No. __-_____

IN THE

Supreme Court of the United States

KALVIN WALKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether errors in calculating the Sentencing Guidelines are automatically rendered harmless by a district court's statement that the correctness of the guideline range would make no difference to its choice of sentence.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Walker*, No. 21-4275, United States Court of Appeals for the Fourth Circuit. Judgment entered September 13, 2022.

(2) *United States v. Walker*, No. 3:20-cr-131, United States District Court for the Eastern District of Virginia. Judgment entered May 19, 2021.

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PETITION FOR WRIT OF CERTIORARI

Kalvin Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 2a of the appendix to the petition and is also available at 2022 WL 4182321 (4th Cir. Sept. 13, 2022).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on September 13, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Title 18, United States Code, Section 3553 provides, in relevant part:

> (a) Factors to be considered in imposing a sentence.—* * * The court, in determining the particular sentence to be imposed, shall consider * * *
>
> (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 * * *.
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission * * *.

Federal Rule of Criminal Procedure 52 provides:

> (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.

INTRODUCTION

This case presents an important and recurring issue in federal sentencing practice: whether a district court may immunize its sentencing guideline miscalculations from appellate review by asserting that the guidelines made no difference to its selection of the sentence. The courts of appeals are deeply divided over this question. The majority of circuits—the Second, Third, Fifth, Seventh, Ninth, and Tenth—hold that "it is not enough for the district court to say the same sentence would have been imposed but for the error." *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017). Instead, the district court must follow the dictates of *Gall v. United States* and first correctly calculate the guideline range and then when choosing the ultimate sentence, "state its justification with enough specificity" to provide sufficient context for effective appellate review. *United States v. Seabrook*, 968 F.3d 224, 235 (2d Cir. 2020) (citing *Gall v. United States*, 552 U.S. 38, 49-50 (2007)).

The minority view, on the other hand, holds that when the sentencing court says "that it would have reached the same result" regardless of the advice of the Guidelines, any error in calculating the Guidelines is harmless. *United States v. Gomez-Jimenez*, 750 F.3d 370, 383 (4th Cir. 2014). The First, Fourth, Sixth, Eighth, and Eleventh Circuits follow the minority approach. As one circuit judge has observed, these

minority circuits have "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 391 (4th Cir. 2014) (Gregory, J. dissenting). The Fourth Circuit applied this approach to affirm Petitioner's sentence. This Court's review is needed to resolve the split and to restore uniformity to federal sentencing.

The sentencing guidelines play a "central role in sentencing," *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341 (2016), and they "remain a meaningful benchmark through the process of appellate review," *Peugh v. United States*, 569 U.S. 530, 541 (2013). But district judges in some circuits are able to evade that appellate review by making a boilerplate statement that the guidelines in fact made no difference in the choice of sentence. This Court should conclude, like the majority of circuits to consider the issue, that a Guidelines error is not harmless simply because a district judge claimed the Guidelines had no effect on the sentence. The Court should grant the petition for certiorari and reverse the Fourth Circuit's misguided approach.

STATEMENT OF THE CASE

A. District Court Proceedings

Kalvin Walker pleaded guilty, without a plea agreement, to possessing a firearm after having been convicted of a felony offense, in violation of 18 U.S.C. § 922(g)(1). App. 1; C.A.J.A. 8–35.[1] The case began when Mr. Walker answered an online ad placed by an undercover police officer posing as a prostitute. Mr. Walker and the officer

[1] "App." refers to the appendix to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

exchanged 178 text messages, most of which discussed the arrangements for a "date." The pair also talked about how much the "prostitute" should charge clients and other aspects of her profession. C.A.J.A. 33. The undercover officer brought up the possibility of Mr. Walker "helping her work," App. 22, and in response, Mr. Walker made fleeting mentions of providing "security" for the woman, C.A.J.A. 33, App. 24.

After texting back and forth for several days, Mr. Walker finally made an appointment to meet the prostitute in person at a hotel. When he arrived, police arrested him under a warrant they had obtained for the crime of commercial sex trafficking. The police alleged that Mr. Walker was planning to become the prostitute's pimp. Mr. Walker possessed a handgun in a backpack he was wearing at the time of his arrest. C.A.J.A. 34. Mr. Walker made statements to police that he made a date because he "was looking for a friend." He acknowledged that the prostitute wanted "someone to help keep her safe while she did what she did," but he denied any intent to act as her pimp. App. 19.

