No. _____

In The
Supreme Court of the United States

JOSE ALFREDO SOLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Sentencing Guidelines "are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). Thus, even when a defendant fails to object to an erroneous Guidelines range at sentencing—and regardless of whether the "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." *Id.* at 198 (emphasis added).

The question presented here has divided the courts of appeals for decades: By what standard of proof must the government prove that a Guidelines error is harmless when, unlike in *Molina-Martinez*, the defendant *objected* to the erroneous Guidelines range before the district court?

RELATED PROCEEDINGS

United States v. Solis, Nos. 21-50140, 21-50142 (9th Cir. Aug. 22, 2022).

United States v. Jose Solis, Nos. 3:20-cr-02510-LAB-1, 3:17-cr-03121-LAB-1 (S.D. Cal. June 7, 2021).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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Petitioner Jose Alfredo Solis respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

It has been more than thirty years since the Court addressed what standard applies to a preserved claim of error that a district court miscalculated the U.S. Sentencing Guidelines. In *Williams v. United States*, the Court held 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, i.e., that the error *did not* affect the district

court's selection of the sentence imposed." 503 U.S. 193, 203 (1992) (emphasis added) (citing FED. R. CRIM. P. 52(a)).

In the decades since, the courts of appeals have split over how the government can meet that burden. The Second, Third, Fifth, and Sixth Circuits require heightened standards of proof—certainty, a lack of ambiguity, or a convincing showing—to conclude that the error did not affect the sentence. By contrast, the Ninth, Tenth, and Eleventh Circuits merely require the government to show harmlessness by a preponderance of the evidence. Those distinctions have significant consequences: The approach taken can be the difference between a remand and an affirmance for cases with similar fact patterns.

The split undermines the Guidelines' basic function: to make federal sentences more uniform. *See Molina-Martinez*, 578 U.S. at 192–93. That is because uniformity requires that the standard for correcting errors is uniform, too. The Court has not hesitated to intervene when division among the courts of appeals have undermined the Guidelines' function. *E.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018); *Molina-Martinez*, 578 U.S. at 193. It must do so again.

OPINION BELOW

The Ninth Circuit held that the district court committed preserved errors in interpreting and applying the U.S. Sentencing Guidelines but nevertheless affirmed Mr. Solis's sentence in a memorandum disposition. *See* Appendix to the Petition ("Pet. App.") at 1a–12a.

JURISDICTION

The Court of Appeals entered judgment on August 22, 2022. It then denied Mr. Solis's joint petition for rehearing and rehearing en banc on November 17, 2022. On February 2, 2023, Justice Kagan extended the time to file a petition for a writ of certiorari until April 16, 2023. *See* 22-A-697. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

Section 3742 of Title 18 of the U.S. Code provides that "[i]f the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f)(1).

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.

FED. R. CRIM. P. 52.

STATEMENT OF THE CASE

Jose Solis was fifty-six years old when he was caught trying to import—in the district court's words—a "benign" amount of methamphetamine through the United States-Mexico border's pedestrian lane. Pet. App. 49a, 61a, 81a. It was a doomed

plan; Mr. Solis was blind, barely mobile, and likely to be searched because he was on supervised release from another case.

Yet, as the district court did not dispute, Mr. Solis felt that he had little choice. His girlfriend owed drug traffickers debts that no honest person could pay. They had put her in the hospital with a beating. They said that only Mr. Solis, a United States citizen, could prevent that from happening again.

Mr. Solis pleaded guilty. At sentencing, he sought a reduction of his offense level under the U.S. Sentencing Guidelines as a "minor participant" in the offense. *See* U.S. SENT'G GUIDELINES MANUAL § 3B1.2(b) (U.S. SENT'G COMM'N 2021). When considered with other intertwined provisions of the Guidelines, § 3B1.2(b)'s reduction would have lowered Mr. Solis's suggested sentence by nearly five years.[1]

The district court spent more than twenty pages of transcript debating the merits of Mr. Solis's Guidelines request. *See* Pet. App. 16a–36a, 70a–73a. There was discussion not just of the case's facts, but of the correct interpretation of the "minor participant" Guideline. The district court ultimately denied the reduction and sentenced Mr. Solis to eighty-four months in prison.

