No. 22-5540

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – (cont'd)

Page(s)

CASES – (cont'd)

STATUTE AND RULES

REPLY BRIEF FOR PETITIONER

Petitioner didn't get to say anything on his own behalf before the district court imposed his federal sentence. On appeal, petitioner, the government, and all three members of the court of appeals panel agreed that this violated the "common-law right" to allocution, *Green v. United States*, 365 U.S. 301, 304 (1961); *see* Fed. R. Crim. P. 32(i)(4)(A)(ii); that the error was "plain" within the meaning of Federal Rule of Criminal Procedure 52(b); and that the plain error "affect[ed]" petitioner's "substantial rights"—which is to say that a reasonable probability exists that petitioner's sentence could be lower had he been allowed to speak. In seven of the nine circuits to have addressed the question, a plain and prejudicial allocution error such as this is also deemed to "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," *United States v. Olano*, 507 U.S. 725, 732 (1993), and so merit remedial action under Rule 52(b), in the ordinary case. And three other circuits operate under precedent that ends in the same result. Had petitioner's case arisen within the geographic confines of *any* of these *ten* circuits, it would have been sent back, and petitioner would have received the opportunity to speak he was originally denied.

But petitioner's case arose in the Fifth Circuit. In that circuit, and one other, plain-error relief from the obvious and prejudicial denial of allocution is contingent on the defendant's ability to proffer an outside-the-record, hypothetical allocution statement that the court of appeals believes is in fact likely to produce a lower sentence. In petitioner's case, that standard worked as arbitrarily as one would expect: his proposed allocution persuaded one member of the Fifth Circuit panel that his voice would likely make a difference on remand;

but two panel members were unimpressed. And so, due to the happenstance that his federal offense occurred in Texas—as opposed to any of the 40 states located in circuits holding the majority view—petitioner languishes in prison serving a sentence passed by a judge who never heard him speak on his own account. Petitioner has accordingly asked this Court to intervene, as only it can, to resolve this acknowledged and entrenched circuit conflict on the question whether the plain and prejudicial denial of the bedrock right to presentence allocution 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.

The government opposes that course. But, aside from an unconvincing attempt to dispute the contours (though not the existence) of the circuit split, the bulk of the government's response tellingly consists of objections (Br. in Opp. 8-17) to the merits of the standard petitioner prefers. Though misguided, the government's merits objections do not counsel against this Court's review. And when it comes to the traditional criteria for review, the government's opposition is in name only. The government concedes (Br. in Opp. 17, 19-20) that the question presented is the subject of an acknowledged circuit conflict. It offers no reason to think that conflict will naturally dissipate. It identifies no vehicle problems. It does not contest that claims of allocution error frequently recur, or that they almost always arise in the context of plain-error review. And it does not dispute that the question presented is outcome determinative in petitioner's case. In short, all of the hallmarks of a case that is worthy of this Court's certiorari jurisdiction are here. The petition should be granted.

Split. The government agrees, in its understated way, that "the circuits' approaches" to the question presented "differ in certain respects" (Br. in Opp. 17), and that the Fifth Circuit "take[s] a narrower approach to the fourth component of plain-error review" in response to obvious and prejudicial allocution error than at least the Third, Tenth, and Eleventh Circuits. Br. in Opp. 19-20. Translation: there is a circuit conflict here; and the standard applied by the court below operates to deny relief where at least three other courts would grant relief. It is thus common ground that (1) the decision below implicates a circuit split over the interpretation of an important rule of federal criminal procedure, and that (2) the point of disagreement is dispositive in this case.

The government's only answer is to try to minimize the conflict by disputing its contours. But the government cannot erase the fact that, as to the question presented, the courts of appeals fall into two clear camps: the Fifth and the Eighth Circuits condition relief under plain error's fourth prong on the persuasiveness of a hypothetical allocution statement, while every other circuit with criminal jurisdiction does not. And there is no dispute that petitioner, consigned to remain forever mute in the face of his federal sentence under the Fifth and Eighth Circuits' approach, would instead be entitled to relief under the approach followed in every other circuit in which the question could arise.

