NO. _____

# In the Supreme Court of the United States

GILBERTO GONZALEZ-ENRIQUEZ,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a sentencing court can insulate a substantial error in calculating the U.S. Sentencing Guidelines range from appellate review simply by asserting that it would have imposed the same sentence "even if I had gotten the guideline range wrong."

## DIRECTLY RELATED PROCEEDINGS

*United States v. Gilberto Gonzalez-Enriquez*, No. 3:20-cr-268 (N.D. Tex. Feb. 17, 2022)

*United States v. Gilberto Gonzalez-Enriquez*, No. 22-10199 (5th Cir. Jan. 11, 2023)

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## PETITION FOR A WRIT OF CERTIORARI

Gilberto Gonzalez-Enriquez respectfully 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 below was not selected for publication. It can be found at 2023 WL 155416. The decision is reprinted in the Appendix. The sentencing court did not issue any written opinions, but the sentencing transcript is reprinted in the appendix.

### JURISDICTION

The Fifth Circuit entered its judgment on January 11, 2023. This petition is timely under S. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 18 U.S.C. § 3742(a)(1)–(2) & (3) and Federal Rule of Criminal Procedure 52(a).

Title 18, Section 3742 provides, in pertinent part:

> (a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--
>
> (1) was imposed in violation of law; [or]
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines . . .
>
> * * * *
>
> (e) Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> (3) is outside the applicable guideline range, and
>
> (A) the district court failed to provide the written statement of reasons required by section 3553(c);
>
> (B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

Federal Rule of Criminal Procedure 52(a) provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

## STATEMENT

Petitioner Gilberto Gonzalez-Enriquez pleaded guilty to illegal reentry after removal in violation of 8 U.S.C. § 1326(a). At sentencing, the parties vigorously disputed the proper calculation of his range under the advisory U.S. Sentencing Guidelines range. The dispute focused on the proper analysis of a 2019 Texas felony conviction for Driving While Intoxicated under U.S.S.G. § 2L1.2(b)(2), (3), and Application Note 5 (2018). Pet. App. 1a–2a.

The U.S. Probation Office calculated Petitioner's advisory Sentencing Guidelines range as 57–71 months. 5th Cir. ROA 154–156, 161. That calculation assumed that the 2019 DWI was a felony committed *after* Petitioner's first removal. *See* U.S.S.G. § 2L1.2(b)(3)(A) (2018). Respondent supported this calculation.

Petitioner objected to that assumption, arguing that "[t]he criminal conduct underlying" his 2019 DWI conviction "occurred both before and after" his 2004 removal. 5th Cir. ROA 166–168 (discussing U.S.S.G. § 2L1.2, cmt., n.5 (2018)). Under Petitioner's interpretation, his guideline range should have been 18–24 months in prison.

The district court recognized that this was an open question, anticipated an appeal, and hoped the Fifth

Circuit would provide "clarity" for the unsettled question. Pet. App. 20a; *see also id.* 21a ("You may win in the Fifth Circuit. So we will see.").

Utilizing the district court's starting point of 57–71 months, Petitioner asked the court to reduce the sentence it would otherwise impose by 23 months, to reflect time he had spent in state custody that would not be credited by the federal Bureau of Prisons. Pet. App. 29a, 33a. The defense thus requested a sentence of 34 months, which would correspond to the bottom of the district court's guideline range (57 months) minus 23 months. Pet. App. 33a. The district court varied down from the Guidelines range, but not as far as the defense wanted. The court sentenced Petitioner to 52 months in prison, followed by three years of supervised release. Pet. App. 37a.

When explaining the sentence it chose, the district court explicitly relied on its disputed Guidelines ruling: "There was engaging in felony conduct after re-entering the U.S., which I find concerning." Pet. App. 37a. Later, though, the district court said: "I will say that even if I had gotten the guidelines range wrong, I would have imposed that same 52-month [prison] and three-year [supervised release] sentence as evidenced by the fact that I threw out the guidelines and granted a variance." Pet. App. 43a.