The state charge was eventually dropped in favor of federal prosecution. Mr. Walker pleaded guilty to one count of possessing a firearm after a felony conviction. He was never charged with a federal sex trafficking offense. *See* C.A.J.A. 6 (indictment).

In the presentence report, Mr. Walker's initial guideline range was 30 to 37 months. C.A.J.A. 193. The government objected, urging the court to add a four-level enhancement for possessing the firearm in connection with another felony offense (sex trafficking). C.A.J.A. 36–41; *see* U.S.S.G. § 2K2.1(b)(6)(B). Mr. Walker responded that

the evidence was insufficient to prove that he possessed the gun in order to facilitate a sex trafficking crime, and that its presence was merely incidental. C.A.J.A. 50–54.

The district court held a lengthy sentencing hearing. App. 3–76. A police officer testified about the sting operation, and both parties made arguments. The court declared that "it was a close call as to whether or not [Mr. Walker] intended to use the firearm as a part of a prostitution operation." App. 69. But the court ultimately sustained the government's objection and applied the enhancement. App. 57–60. That ruling made raised Mr. Walker's guideline range to 46 to 57 months. App. 60.

The government asked for a sentence within this new range, and Mr. Walker argued that more appropriate sentence was something within the original range. App. 61–68. After Mr. Walker spoke on his own behalf, the court said to him that "you are obviously a good person but, unfortunately, you have done some bad things in the course of your lifetime." App. 71. The court imposed a sentence of 46 months—within the new range and above the original, unenhanced range. App. 72.

At the end of the hearing, the district court stated that "should the U.S. Court of Appeals find that the guidelines in this case have been improperly calculated, this Court believes that a nonguideline sentence of 46 months would be appropriate based upon your background and the facts and circumstances of this case." App. 75. The court did not elaborate further on any justification for a hypothetical upward variance.

B. Proceedings in the Court of Appeals

On appeal, Mr. Walker renewed his argument that the guideline range was improperly calculated. But the Fourth Circuit did not address that argument at all.

Instead—without even mentioning the facts of the case or the parties' competing arguments—the appeals court found any possible error to be harmless in light of the district court's statement that it would have imposed the same sentence even if the range had been lower. App. 1–2. The court acknowledged Mr. Walker's argument that the Fourth Circuit's "assumed error harmlessness" inquiry was inappropriate and inconsistent with this Court's precedents. App. 1. It applied the doctrine nevertheless, finding that it did not need to weigh in on the guideline application dispute because the sentence was reasonable. App. 1–2. The Fourth Circuit thus affirmed Mr. Walker's 46-month, above-guidelines sentence. App. 2.

REASONS FOR GRANTING THE PETITION

In five circuits, district courts are able to effectively avoid any appellate review of their sentencing guidelines determinations by making a boilerplate statement that they would have imposed the same sentence regardless of the guideline range. But in six other circuits, such statements are not sufficient to prevent the courts of appeals from performing their appellate review function and assessing guideline calculation questions on their merits. District courts should not be able to render their sentencing choices categorically harmless by saying a few magic words. The deep and entrenched division over whether that is permissible is a question that merits this Court's review. Because Mr. Walker's petition provides the Court with a good vehicle to resolve that circuit split, the Court should grant his petition for certiorari.

I. The Circuits Are Divided Over Whether A Sentencing Guidelines Error Is Harmless If The District Court States That It Would Impose The Same Sentence Regardless Of The Guideline Range.

In the majority of circuits, a district court cannot "insulate its sentence from [appellate] review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did." *United States v. Seabrook*, 968 F.3d 224, 233–234 (2d Cir. 2020). The Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits require a more detailed and thorough harmless error analysis before affirming a defendant's sentence. In contrast, the First, Fourth, Sixth, Eighth, and Eleventh Circuits require little more than a "few magic words" to affirm a sentence based on harmless error. *United States v. Gomez-Jimenez*, 750 F.3d 383, 391 (4th Cir. 2014) (Gregory, J. dissenting). This deep and persistent division of authority on such an important and recurring issue requires a resolution from this Court. *See* S. Ct. R. 10(a).