Following the imposition of sentence, Mr. Solis's lawyer ensured that his objections were preserved for appeal. Then, for the first time, the court said that it would have imposed the same sentence with or without the "minor participant"

[1] Without the "minor participant" reduction—and as the district court calculated—Mr. Solis's effective adjusted offense level was 29 and his Guidelines range was 151 to 188 months' imprisonment. Pet. App. 61a. But with the reduction, his adjusted level would have been 23, and his suggested term of imprisonment was 92–115 months' imprisonment. *Id.* at 6a; Appellant's Excerpts of Record at 87, United States v. Solis, No. 21-50140 (9th Cir. Jan. 7, 2022), ECF No. 14.

reduction: "One more thing. Even if I granted minor role, the variance here was enormous. And I would not have imposed any different sentence, even if I granted minor role."[2] *Id.* at 73a.

Seeking to justify that belated assertion, the court tried to calculate what Mr. Solis's offense level would have been with the disputed reduction. But in doing so, the court missed a Guidelines provision and concluded that the disputed reduction would have had a lesser effect on Mr. Solis's recommended sentencing range than it, in fact, did. *See id.* at 6a (assuming arguendo that the district court's alternative calculation was wrong, too).

Thus, the sentencing judge ruled that Mr. Solis's eighty-four-month sentence was "significantly lower" than either of the (erroneous) Guidelines ranges that he had calculated. The judge reasoned that he

> wouldn't have gone any lower, even if I had granted minor role. So I have to tell you that looking at it both ways, that's the sentence that I think is fair and reasonable, in light of the factors that I mentioned were the most important to me, which was just punishment, and deterrence, specific deterrence in his case.

Id. at 73a.

Mr. Solis appealed. He argued that the district court erroneously interpreted § 3B1.2, contravening the Ninth Circuit's precedent. The panel unanimously agreed. *Id.* at 3a–4a. Nevertheless, the panel's majority concluded that those errors were harmless. *Id.* at 8a. That was so, the majority reasoned, because the government merely had to "show that it is more probable than not that the error did not affect

[2] In the Southern District of California, practitioners refer to § 3B1.2(b)'s reduction as "minor role."

the sentence." *Id.* at 5a. (quoting *United States v. Dominguez-Caicedo*, 40 F.4th 938, 963 (9th Cir. 2022), *petition for writ of certiorari on other grounds docketed*, No. 22-6461 (Dec. 27, 2022)).

Judge Holly A. Thomas dissented as to harmlessness. "In light of the multiple mistakes of law committed during the sentencing proceedings, [she] d[id] not believe it is more likely than not that the errors did not affect Solis'[s] sentence." *Id.* at 11a.

Mr. Solis petitions the Court for review.

REASONS FOR GRANTING THE WRIT

After thirty years of percolation, the courts of appeals remain hopelessly divided on an elemental question of federal criminal law: What is the correct harmless-error standard for disputed calculations of the U.S. Sentencing Guidelines? By its mere existence, a circuit split undermines the Guidelines' systemic function—encouraging uniformity among the thousands of federal sentences imposed each year.

The Court should use this case to resolve that split. Mr. Solis squarely presents the issue, and the standard of review is outcome determinative. The panel used the least-remand-friendly standard and still divided over whether the undisputed error was harmless. It follows that a different standard would mean a different result. Finally, the Ninth Circuit is wrong. Its harmless-error standard for preserved Guidelines disputes is incompatible with this Court's clear precedents. For the reasons that follow, the Court should grant the petition.

I. The courts of appeals are divided on when a preserved Guidelines error may be proven harmless.

The courts of appeals have long been divided about when the government meets its burden to show that a *preserved* Guidelines error was harmless. That conflict came into stark relief following the Court's clarification of when a defendant can show prejudice from an *unpreserved* Guidelines error in *Molina-Martinez* and *Rosales-Mireles*. Yet lower courts remain divided. If thirty years of percolation among the circuits failed to brew a uniform standard, only the Court can bring uniformity.