On appeal, the Fifth Circuit affirmed the sentence without addressing the dispute over the Sentencing Guidelines:

> We need not decide whether the court procedurally erred in applying the

> enhancement, because the Government has met its burden on appeal of showing that any error was harmless by demonstrating: the court "would have imposed the same sentence had it not made the error"; and it "would have done so for the same reasons it gave at . . . sentencing".

Pet. App. 2a (quoting *United States v. Guzman-Rendon*, 864 F.3d 409, 411–12 (5th Cir. 2017)). This timely petition follows.

## REASONS FOR GRANTING THE PETITION

### I. THE CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED.

#### A. Most circuits do not truncate appellate review simply because the sentencing uttered an inoculating statement.

This Court has explained, in the context of plain error review, that lowering the guideline range usually lowers the resulting sentence, "[a]bsent unusual circumstances." *Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016). Consistent with that guidance, the majority approach—adopted by the Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits— provides that a Guidelines calculation error is not harmless merely because the district court included a boilerplate statement that it would have reached the same sentence without regard to any Sentencing Guidelines calculation errors. Instead, these circuits require that a sentencing court clearly

explain its reasoning for choosing a sentence that deviates from the correct Guidelines range.

The Second Circuit sets a high bar for harmless error review that exemplifies the majority rule. It is a searching review: "A non-Guidelines sentence requires a written statement of reasons that lays out the justification for a non-Guidelines sentence 'with specificity.' This requirement is not an empty formality." *United States v. Seabrook*, 968 F.3d 224, 235 (2d Cir. 2020) (quoting *United States v. Cavera*, 550 F.3d 180, 192-93 (2d Cir. 2008)). Simply put, "the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did." *Id.* at 233–34. In *Seabrook*, the district court was presented with the correct Guidelines range and, in announcing its sentence, asserted a Guidelines disclaimer. Determining that the court's Guidelines calculation was erroneous, however, the circuit court scrutinized the significant upward sentencing variance imposed. "Absent . . . explanation," the appeals court reasoned, it could not "be certain that the [district] court's calculus would not have been altered had it appreciated the full extent of the upward variance it was contemplating." *Id.* at 234. It therefore vacated and remanded the case for resentencing. Second Circuit precedent cautions that "a district court generally should not try to answer the hypothetical question of whether or not it definitely would impose the same sentence on remand if this Court found particular enhancements erroneous." *United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011). Indeed, "a simple incantation"

cannot "exempt[] from procedural review" "criminal sentences." *Id.*

The Third Circuit similarly requires that district courts articulate their reasoning in order for a Guidelines disclaimer to be effective. *See United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013) ("Though probative of harmless error, these [inoculation] statements will not always suffice to show that an error in calculating the Guidelines range is harmless; indeed, a district court must still explain its reasons for imposing the sentence under either Guidelines range."); *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 unless that 'alternative sentence' was, itself, the product of the three step sentencing process"); *United States v. Langford*, 516 F.3d 205, 218 (3d Cir. 2008) ("A 'blanket statement' that the sentence imposed is fair is not sufficient; a district court must determine a Guidelines range without the miscalculation error and explain any variance from it based on § 3553(a) factors."). In *United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008), the Third Circuit vacated and remanded a sentence because, even though the district court had included a Guidelines disclaimer, "the alternative sentence [was] a bare statement devoid of any justification."

The Sixth Circuit also refuses to take a Guidelines disclaimer at face value. In *United States v. Collins*, the circuit rejected a district court's claim that it would have varied a defendant's sentence upward

regardless of a Guidelines error. 800 F. App'x 361, 363 (6th Cir. 2020). The "incorrect guidelines range may well have had an upward 'gravitational pull' on the ultimate sentence" because "the court nowhere suggested that it would have opted for what would have been a significant 39-month upward variance from the correct guidelines range." *Id.*