A. Six circuits hold that a district court cannot immunize guideline errors by announcing that the guidelines did not matter to the chosen sentence.

The majority rule adopted by the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits provides that a district court cannot render a guideline calculation error harmless merely by stating that it would have imposed the same sentence regardless of the correctness of the guideline range.

The Seventh Circuit recently addressed this issue and explained why district courts should not be able to appeal-proof their sentences. In *United States v. Asbury*, the sentencing court rejected the defendant's objections to the presentence report, and

added: "[I]f I made an error in the guideline calculation in terms of offense level, that would not affect my sentence. I'm basing my sentence on the Section 3553(a) factors and the exercise of my discretion after placing a lot of thought into this sentencing hearing." 27 F.4th 576, 579 (7th Cir. 2022). The Seventh Circuit rejected the conclusion that the sentencing court's statement rendered its sentencing errors harmless, holding that while sentencing courts have discretion to fashion sentences under 18 U.S.C. § 3553, this discretion does not "permit the judge to nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence." *Id.* at 581. Reasoning that sentencing decisions at every level of the judiciary must be made by reference to the appropriate Guidelines calculation, "'a conclusory comment tossed in for good measure' is not enough to make a guidelines error harmless." *Id.*; accord *United States v. Loving*, 22 F.4th 630, 636 (7th Cir. 2022) ("[W]e cannot infer, based on the district court's terse comments about the sentencing factors under 18 U.S.C. § 3553(a) that the court believed a 71-month prison sentence would be appropriate regardless of the correct guideline range.").

As the Seventh Circuit explained, permitting such conclusory assertions to insulate sentencing errors from appellate review would circumvent the need for the judge in every case to correctly calculate a baseline Guidelines sentencing range and explain sentencing decisions departing from that range, and therefore is fundamentally inconsistent with Guidelines sentencing. "There are no 'magic words' in sentencing." *Asbury*, 27 F.4th at 581. "If there were, the judge would have no incentive to work

through the guideline calculations: she could just recite at the outset that she does not find the [G]uidelines helpful and proceed to sentence based exclusively on her own preferences." *Id.*

Likewise, the Second Circuit has held "the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination" because "the Guidelines, although advisory, are not a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *United States v. Seabrook*, 968 F.3d 224, 233–234 (2d Cir. 2020). The Third, Fifth, Ninth, and Tenth Circuits have reached similar holdings. *See, e.g.*, *United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) ("a statement by a sentencing court that it would have imposed the same sentence even absent some procedural error does not render the error harmless" because "it must still begin by determining the correct alternative Guidelines range and properly justify the chosen sentence" in relation to it); *United States v. Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (sentencing error was not harmless despite district court's statement that "it would have given the same sentence . . . if it had applied" the Guidelines as the defendant requested does not make the error harmless); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reversing because of district court's Guidelines miscalculation notwithstanding the district court's statements "that it would have imposed the same sentence" regardless of the Guidelines); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017) (remanding for new sentencing because "it is not enough for the district court to say the same sentence would have been imposed but for the error"); *United States v. Gieswein*, 887

F.3d 1054, 1062–1063 (10th Cir. 2018) (noting that the "court has rejected the notion that district courts can insulate sentencing decisions from review by making . . . statements" that "its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.'" (collecting cases).

B. Five circuits allow a district court's boilerplate statement that it would impose the same sentence regardless of the guideline range to render any calculation error harmless.