1. To begin, the government correctly concedes (Br. in Opp. 19-20) that the "approach to the fourth component of plain-error review" that prevails in the Fifth Circuit, and that controlled the disposition of the decision below, conflicts with *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017) (en banc), *United States v. Prouty*, 303 F.3d 1249

(11th Cir. 2002), and *United States v. Adams*, 252 F.3d 276 (3d Cir. 2001). And it wisely does not dispute that the conflict is entrenched. As the government is forced to admit, the Tenth Circuit in *Bustamante-Conchas*, sitting en banc, explicitly "disagreed with the Fifth Circuit's requirement that a defendant 'proffer an allocution statement to the appellate court' in order to obtain relief." Br. in Opp. 19-20 (quoting *Bustamante-Conchas*, 850 F.3d at 1143). But the Tenth Circuit more than merely disapproved of the Fifth Circuit's hypothetical-statement gloss on Rule 52(b); it "expressly overrule[d]" several panel decisions that had adopted and applied that gloss to deny plain-error relief. *Bustamante-Conchas*, 850 F.3d at 1144. The government's admission that a direct conflict exists between the decision below and those of at least three other courts of appeals is reason enough, without more, to warrant this Court's intervention.

There is more, though. As the petition details (Pet. 11-21), the conflict over the question presented cuts much deeper. Seven circuits—not merely the Third, Tenth, and Eleventh—have addressed Rule 52(b)'s application in this context and reached a general consensus that, absent countervailing circumstances, allocution error that is plain and deemed to affect substantial rights warrants correction in the ordinary case. *See* Pet. 14-18. And three more circuits, though yet to directly address the issue under Rule 52(b), have similarly held that allocution error merits reversal in all but rare circumstances. *See* Pet. 18-19. Indeed, the government nowhere disputes that only the Eighth Circuit has adopted and persisted in following the Fifth Circuit's hypothetical-statement convention. *See* Pet. 13-14. The degree of the actual divide here only reinforces that the question presented is worthy of certiorari.

2. The government's attempts to downplay this circuit conflict are unavailing.

a. The government contends (Br. in Opp. 19) that the question presented remains open in the D.C. Circuit even after *United States v. Abney*, 957 F.3d 241 (D.C. Cir. 2020). The government posits that future panels are free to disregard *Abney*'s holding that the allocution error there "require[d] vacatur even if unpreserved," *id.* at 253, because the court alternatively "found that the defendant had preserved his claim." Br. in Opp. 19 (citing *Abney*, 957 F.3d at 249). But in the D.C. Circuit, as everywhere else, where "there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter dictum, but each is the judgment of the court, and of equal validity with the other." *Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 673 (D.C. Cir. 2013) (quoted source omitted). *Abney*'s alternative holding, in line with the majority of circuits, that "there may be few, if any, cases in which [the allocution right's] unremedied denial would not undermine the fairness of the judicial process," *Abney*, 957 F.3d at 254, thus carries the weight of precedent.[1]

b. The government similarly casts doubt (Br. in Opp. 20-21) on the Ninth Circuit's commitment to that court's application of Rule 52(b) to the denial of allocution in *United States v. Daniels*, 760 F.3d 920 (9th Cir. 2014). It is difficult to take that argument seriously, however, given that the government routinely concedes the existence of plain and reversible

[1] The government likewise errs in suggesting (Br. in Opp. 19) that *United States v. Lawrence*, 1 F.4th 40 (D.C. Cir. 2021), indicates otherwise. *Lawrence*'s observation that *Abney* pretermitted the question whether allocution error is per se harmful, *see* 1 F.4th at 45, simply acknowledges that the prior panel prudently reserved that question given its alternative (and binding) conclusion that the "failure to invite Abney to allocute" merited correction even "assuming the more demanding approach" applied. *Abney*, 957 F.3d at 247.

allocution error, under *Daniels*, in the Ninth Circuit. *See United States v. Lopez-Ramirez*, 708 F. App'x 370 (9th Cir. 2017) ("The government concedes, and we agree, that the district court plainly erred by failing to . . . ask if [the defendant] wanted to speak before sentencing. Accordingly, we vacate and remand for resentencing.") (citing *Daniels*, 760 F.3d at 925-26); *accord, e.g.*, *United States v. Storer*, No. 21-30213, 2022 WL 845244, at *1 (9th Cir. Mar. 18, 2022); *United States v. Dooley*, 719 F. App'x 604, 607 (9th Cir. 2018); *United States v. Nix*, 700 F. App'x 683, 684 (9th Cir. 2017).