The Seventh Circuit requires a "detailed" inoculating statement focusing "specific . . . attention to the contested guideline issue" before it will find harmless error. *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022) (citing *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009)). The statement must "explain the 'parallel result,'" meaning it is "tied to the decisions the court made" and "account[s] for why the potential error would not 'affect the ultimate outcome.'" *Id.* at 581–82 (quoting *United States v. Bravo*, 26 F.4th 387, 397 (7th Cir. 2022)). In *Asbury*, the judge's inoculating statement acknowledging possible Guidelines error was not specific enough because it "shed[ ] no light on which potential errors [the court] had in mind." *Id.* at 583; *see also Bravo*, 26 F.4th at 397 (rejecting a Guidelines disclaimer because the court failed to explain "why a sentence so tied to one guidelines range would have come out the same way with a different starting point"). Indeed, in the Seventh Circuit, "[a] ge-neric disclaimer of all possible errors will not do." *Asbury*, 27 F.4th at 581. This is for good reason. Otherwise, "the judge would have no incentive to work through the guideline calculations" and could "proceed to sentence based exclusively on her own preferences," a result antithetical to Congress' envisioned approach to uniform sentencing. *Id.*

The Ninth Circuit similarly requires that a Guidelines inoculation statement be accompanied by an explanation for the decision. In *United States v. Munoz-Camarena*, the Ninth Circuit explained that "[a] district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range. The court must explain, among other things, the reason for the extent of a variance." 631 F.3d 1028, 1031 (9th Cir. 2011). In *United States v. Acosta- Chavez*, the district court explicitly calculated both the enhanced and unenhanced Guidelines ranges and landed on a sentence in the middle. 727 F.3d 903, 909–10 (9th Cir. 2013). Reasoning the enhanced range "overstate[d]" the conviction while the unenhanced range "would not sufficiently address the statutory factors," the court determined a 30-month sentence would "adequately and fairly address[ ] all of the statutory factors." *Id.* The Ninth Circuit was unconvinced. Because "[t]he district court's alternative explanation . . . [did] not explain the 'extent' of the variance," the erroneous sixteen-level enhancement was not harmless. *Id.* at 910.

The Tenth Circuit agrees. "At the very least, the district court must find and articulate sufficient facts and reasons to allow us to review the appropriateness of the enhancement." *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1112 (10th Cir. 2008). "In the absence of explanation," the court continues, "we might be inclined to suspect that the district court did

not genuinely 'consider' the correct guidelines calculation in reaching the alternative rationale, as is required under *United States v. Booker*."[1] *Id.* at 1117; *see also United States v. Porter*, 928 F.3d 947, 963 (10th Cir. 2019) ("It is not enough for the district court to say 'that its conclusion would be the same even if all the defendant's objections to the presentence report had been successful.'").

### B. In a few circuits, including the Fifth, an inoculating disclaimer terminates further appellate review.

The Fifth Circuit's approach is emblematic of the minority rule. These circuits accept Guidelines errors without further inquiry if the district court includes a boilerplate disclaimer that the Guidelines did not matter to its sentence. There need only be a scintilla of evidence in the record that the sentencing court had before it both the "correct" and "incorrect" Guidelines ranges when it handed down its sentence. In practice, this latter inquiry is not searching, and at least the Eleventh Circuit does not engage in it at all.

*United States v. Vega-Garcia*, 893 F.3d 326 (5th Cir. 2018), is typical of the Fifth Circuit's approach. A Guidelines error is harmless if "the district court considered both [Guidelines] ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." *Id.* at 327; *see also United States v. Guzman-Rendon*, 864 F.3d 409, 412 (5th Cir. 2017). The district

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

court does not even need to state that it considered both ranges as long as there is record evidence it was presented with both. *See United States v. Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir. 2021), *cert. denied*, 141 S. Ct. 2545 (2021) ("[T]he district court was aware of the guidelines range absent the enhancements because Medel-Guadalupe advised the court of this range in his written PSR objections.") Unlike the majority of circuits, if the initial tests are met, the Fifth Circuit does not inquire further into the reasons underlying a sentencing variance. This is true even in cases like this one, where the district court *believed* it was imposing a below-guideline-range sentence but *in fact* imposed a sentence well above the correct range. This approach leaves unreviewed whether the incorrect Guidelines calculation impermissibly influenced the sentence despite the judge's disclaimer. "Error does not necessarily result when the district court's reasons" for setting a non-Guidelines sentence "are not clearly listed for our review" when the court's reasoning is otherwise apparent from the record. *United States v. Bonilla*, 524 F.3d 647, 657–58 (5th Cir. 2008), *abrogated on other grounds by United States v. Reyes- Contreras*, 910 F.3d 169 (5th Cir. 2018).