A minority of circuits hold that a district court's bare statement that it would have imposed the same sentence regardless of the guideline range means that any guideline error is automatically harmless. That is the rule that the court of appeals applied in Mr. Walker's case to skip over the difficult guideline question entirely. App. 1–2. The Fourth Circuit treats a district court's "same sentence regardless" pronouncement as conclusively establishing that remand would be pointless. The only appellate review the defendant receives in those cases is a virtually toothless scrutiny for "substantive reasonableness." *See, e.g.*, *Gomez-Jimenez*, 690 F.3d at 203; *United States v. Savillon-Matute*, 636 F.3d 119, 123 (4th Cir. 2011).[2]

Just like the Fourth Circuit, the First, Sixth, Eighth, and Eleventh Circuits hold that a district court's cursory statement that the guideline range was irrelevant to its

[2] Counsel is aware of only two cases in the past ten years in which the Fourth Circuit vacated a sentence as substantively unreasonable. *See United States v. Howard*, 773 F.3d 519, 528–536 (4th Cir. 2014) (upward variance to life sentence from guideline range of 120 to 121 months); *United States v. Zuk*, 874 F.3d 398, 408–412 (4th Cir. 2017) (government appeal of downward variance 26-month sentence from 240-month guideline range). Neither of those cases involved the Fourth Circuit's "assumed error harmlessness inquiry."

sentencing choice allows the circuit court to pretermit appellate review of the correctness of the guideline calculation. In the Eighth Circuit's words, "a district court's incorrect application of the Guidelines is harmless error when the court specifies the resolution of a particular issue did not affect the ultimate determination of a sentence, such as when the district court indicates it would have alternatively imposed the same sentence even if a lower [G]uideline range applied." *United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2021); *see also United States v. Foston*, No. 21-2435, 2022 WL 1510689, at *1 (8th Cir. May 13, 2022). Three other circuits follow that approach. *See United States v. Ouellette*, 985 F.3d 107, 110–111 (1st Cir. 2021); *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021); *United States v. Kamper*, 748 F.3d 728, 743–744 (6th Cir. 2014); *but see United States v. Montgomery*, 969 F.3d 582, 583 (6th Cir. 2020) (Moore, J., joined by White, J., opinion regarding denial of rehearing en banc) ("We see no reason why we should give any weight to boiler-plate language designed to thwart a deserved resentencing.").

* * *

This split is intractable and untenable. Judges in five circuits are able to inoculate their potential guideline errors from appellate review by simply uttering a throwaway line to the effect that the guideline range calculation process was a pointless exercise. In six other circuits, such a statement would not be sufficient to render a sentencing error harmless without further analysis. There is no hope that the circuit courts will resolve their differences absent this Court's intervention. Indeed, at least three circuits have denied rehearing on the issue in recent years. *See*

Montgomery, supra; *United States v. Foston*, No. 21-2435 (8th Cir. June 21, 2022) (order denying petition for rehearing); *United States v. Henry*, No. 18-15251 (11th Cir. Aug. 17, 2021) (order denying petition for rehearing). This Court's review is critically necessary to bring uniformity to this aspect of federal sentencing procedure. *Cf. Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765 (2020) (noting that Court granted certiorari "in light of differences among the Courts of Appeals" in application of Federal Rule of Criminal Procedure 52 to certain sentencing errors).

II. The Minority Rule Applied By The Fourth Circuit Is Wrong.

The Fourth Circuit is wrong in holding that when a sentencing court states it would have imposed the same sentence regardless of the Guidelines, a reviewing court may conclude that any Guidelines calculation error is rendered categorically harmless. Blanket harmless error findings conflict with what Congress and this Court require courts to perform at every sentencing hearing, and also conflict with how harmless error review must be conducted under Federal Rule of Criminal Procedure 52(a).

A. This Court's precedents establish that sentencing courts must properly calculate the sentencing guidelines, and reviewing courts should ordinarily correct guidelines errors.

This Court has made clear that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007). Appellate courts, in turn, "must first ensure" the district court did not "improperly calculate the Guidelines range." *Id.* at 49–51. Only after ensuring that the district court properly calculated the Guidelines range does the appellate court proceed to considering the substantive reasonableness of the sentence.

See Rosales-Mireles v. United States, 138 S. Ct. 1897, 1910 (2018) ("Before a court of appeals can consider the substantive reasonableness of a sentence, '[i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.'" (quoting *Gall*, 552 U.S. at 51)).