Lopez-Ramirez, in fact, perfectly illustrates the disparate treatment that follows from the circuits' divergent approaches to the question presented. Like petitioner, Mr. Lopez-Ramirez reentered the country without permission, *see* 8 U.S.C. § 1326, and was denied the opportunity to speak on his own behalf before being sentenced. *See Lopez-Ramirez*, 708 F. App'x 370. Yet unlike petitioner, Mr. Lopez-Ramirez received plain-error relief because the Ninth Circuit, in contrast to the Fifth, squarely rejects the "pure[ly] conjectur[al]" inquiry into what a defendant "might have said" and whether those things "would have been likely to motivate the court to impose an even shorter sentence" as "beside the point" and "of no moment" to the third and fourth prongs of plain error. *Daniels*, 760 F.3d at 925-26.

c. The government also attempts (Br. in Opp. 18-19) to blur the lines between the Fifth Circuit's concededly "narrower approach" to the question presented and the approaches of the Fourth and Seventh Circuits. But it can do that only by ignoring the very feature of the Fifth Circuit's standard that defines the split: the requirement that the defendant proffer a hypothetical account of what he might say that "likely would have moved the district court

to grant a more lenient sentence." *United States v. Chavez-Perez*, 844 F.3d 540, 545 (5th Cir. 2016), *cert. denied*, 137 U.S. 2215 (2017). True, "all three circuits look to the particular facts of the case to determine whether the [allocution] error satisfies the fourth plain-error requirement." Br. in Opp. 18. But neither the Fourth nor the Seventh Circuit makes that case-specific determination contingent on the defendant's ability to provide "new mitigating information in his appellate brief," Pet. App. 3a-4a (quoting *Chavez-Perez*, 844 F.3d at 545), that must convince the court of appeals that a lower sentence is not only reasonably probable but "likely" to result. *Chavez-Perez*, 844 F.3d at 545. Indeed, the Seventh Circuit, like the Ninth and the Tenth Circuits, *see* Pet. 17-18, has expressly disavowed the notion that an appellate court's "speculat[ion] as to the persuasive ability of anything [the defendant] may have said" has any relevance to the plain-error inquiry. *United States v. O'Hallaren*, 505 F.3d 633, 636 (7th Cir. 2007).

This last observation points up the fundamental error undergirding the government's efforts to minimize the circuit conflict here. Whatever minor "variations" (Br. in Opp. 21) exist in the approaches followed by the circuits that petitioner locates on his side of the split, the government does not, and could not, dispute that petitioner would be entitled to relief if his case were reviewed under the approach that governs in any one of those ten circuits. Indeed, had petitioner's case arisen in one of those circuits, the government would have conceded plain and reversible error. *See, e.g.*, *United States v. Stroupe*, 752 F. App'x 169, 170 (4th Cir. 2019); *Lopez-Ramirez*, 708 F. App'x 370; *United States v. Woods*, 446 F. App'x 213, 214 (11th Cir. 2011); *United States v. Johnson*, 340 F. App'x 309, 311 (6th Cir. 2009). The

government's desire to continue winning cases in two circuits even though the same cases would prompt it to readily concede defeat in ten others is understandable; but it is not a valid objection to the need for this Court's review.

To the contrary: the Court's interest in exercising certiorari jurisdiction is at its zenith when the application of federal law leads to different outcomes in one part of the country than it does in others. There is no dispute that is the case here.

Merits. The government devotes the majority of its response to the merits (Br. in Opp. 9-17), arguing that the court below correctly declined to afford petitioner relief because, in its view, anything he might say would fall on deaf ears. While premature at this stage, the government's merits preview serves only to bolster the case for review. It is also wrong.

1. The government attempts (Br. in Opp. 9-16) to paint petitioner's view on the merits as inconsistent with this Court's plain-error precedents. But its analysis on this score moves from the premise that petitioner "appears" to "advocate an approach to allocution errors under which appellate relief on plain-error review would be all but automatic." Br. in Opp. 9.