The other circuits in the minority camp are at least as deferential to boilerplate inoculation statements. In *United States v. Marsh*, 561 F.3d 81 (1st Cir. 2009), the First Circuit encountered a bare disclaimer that simply stated the court would have imposed the same sentence as a non-Guidelines sentence under the statutory sentencing factors. "While the district court's explicit acknowledgement of § 3553(a) was

brief, we do not require the court to 'address those factors, one by one, in some sort of rote incantation when explicating its sentence.'" *Id.* at 86 (internal citation omitted); *see also United States v. Ouellette*, 985 F.3d 107, 110 (1st Cir. 2021) ("Because the district court made clear that it would have imposed the same sentence regardless of the Guidelines, any alleged error in calculating Ouellette's [base offense level] is harmless.").

The Fourth Circuit likewise will deem Guidelines errors harmless if the district court says it would have imposed the same sentence anyway, provided the variance is substantively reasonable. *See United States v. Prater*, 801 F. App'x 127, 128 (4th Cir. 2020); *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019); *United States v. Gomez-Jimenez*, 750 F.3d 370, 382–83 (4th Cir. 2014); *United States v. Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012).

The Eighth Circuit is similarly deferential: "When the district court explicitly states that it would have imposed the same sentence of imprisonment regardless of the underlying Sentence Guideline range, 'any error on the part of the district court is harmless.'" *United States v. Peterson*, 887 F.3d 343, 349 (8th Cir. 2018) (quoting *United States v. Davis*, 583 F.3d 1081, 1094–95 (8th Cir. 2009)); *see also United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2018) ("[W]e conclude that such error was harmless because the district court stated that it would have varied upward had it not applied the cross-reference."); *United States v. Waller*, 689 F.3d 947, 958 (8th Cir. 2012).

The Eleventh Circuit takes the most deferential approach to Guidelines disclaimers. When a district court has "stated on the record that it would have imposed the same sentence either way, that is 'all we need to know' to hold that any potential error was harmless.'" *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 814 (2022) (quoting *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)).

The circuits are thus firmly divided on a frequently recurring and fundamental question regarding the review of sentencing errors on appeal. The split is deep enough that there can be no expectation that the courts will resolve the split absent this Court's intervention.

## II. THE FIFTH CIRCUIT'S RULE UNDERMINES THE CORE PURPOSE OF THE SENTENCING REFORM ACT.

The Fifth Circuit is wrong to hold a Guidelines error categorically harmless any time it is accompanied by a judicial disclaimer that the sentence would be the same without the error. The majority rule, which views such statements with suspicion and requires detailed explanation to support the alternative sentencing variance, is the only way to ensure the error did not unduly influence the sentence. Harmless error findings based on boilerplate disclaimers conflict with the analysis that this Court requires both at sentencing hearings and at every appellate review. *See Gall v. United States*, 552 U.S. 38, 49–51 (2007).

Properly calculating the Guidelines is a mandatory step for sentencing courts. *Id.* at 49. The Guidelines are crucial to sentencing, even if the sentencing judge chooses to depart or vary from the Guidelines range, because while not binding, the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.'" *Id.* at 46. Thus, even when a sentencing court decides not to impose a Guidelines sentence, it must explain its sentencing decision by reference to the properly calculated Guidelines sentence; it is "uncontroversial" that a "major departure [from the Guidelines] should be supported by a more significant justification than a minor one," and sentencing courts "must adequately explain the chosen sentence . . . to promote the perception of fair sentencing." *Id.* at 50.

To impose a reasonable sentence, a district court must at least have in mind the correct Guidelines sentencing range. That is 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). Though the district court has the 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).

In *Molina-Martinez*, this Court held that correctly calculating the Guidelines range is the starting point

for all sentencing hearings. "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." 578 U.S. at 198.These holdings emphasize the "anchoring" effect of the Guidelines; the Guidelines shape judges' sentencing decisions whether or not they choose to impose a Guidelines sentence.

The Guidelines also play a crucial role in reviewing sentences on appeal, just as appellate decisions interpreting the Guidelines play a crucial role in evaluating and amending the Guidelines. "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. 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.