A. The Second, Third, Fifth, and Sixth Circuits require the government to meet heightened standards of proof to show that a preserved Guidelines error was harmless.

The Second, Third, Fifth, and Sixth Circuits hold the government to very high burdens in showing the harmlessness of a preserved Guidelines error. To the extent that those standards differ on the margins, the thrust is the same: Because of correct Guidelines calculations' importance, the government can rarely show that a sentencing judge's Guidelines error—objected to at sentencing—was harmless.

1. The Sixth Circuit requires certainty that the error was harmless.

In the Sixth Circuit, if a sentencing judge "makes a mistake in calculating a guidelines range . . . , [the appellate court is] required to remand for resentencing *'unless [it is] certain* that any such error was harmless.'" *United States v. Duckro*, 466 F.3d 438, 446 (6th Cir. 2006) (emphasis added) (quoting *United States v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005)).

2. The Third Circuit requires a "sure conviction" based on an unambiguous record that the error was harmless.

In the Third Circuit, the government must generally show a "high probability" that the Guidelines error was harmless. *United States v. Langford*, 516 F.3d 205, 215 (3d Cir. 2008). That court's precedents show that the bar is even higher than it sounds. To affirm a sentence, a court must "possess a '*sure conviction* that the error did not prejudice' the defendant." *Id.* (emphasis added) (citation omitted). And even when, as here, "the sentence is below the Guidelines range, the record *must be unambiguous* that the miscalculation of the range had no effect." *Id.* at 217 (emphasis added); *see also United States v. Nagle*, 803 F.3d 167, 183 (3d Cir. 2015) (reiterating that "the record must be unambiguous").

3. The Second Circuit requires an unambiguous indication that the error was harmless.

The Second Circuit also requires a lack of ambiguity. "[I]f a district court errs in calculating a defendant's Guidelines sentencing range, [the Second Circuit] cannot assume, *without unambiguous indication to the contrary*, that the sentence would be the same absent the error." *United States v. Feldman*, 647 F.3d 450, 459 (2d Cir. 2011) (emphasis added). That court is "especially wary of" assuming that a defendant would receive the same sentence on remand when the "alleged erroneous enhancement" had a dramatic effect on the recommended range of sentences. *Id.* at 460. In *Feldman*, for example, the defendant's Guidelines range would have been cut from 151 to 188 months in prison—the same as Mr. Solis's erroneously calculated range—to 63 to 78 months—just less than Mr. Solis's correct range. *Id.*

It is no answer if the sentencing judge utters the "simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Id.* First, such predictions are "rarely appropriate." *Id.* at 452. And second, "because the correct Guidelines range is 'the starting point and the initial benchmark' for federal sentences, [a court] cannot lightly assume that eliminating enhancements from the Guidelines calculation would not affect the sentence." *Id.* at 459–60 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

4. The Fifth Circuit requires that the government "convincingly demonstrate" that it met its "heavy burden" to show that the error was harmless.

Finally, as relevant here, the Fifth Circuit holds that "the harmless error doctrine applies only if the proponent of the sentence *convincingly demonstrates* both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing."[3] *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010) (emphasis added). That "is a heavy burden." *Id.* at 717. It is insufficient to show "that the same explanation the court gave for imposing a sentence outside the miscalculated range *could* also support a sentence outside the correctly calculated range." *Id.* Thus, "an incorrect Guidelines calculation will usually invalidate the sentence, *even when the district court chose to impose a sentence outside the Guidelines range*." *Id.* (emphasis added).

[3] In the Fifth Circuit, a preserved Guidelines error also is deemed harmless if "the district court considered both ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017).