Even when a sentencing court chooses not to impose a Guidelines sentence, it must explain its sentencing decision in relation to the properly-calculated Guidelines sentence because it is "uncontroversial" that a "major departure [from the Guidelines] should be supported by a more significant justification that a minor one," and sentencing courts "must adequately explain the chosen sentence . . . to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. Determining substantive reasonableness also requires knowing the correct Guidelines sentencing range because "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*." *Peugh v. United States*, 569 U.S. 530, 542 (2013) (emphasis in original). In other words, although the district court has discretion to depart from the Guidelines, the court "must consult those Guidelines and take them into account when sentencing." *United States v. Booker*, 543 U.S. 220, 264 (2005).

Because properly calculating the Guidelines is central to sentencing, this Court has stated that an error in calculating the Guidelines range will ordinarily entitle a defendant to a new sentencing hearing. *See Molina-Martinez v. United States*, 578 U.S.

189, 203 (2016) ("When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error."); accord *Rosales- Mireles*, 138 S. Ct. at 1903 (holding that a Guidelines error "in the ordinary case" warrants a remand for a new sentencing hearing because "it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.").

The Guidelines also play a critical role in reviewing sentences on appeal. "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh*, 569 U.S. at 541 (emphasis added). And when reviewing a sentence on appeal, "the appellate court . . . must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51.

Finally, this Court has explained that one purpose of appellate review of federal sentences is to further the "continual evolution" of the Sentencing Guidelines, a process in which the Sentencing Commission will "collect and examine the results" of the circuit courts' review of sentences for reasonableness. *Rita v. United States*, 551 U.S. 338, 350 (2007). District courts derail that evolutionary process, and stultify the

development of the law, when they insulate their decisions from appellate review with boilerplate statements that the guidelines did not matter.

B. Rule 52 requires that guideline errors should ordinarily be corrected.

The correct guidelines range is of such paramount importance to sentencing that Rule 52(b) ordinarily requires guidelines miscalculations to be corrected even on plain error review when a defendant fails to object. *Rosales-Mireles*, 138 S. Ct. at 1907. The error also should ordinarily be corrected on harmless-error review because "ensuring the accuracy of Guidelines determinations also serves the purpose of providing certainty and fairness in sentencing on a greater scale," in light of the fact that "[w]hen sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined." *Id.* at 1908. Finally, Guidelines errors should ordinarily be corrected because the anchoring effect of the guidelines means that "the risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity or public reputation of judicial proceedings in the context of plain Guidelines error because the role the district court plays in calculating the range and the relative ease of correcting the error." *Id.*

These principles weigh in favor of reversal where, as here, the defendant has preserved the error and the claim is "governed by the more lenient harmless-error standard of Rule 52(a) rather than the more exacting plain-error standard of Rule 52(b)." *Greer v. United States*, 141 S. Ct. 2090, 2093 (2021). "When Rule 52(a)'s 'harmless-error rule' governs, the prosecution bears the burden of showing harmlessness." *United States v. Davila*, 569 U.S. 597, 607 (2013) (quoting *United*

States v. Vonn, 535 U.S. 55, 62 (2002)). But the minority approach taken by the Fourth Circuit effectively flips the burden under Rule 52(a), placing it on the defendant to prove prejudice when the district court has said it would have imposed the same sentence regardless of the Guideline range. This is a burden the defendant cannot overcome on appeal because the Fourth Circuit uncritically accepts even boilerplate assertions at face value, no matter how rote such announcements are in practice. Such harmless error review is tantamount to no review at all on appeal, because the Fourth Circuit always affirms if the sentencing court has made a boilerplate disavowal of the Guidelines' importance. And defendants who fail to object to a guideline error should not be better off than ones who raise the objection at their sentencings.

The minority's application of Rule 52(a) is also improper because it neglects that "the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole*" when conducting harmless error review. *United States v. Hasting*, 461 U.S. 499, 509 (1983) (citations omitted and emphasis added). This Court held of the mandatory Guidelines that "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record *as a whole*, that the error was harmless." *Williams v. United States*, 503 U.S. 193, 203 (1992) (emphasis added). But in finding Guidelines calculation errors harmless, the minority approach looks only to the district court's harmless error statements, instead of the entire record.