Those appellate decisions, in turn, influence the Sentencing Commission when revising and clarifying the Guidelines:

> The Commission's work is ongoing. The statutes and the Guidelines themselves

> foresee continuous evolution helped by the sentencing courts *and courts of appeals* in that process. The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. *The courts of appeals will determine the reasonableness of the resulting sentence.* The Commission will collect and examine the results

*Rita v. United States*, 551 U.S. 338, 350 (2007) (emphases added). If a district court can preempt appellate review by predicting that the sentence would remain the same, that would short-circuit this process.

## III. THE CONFLICT CALLS OUT FOR SUPREME COURT REVIEW.

### A. The question presented is important.

Inconsistency in the circuits' standards for harmless error review in the face of Guidelines disclaimers harms individual liberty, undermines the Guidelines' main purpose of promoting sentencing uniformity, and interferes with the Guidelines' proper and just application. *See Hughes v. United States*, 138 S. Ct. 1765, 1774 (2018).

Federal sentencing procedures affect the lives of tens of thousands of individuals every year. Over 57,000 federal defendants were sentenced in 2021 alone, and 31%—17,669 defendants—received

sentences that represented variances from the Guidelines. U.S. Sent'g Comm'n, Table 29, "Sentence Imposed Relative to the Guideline Range," 2021 Annual Report and Sourcebook of Federal Sentencing Statistics 84, https://www.ussc.gov/research/sourcebook-2021. As the foregoing circuit-by-circuit review demonstrated, in nearly half the country, district courts can remove their sentencing decisions from appellate scrutiny with a perfunctory boilerplate disclaimer—effectively unmooring these sentencing decisions entirely from any sound basis in the Guidelines.

For example, in Amarillo and Lubbock, Texas, alone, an analysis of 208 federal defender cases closed in 2021 revealed that fully 99% of them—and 100% of cases that resulted in non-Guidelines sentences—included a judicial inoculation statement. E-mail from Victoria M. Smiegocki, Assistant Dir. of Rsch., Deason Crim. Just. Reform Ctr., SMU Dedman Sch. of L., to K. Joel Page, Asst. Fed. Pub. Def., N.D. Tex. (Feb. 13, 2023, 07:13 CST) (on file with author).

The increasing use of disclaimers to inoculate Guidelines errors has been noted in the circuits. *See Asbury*, 27 F.4th at 581. One Fourth Circuit judge has explicitly "encourage[d] district courts to consider announcing alternative 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). Meanwhile, the Second Circuit discour-ages this practice. *See Feldman*, 647 F.3d at 460 ("[A] district court generally should not try to answer the hypothetical question of whether or not it

definitely would impose the same sentence on remand if this Court found particular enhancements erroneous."). This Court should resolve which practice is proper by issuing clear instructions for appellate courts to follow in assessing the import of a judicial Guidelines disclaimer under the harmless error standard.

Ensuring proper harmless-error reviews of Guidelines miscalculations also benefits the government when it appeals Guidelines miscalculations. *See Porter*, 928 F.3d at 968 (remanding after the government demonstrated the Guidelines miscalculation was not harmless, even though the district court included a Guidelines disclaimer). Because improper sentences stemming from Guidelines calculation errors "seriously affect the fairness, integrity, or public reputation of judicial proceedings," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018), both the government and criminal defendants have an interest in ensuring that harmless-error reviews of such sentences are conducted correctly.

### B. This case is an ideal vehicle to resolve the circuit split.

This case is an excellent vehicle for resolving this important and recurring question. Petitioner was sentenced *below* the Guideline range the district court deemed applicable, but properly preserved a separate Guideline objection. If that objection were sustained, the sentence the district court chose would be *well above* the correct range. Rather than settle the interpretive dispute—as even the district court

anticipated—the Fifth Circuit relied on the judge's boilerplate inoculation statement. Pet. App. 2a. Indeed, the decision below only addressed the inoculation question and, as is often the case, never addressed the Guidelines question itself. *Id.* This truncated form of review deprives litigants, district courts, and the Sentencing Commission of guidance on important sentencing disputes. There are no jurisdictional questions that would prevent the Court from resolving the issue and nearly every circuit has thoroughly analyzed the issue, creating an entrenched split.

## CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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