The burden particularly is "difficult . . . if the district court fails to indicate why it selected a sentence of a particular length." *Id.* at 718. For example, in *Ibarra-Luna*, the district court erroneously calculated the Guidelines range as twelve to eighteen months' imprisonment *Id.* at 719. The correct Guidelines range was six to twelve months. *Id.* Although the district court varied upward because even its inflated range "was not sufficiently long to protect the public from further crimes by [the defendant] or, given his status as a repeat offender, to promote respect for the law," the Fifth Circuit still vacated and remanded. *Id.*

That result is notable because the Fifth Circuit was "convinced that the explanation the district court gave for imposing an above-Guidelines sentence would have led it to do so even if it had considered the correct Guidelines range." *Id.* Regardless, the panel could not "state with the requisite *certainty*, however, that the district court would have imposed precisely the same sentence." *Id.* (emphasis added). The problem, in part, was that the sentencing judge made a point of saying, "'I need to understand where he comes out on the Guidelines, and then make my variance,' which suggest[ed] that, quite properly, the Guidelines recommendation affected the sentence [the judge] selected." *Id.*

B. The Ninth, Tenth, and Eleventh Circuits merely require that the government show that it is more probable than not that a Guidelines error was harmless.

In this case, the panel applied a rule adopted by the Ninth, Tenth, and Eleventh Circuits: "To establish harmlessness, the Government must show that 'it is more probable than not' that the [Guidelines] error did not affect the sentence."

Pet. App. 5a (quoting *Dominguez-Caicedo*, 40 F.4th at 963). The Ninth Circuit's more-probable-than-not standard is mathematically identical to the Tenth Circuit's rule that "[t]he Government has the burden of establishing by a preponderance of the evidence that the district court's procedural miscues were harmless." *United States v. Kieffer*, 681 F.3d 1143, 1169 (10th Cir. 2012). That includes any erroneous calculation of the Guidelines. *Id.*

Meanwhile, the Eleventh Circuit has held that a reviewing court is "not required to vacate the sentence and remand the case if the court would have *likely* sentenced [the defendant] in the same way without the error." *United States v. Scott*, 441 F.3d 1322, 1329 (11th Cir. 2006) (per curiam) (emphasis added).

Thus, although the phrasing differs slightly, the result is the same for all three standards: If the party defending a sentence shows a 50.01% probability that a preserved Guidelines error did not affect the sentence, no remand is required. A reviewing court can have substantial concerns that the person would have received a different sentence under the correct Guidelines range and still affirm.

Why those circuits adopted more lenient tests is unclear.[4] They appear to have copied and pasted those courts' harmlessness standards for other trial or sentencing errors. For example, the Ninth Circuit's *Dominguez-Caicedo* opinion attributed "more probable than not," 40 F.4th at 963, to *United States v. Morales*,

[4] Similarly, the courts of appeals for the First, Fourth, Seventh, Eighth, and District of Columbia Circuits have not expressed what quantum of proof one must meet to show that a preserved Guidelines error is harmless and have given no explanation for their silence. *See, e.g.*, *United States v. Ouellette*, 985 F.3d 107, 110 (1st Cir. 2021); *United States v. McDonald*, 850 F.3d 640, 643 (4th Cir. 2017); *United States v. Shelton*, 905 F.3d 1026, 1031 (7th Cir. 2018); *United States v. Dace*, 842 F.3d 1067, 1069 (8th Cir. 2016); *United States v. Kpodi*, 824 F.3d 122, 129 (D.C. Cir. 2016).

108 F.3d 1031 (9th Cir. 1997) (en banc). That case addressed whether "expert testimony ha[d] been erroneously excluded." *Morales*, 108 F.3d at 1040. Similarly, the Tenth Circuit's *Kieffer* case attributed the "preponderance of the evidence" standard to *United States v. Lente*, 647 F.3d 1021 (10th Cir. 2011), which involved a failure to address a defendant's arguments at sentencing. *Kieffer*, 681 F.3d at 1169; *Lente*, 647 F.3d at 1037–38. The Eleventh Circuit's "likely" standard is particularly unexplained. *Scott*'s per curiam decision attributes it—without quoting—to three sources: the Court's opinion in *Williams*, a concurrence from another Eleventh Circuit case, and another per curiam decision from another panel of that court. 441 F.3d at 1329. None of those opinions describe a "likely" standard. *See Williams*, 503 U.S. at 203; *United States v. Williams*, 431 F.3d 767, 775 (11th Cir. 2005) (Carnes, J., concurring); *United States v. Blas*, 360 F.3d 1268 (11th Cir. 2004) (per curiam).