That premise is false: neither petitioner, nor any of the courts of appeals on his side of the split that have applied Rule 52(b) to allocution error, *see* Pet. 14-17, endorse the view that "such errors automatically satisfy the fourth requirement of plain-error review." Br. in Opp. 13. As the petition explains (Pet. 22), petitioner's preferred approach is the approach endorsed by the en banc Tenth Circuit in *Bustamante-Conchas*. There, "[a]s [it had] with the third prong," the Tenth Circuit expressly "decline[d] to adopt a per se rule or a formal presumption" as the standard for assessing allocution error under the fourth prong. *Bustamante-*

Conchas, 850 F.3d at 1142. "Instead," the court adopted the approach petitioner advocates: "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 or typical case, "regardless of whether the defendant has proffered a proposed allocution statement on appeal." *Id.* at 1134, 1142; *accord* Pet. 14-16, 22.

Contrary to the government's suggestions (Br. in Opp. 12-15), that approach is entirely consistent with the "case-specific determination" this Court's precedents require. *See Bustamante-Conchas*, 850 F.3d at 1138-43 (detailing fact-specific showings the defendant must make, including a total (not partial) denial of allocution, the lack of a prior opportunity to fully allocute, a sentence above any applicable statutory minimum, or minimum agreed term in any binding plea deal, and the absence of any other potentially countervailing factors). Indeed, the Tenth Circuit relied heavily on this Court's reasoning in *Molina-Martinez v. United States*, 578 U.S. 189, 200-04 (2016), mirroring the case-specific prejudice inquiry this Court approved in the analogous context of sentencing Guidelines error. *See Bustamante-Conchas*, 850 F.3d at 1139. And the Tenth Circuit's recognition that certain "rare circumstances" will alleviate the injury to the fairness, integrity, and public reputation of judicial proceedings that ordinarily attends uncorrected allocution error, *see id.* at 1142-43, tracks this Court's later allowance in *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1909 (2018), that "there may be instances where countervailing factors" likewise serve to blunt the ordinary, correction-worthy impact of a Guidelines miscalculation.

The government's preferred standard, in contrast, turns on an inquiry that is wholly untethered to the factual record. To prevail under that standard, the defendant's appellate counsel must conjure, or solicit the defendant himself to produce, a proposed allocution that was not before the district court. That proposal must consist of "new mitigating information," Pet. App. 3a (quoting *Chavez-Perez*, 844 F.3d at 545), that neither counsel nor any third party submitted on the defendant's behalf, including through "letters written by [the defendant]'s family." Br. in Opp. 17. Then, after imagining the impression this new information would make on the trial judge that never heard it, the court of appeals must conclude that said judge is likely to impose a lower sentence. And all of this proceeds, *see* Br. in Opp. 16-17, without any cognizance of the fact that "[i]t is not only the content of the defendant's words that can influence a court, but also the way he says them." *Bustamante-Conchas*, 850 F.3d at 1144 (quoting *United States v. Noel*, 581 F.3d 490, 503 (7th Cir. 2009)). Nothing remotely resembling this kind of arbitrary and counterfactual inquiry is discernible from Rule 52(b)'s text or this Court's precedents.

2. Perhaps the most telling aspect of the government's merits preview is that it defends (Br. in Opp. 9-10 n.*, 16-17) the court of appeals' hypothetical-statement standard as consistent with this Court's interpretation of Rule 52(b)'s *third* prong, not the fourth. Indeed, the government nowhere suggests that it would have been appropriate to deny relief to petitioner under the fourth prong even assuming—as the court of appeals held—that a reasonable probability of a lower sentence accompanied this plain allocution error. In other words: the government does not defend the interpretation of Rule 52(b)'s fourth prong that controlled the

decision below; rather, it contends that the decision below is correct under an interpretation of Rule 52(b)'s third prong that it admits (Br. in Opp. 9-10 n.*) is foreclosed by the precedent of the court below, and that *no* court of appeals has heretofore endorsed. That contention is unavailing on multiple fronts.