* * *

The district court in this case acknowledged that the guideline calculation dispute was a "close" one, and that Mr. Walker was "obviously a good person" who had just made some mistakes in life. App. 69, 71. Despite those statements, the district court made a boilerplate pronouncement that it would have imposed the same sentence as a substantial upward variance even if that "close" call had gone the other way. The disconnect between those sentiments renders the boilerplate statement a non sequitur, and the statement renders the parties' efforts over determining the guideline range pointless. This Court should not allow district courts to appeal-proof their guideline determinations with so many "magic words."

III. The Question Presented Is Important.

The circuit split at issue here means that some defendants are denied effective appellate review of their sentences based on the happenstance of where they are sentenced, and whether their judge says the right phrase to thwart review of any potential guideline errors. Not only does that prevent some defendants from receiving a "deserved resentencing," *Montgomery*, 969 F.3d at 583, it undermines the goal of uniformity in federal sentencing, which was Congress's "principal purpose" in adopting the Sentencing Guidelines system, *Hughes v. United States*, 138 S. Ct. 1765, 1774 (2018).

More than one-fourth of federal defendants sentenced in 2020 received a sentence that was a variance from the guideline range. *See* U.S. Sentencing Comm'n,

Table 29, "Sentence Imposed Relative to the Guidelines Range," *FY2020 Sourcebook of Federal Sentencing*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/Table29.pdf. In five circuits, judges can avoid any real appellate scrutiny of those sentences by saying nothing more than that they would have imposed the same sentence irrespective of the guideline range.

Just this year, the Seventh Circuit "noticed the frequency with which sentencing judges are relying on inoculating statements" in an effort to immunize Guidelines miscalculations on appeal. *Asbury*, 27 F.4th at 581. District judges face incentives that encourage them to make blanket assertions about their sentencing conclusions to insulate their Guidelines calculations from appellate review. Indeed, one Fourth Circuit judge has encouraged district judges to make that practice a uniform policy by "announcing alternate sentences in cases . . . . where the guidelines calculation is disputed." *United States v. Montes-Flores*, 736 F.3d 357, 374 (4th Cir. 2013) (Shedd, J., dissenting); *but see United States v. Johnson*, 333 F. Supp. 2d 573, 575 (S.D.W. Va. 2004) (rejecting such pronouncements as advisory opinions and observing that "[h]ypothetical sentencing is an abdication of [the court's] duty to *decide* legal issues") (emphasis in original).

In addition to the long line of post-*Booker* cases in which this Court has resolved disputes over federal sentencing procedure—with the aim of ensuring nationwide uniformity—the Court frequently has granted certiorari to address the application of harmless error review. *See, e.g.*, *Williams*, 503 U.S. at 203 (whether incorrect application of the mandatory Guidelines is harmless error); *United States v. Davila*,

569 U.S. 597, 605 (2013) (whether violations of Rule 11(c)(1) are harmless); *Neder v. United States*, 527 U.S. 1, 7 (1999) (whether an erroneous jury instruction is harmless error); *Peguero v. United States*, 526 U.S. 23, 24 (1999) (whether the failure to advise a defendant of his right to appeal is harmless error). The Court's review is just as necessary here.

IV. This Case Is a Good Vehicle to Resolve the Circuit Split.

Petitioner's case provides the Court with an ideal opportunity to address this important issue. The question comes to the Court cleanly. Mr. Walker preserved his argument in the Fourth Circuit that its "assumed error harmlessness inquiry" was inconsistent with this Court's precedents. The court of appeals acknowledged that argument but squarely rejected it. App. 1.

The Fourth Circuit rested its decision entirely on its harmless error finding, without addressing the underlying guideline calculation in any way. App. 1–2. Thus there is no alternative basis on which this Court could affirm the lower court's ruling. If it rules in Mr. Walker's favor, the Court could simply remand the case to the Fourth Circuit so it can address the propriety of the guideline calculation in the first instance.

As the district court itself admitted, the substance of the guidelines calculation dispute is a close call. That is precisely the type of issue that deserves appellate review on the merits. This Court should grant Mr. Walker's petition and hold that the district court's boilerplate statement was not sufficient to prevent that review.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold this petition pending the outcome of the petition in *Irons v. United States* (No. 22-242), *Brooks v. United States* (No. 22-5788), or any other case presenting a similar issue.

Respectfully submitted,

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