C. The conflicting standards influence how the circuits resolve Guidelines appeals with similar fact patterns.

Different standards in different circuits can lead to differing outcomes in similar cases. Take the facts at issue here: After imposing a sentence under an incorrect Guidelines range, the sentencing judge mentioned an alternative (albeit also incorrect) Guidelines range and said that he would impose the same sentence under either range. The Ninth Circuit nevertheless affirmed because, under its more-probable-than-not standard, a Guidelines error is harmless if the court imposes a "within-Guidelines sentence that falls within both the incorrect and the

correct Guidelines range and explains the chosen sentence adequately."[5] Pet. App. 7a (quoting *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011) (per curiam)). The panel extended that logic to Mr. Solis's case because his sentence fell below both the correct and incorrect Guidelines ranges. *Id.*

Such reasoning likely would not suffice in the Third Circuit. That court recognized that "some courts have adopted an 'overlapping range' rationale." *Langford*, 516 F.3d at 216. Nevertheless, it held "that such an 'overlap' does not necessarily render an error in the Guidelines calculation harmless." *Id.* Nor would it suffice that the sentencing judge here calculated two Guidelines ranges because *both ranges* were incorrect. Because in the Third Circuit, "[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." *Id.* at 218 (emphasis added)).

In sum, since the Court held in *Williams* that harmless error applies to preserved Guidelines errors, the courts of appeals have crafted incompatible standards by which to show that an error was harmless. Those differences are not just semantics—they call for opposite outcomes on identical fact patterns. The Court

[5] That reasoning also is in tension with the Court's precedent. In *Molina-Martinez*, the Court addressed whether a defendant could show prejudice—on plain-error review—from a Guidelines error even if his sentence fell within both the correct Guidelines range he sought and the incorrect range used by the sentencing judge. *See* 578 U.S. at 197, 204 (holding that he could). Yet numerous jurists on the Ninth Circuit still believe that, even after *Molina-Martinez*, so long as the incorrect Guidelines range cited by the district judge "overlaps substantially" with the correct Guidelines range, any error is harmless. *See, e.g.*, *United States v. Roberty*, 689 F. App'x 492, 493 (9th Cir. 2017); *United States v. Espinoza*, 637 F. App'x 410, 413 (9th Cir. 2016) (Callahan, J., dissenting).

needs to create a uniform standard for all circuits to ensure that the Guidelines maintain their place as the lodestar of federal sentencing.

II. The division among the circuits demands the Court's attention because the Guidelines cannot promote uniformity without a uniform harmless-error standard.

The U.S. Sentencing Guidelines are the cornerstone of federal sentencing. *See Molina-Martinez*, 578 U.S. at 198–200 (collecting cases). They "serve as 'a meaningful benchmark' in the initial determination of a sentence and 'through the process of appellate review.'" *Rosales-Mireles*, 138 S. Ct. at 1904 (citation omitted). Suffice to say, it is an "important role." *Id.*

Federal courts sentence more than 60,000 people each year. *See, e.g.*, U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 (2022). A sentencing proceeding "must begin" with the judge calculating the Guidelines, correctly. *Gall*, 552 U.S. at 50 n.6. And even if the judge decides to vary above or below the Guidelines range, such as here, the judge "must consider *the extent of the deviation* and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50 (emphasis added).