a. *First*, the government's attempt to reengineer the court of appeals' outlier standard as a defensible interpretation of plain error's third prong is not properly before this Court. As the government admits (Br. in Opp. 9-10 n.*), it conceded the third prong below. *See* Gov't C.A. Br. 11-13. And it did not purport to preserve for this Court's review any objection to the Fifth Circuit's standard for deeming plain allocution error to "affect[] substantial rights." To the contrary, the government spent nearly 13 pages of its brief (Gov't C.A. Br. 25-38) defending the Fifth Circuit's current third-prong approach.[2]

Nor does the government contend that the question whether petitioner satisfied plain error's third prong is fairly encompassed by the question presented. Rightly so: the court of appeals found petitioner's claim lacking only under its elevated standard for "prong four." Pet. App. 3a; *see id.* at 5a (Elrod, J., dissenting) ("All agree that . . . the obvious error harms [petitioner]'s substantial rights. The only issue for us is whether allowing the district court to swap out colloquy for soliloquy seriously affects the fairness, integrity, or public reputation of judicial proceedings."). As petitioner's case comes to this Court, then, it is a given

[2] That is not surprising, given that the circuits to have addressed the issue—including the Fifth, *see United States v. Reyna*, 358 F.3d 344, 351-52 (5th Cir. 2004) (en banc)—unanimously agree that plain allocution error raises a reasonable probability of a different outcome where a lower sentence is possible and other rare circumstances are absent. *See* Pet. 14-17 (collecting cases from the Third, Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits that so hold); *Bustamante-Conchas*, 850 F.3d at 1138 (also collecting cases).

that he suffered an obvious denial of the right to allocute and that a reasonable probability exists that his sentence would be lower if the error is corrected. The only question is whether the court of appeals erred in deeming that plain and prejudicial error not to seriously affect the fairness, integrity, or public reputation of judicial proceedings on the ground (also a given at this stage) that petitioner failed to proffer a sufficiently persuasive hypothetical allocution statement in his appellate briefing.

b. *Second*, and in any event, the contention that the Fifth Circuit's hypothetical-statement standard maps onto Rule 52(b)'s third-prong inquiry is wrong. Petitioner has already detailed (Pet. 24-25) several reasons why an appellate court's speculation as to the persuasive value of an outside-the-record, hypothetical allocution is an invalid measure of an allocution error's impact on the fairness, integrity, and public-reputation pillars of plain error's fourth prong. As the courts of appeals to have aired them note, these problems apply equally to the third prong. *See Bustamante-Conchas*, 850 F.3d at 1139; *Daniels*, 760 F.3d at 925-26; *O'Hallaren*, 505 F.3d at 636. The government's discussion of the merits is conspicuously silent on these points.

c. *Finally*, at bottom, the government's merits preview only underscores the need for this Court to intervene. Unwilling to defend the Fifth Circuit's controlling legal standard as a correct interpretation of plain error's fourth prong, the government has attempted to shift that standard to the third prong it conceded below. Whatever else, this maneuver reinforces petitioner's contention that the interpretation and application of Rule 52(b) to allocution error is a subject that has sewn sufficient confusion to merit clarification from this Court.

Vehicle. The government rightly does not quarrel with petitioner's contentions (Pet. 26-28) that the question presented is important and that his case is an excellent vehicle for resolving the circuit conflict over the answer. That leaves only the government's observation (Br. in Opp. 7) that the Court has previously denied petitions "raising claims about the proper approach to appellate review of allocution errors." But, as the government's careful phrasing foreshadows, a look behind the curtain reveals that only four of those petitions, *see Chavez-Perez v. United States*, No. 16-8118; *Coleman v. United States*, No. 08-6122; *De Anda-Duenez v. United States*, No. 04-5456; *Reyna v. United States*, No. 03-8903, raised questions implicating plain error's fourth prong (as opposed to the second or third prongs). At any rate, if anything, the government's list merely illustrates that the application of Rule 52(b) in response to the denial of allocution is a frequently recurring subject that is overdue for this Court's attention.

The question raised here has divided the circuits for decades. Petitioner's case cleanly presents the Court with an opportunity to resolve that conflict. The right to "speak before imposition of sentence" is older than this country. *Green*, 365 U.S. at 304. Relief from its denial should not turn on geography. The Court should grant the petition.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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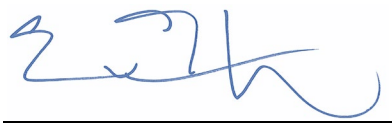

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