 426, 427 (5th Cir. 2008); *United States v. Coleman*, 280 F. App'x 388, 392 (5th Cir. 2008); *United States v. Lister*, 229 F. App'x 334, 339 (5th Cir. 2007); *United States v. Neal*, 212 F. App'x 328, 332 (5th Cir. 2007); *United States v. Perez-Toj*, 181 F. App'x 464, 465 (5th Cir. 2006); *Magwood*, 445 F.3d at 830. The reader should note that these are merely the cases in which the Fifth Circuit's hypothetical-statement rule was dispositive of a claim of plain allocution error.

The hypothetical-statement rule the Fifth and Eighth Circuits apply in the allocution context is of a piece with the standards invalidated in *Molina-Martinez*, *Rosales-Mireles*, and *Davis*. Each represents a gloss on Rule 52(b) that finds no footing in the rule's text or in this Court's cases. And each has the effect of erecting an unprincipled barrier to relief from obvious and prejudicial sentencing errors. This Court should intervene to correct the outlier interpretation of Rule 52(b) at issue here as well.

2. This case is also an ideal vehicle for resolving this important question. Petitioner thoroughly preserved his foreclosed objection to the court of appeals' hypothetical-statement requirement. *See* Pet. C.A. Br. 23-34. The question, moreover, is cleanly presented and dispositive. The government conceded below, and all three members of the panel agreed, that the allocution error here satisfied *Olano*'s second and third prongs. *See* Pet. App. 5a (Elrod, J., dissenting) (noting agreement); Gov't C.A. Br. 11-13, 26 (so conceding). The panel majority thus affirmed on the ground that the error faltered at the final prong for want of any actionable impact on the fairness, integrity, or public reputation of proceedings. Pet. App. 3a. And that result rested entirely on application of the hypothetical-statement rule. *Id.* 3a-4a. There is, therefore, no question that petitioner would be entitled to relief under the fourth-prong standard that prevails in the majority of circuits.

* * *

The question presented implicates a procedural right that has been regarded as fundamental to the fair administration of justice since the common law: every criminal defendant is entitled to be heard before a court imposes sentence. As a Justice of this Court

has previously remarked, "A rule so highly prized for so sound a reason for so long a time deserves to be rigorously enforced" by federal courts, "not merely praised in resounding glittering generalities calculated to soften the blow of nonenforcement." *Green*, 365 U.S. at 311 (Black, J., dissenting). The circuits openly disagree over the standard for exercising plain-error discretion in response to the plain and prejudicial denial of that foundational right. This Court should grant review and resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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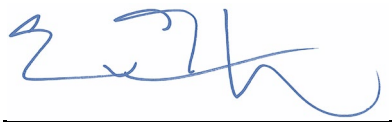

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