That is why "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez*, 578 U.S. at 200. Put another way, "[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) (quoting *Freeman v.*

United States, 564 U.S. 522, 529 (2011) (plurality opinion)). Consequently, "[a]s the Court has recognized, 'when a Guidelines range moves up or down, offenders' sentences [tend to] move with it.'" *Molina-Martinez*, 578 U.S. at 199 (second alteration in original) (quoting *Peugh*, 569 U.S. at 544).

The problem—as judges, lawyers, and defendants can attest—is that "[t]he Guidelines are complex." *Id.* at 193. And "given th[at] complexity . . . district courts sometimes make mistakes." *Rosales-Mireles*, 138 S. Ct. at 1904. Those mistakes, if not uniformly corrected, weaken the Guidelines' role as a national anchor for criminal sentences. For example, the U.S. Sentencing Commission uses statistics from Guidelines computations and imposed sentences to determine if amendments are needed. *Id.* at 1908; U.S. SENT'G COMM'N, FISCAL YEAR 2022 ANNUAL REPORT 7–8 (2022). But "[w]hen sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined." *Rosales-Mireles*, 138 S. Ct. at 1908. It thus makes sense that the Court has encouraged remands of Guidelines errors even under the stringent plain-error standard. *See Molina-Martinez*, 578 U.S. at 198; *Rosales-Mireles*, 138 S. Ct. at 1907–08.

A uniform and equitable harmless-error standard for Guidelines errors serves another key function: maintaining "the public legitimacy of our justice system." *Rosales-Mireles*, 138 S. Ct. at 1908. Such legitimacy "relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that '*provide opportunities for error correction*.'" *Id.* (emphasis added) (quoting Josh Bowers & Paul H.

Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 215–216 (2012)).

That is because "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" *Id.* (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) (Gorsuch, J.)). If that is true for cases subject to plain error, it must be more so in cases where the lawyer objects and the court of appeals tells the defendant: "Your lawyer was right, the judge was wrong, but the courts cannot bother with a resentencing."

A court's unwillingness to correct a preserved error might strike a person as particularly odd given that the Court and others are on record stating that "a remand for resentencing, while not costless," is "relatively inexpensive" in the currency of judicial resources. *Id.* at 1908–09 (citation omitted). The proceeding "is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Id.* at 1908 (quoting *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005)); *Sabillon-Umana*, 772 F.3d at 1334 (same).

In sum, bringing clarity to when a preserved Guidelines error is prejudicial would boost uniformity in thousands of sentencing appeals, protect the Guidelines role as the lodestar of federal sentencing, and boost public faith that federal

sentencing is fair. As the Court has acknowledged repeatedly, that—by its nature—is an issue of exceptional importance. *E.g.*, *Rosales-Mireles*, 138 S. Ct. at 1903 (holding that the Guidelines are "important"); *Molina-Martinez*, 578 U.S. at 200 (holding that they are the "lodestar"); *Gall*, 552 U.S. at 49 (holding that they are the "benchmark").

III. Mr. Solis presents the right vehicle to resolve the circuit split.

Mr. Solis's case presents the right vehicle to resolve this circuit split for at least three reasons. First, the issue is squarely presented. Mr. Solis objected to the district court's Guidelines calculation. The appellate panel unanimously agreed that the district court committed Guidelines errors. Pet. App. 3a. And despite those errors, the sentence was affirmed using a harmless-error standard upon which circuit courts disagree.

Second, the question presented will determine the outcome of Mr. Solis's appeal. That can be seen in the Ninth Circuit's reasoning below: The panel unanimously held that the district court legally erred *four times* in interpreting the Guidelines. *Id.* at 3a–4a. Yet even under the most remand-averse standard, the panel split as to whether those errors were harmless. That means, at the very least, this case was close.

And in "close" cases, the standard of proof makes the difference. *See, e.g.*, *Ragsdale v. Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960) (holding, in a "close" case, that a committed person may establish by a "preponderance of the evidence" that release is appropriate but affirming detention because "reasonable medical

doubts or reasonable judicial doubts" remained), *overruled on other grounds in Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968). If the Ninth Circuit barely affirmed Mr. Solis's sentence when using even the more-probable-than-not standard, it follows that even a slightly less remand-averse standard could change the outcome.[6]

Finally, if the Ninth Circuit remands Mr. Solis's case, he very likely will get a lower sentence at resentencing. As discussed above, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Molina-Martinez*, 578 U.S. at 199 (alteration in original) (citation omitted); *see also Sabillon-Umana*, 772 F.3d at 1333; *Langford*, 516 F.3d at 217. It matters not that the sentencing judge ultimately varied downward. "[W]hether or not the defendant's ultimate sentence falls within the correct range—the [Guidelines] error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 578 U.S. at 198.

That makes sense. As then-Judge Gorsuch recognized, "[w]hen the court's starting point is skewed[,] a 'reasonable probability' exists that its final sentence is skewed too." *Sabillon-Umana*, 772 F.3d at 1333. That especially is the case when a sentencing judge is "careful to insist that '[he] need[s] to understand where [the defendant] comes out on the Guidelines, and then make [his] variance.'" *Ibarra-Luna*, 628 F.3d at 719. Such a comment "suggests that, quite properly, the Guidelines recommendation affected the sentence [the court] selected." *Id.*

[6] Even if the Court ultimately concludes that the Ninth Circuit's more-probable-than-not standard is correct, Mr. Solis's case remains a strong vehicle to resolve the question presented. That is because the Court could still clarify how that standard should be applied in close cases like this one where the district court *never* correctly calculated the Guidelines.

In Mr. Solis's case, the sentencing judge made similar comments before varying downward. For example, after Mr. Solis's trial lawyer raised another Guidelines issue, the sentencing judge said that the matter would be better handled as a variance, "just to be in line with what I understand the sentencing obligation to be, which is to correctly calculate the [G]uidelines first, applying the [G]uidelines that are in effect at the time of the sentencing." Pet. App. 41a.

Indeed, most of the lengthy sentencing transcript for this case addresses some aspect of calculating Mr. Solis's Guidelines range. *See id.* at 16a–36a; 70a–73a (discussing the "minor participant" reduction); *id.* at 36a–38a (discussing Mr. Solis's criminal history category); *id.* at 38a–41a (discussing a variance to reflect the First Step Act and the Guidelines' "safety valve" provision); *id.* at 41a–43a (discussing other potential variances); *id.* at 60a–61a; 63a–65a (calculating the Guidelines and applying variances). The Southern District of California is a busy border district, not a moot court competition. If a sentencing judge is willing to spend that much time discussing the proper calculation of the Guidelines, "*then the Guidelines are in a real sense the basis for the sentence*." *Peugh*, 569 U.S. at 542 (citation omitted). It necessarily follows that if the basis for the sentence is lower, the sentence would—and should—be lower.

That all makes this case an excellent vehicle for the Court to resolve the question presented. The issue is preserved, outcome-determinative on appeal, and very likely to ensure that Mr. Solis receives a different sentence.

IV. The Ninth Circuit's expansive use of harmless error in Guidelines cases is wrong.

The divergent approaches of the courts of appeals warrant review no matter which standard prevails. But granting the petition is particularly vital here because the Ninth Circuit's more-probable-than-not standard is incompatible with this Court's precedents and Congress's directive. That can be verified not just by the Court's holdings and the statutory text, but by formal logic.

A. The Ninth Circuit's standard conflicts with the plain commands of the Court and Congress.

First, in *Williams*, the Court did not mince words: A remand is the remedy unless a court of appeals concludes "that the error *did not* affect the district court's selection of the sentence imposed." *Williams*, 503 U.S. at 203 (emphasis added). The Court did not say "*likely* did not affect" the sentence, or "*probably* did not affect" the sentence. It said "*did not* affect" the sentence—full stop. Thus, the Second, Third, Fifth, and Sixth Circuits' heightened standards best comport with the Court's holding the last time it addressed the harmlessness of a preserved Guidelines error.

Those courts' holdings also better reflect the statutory command that "[i]f the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court *shall remand* the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f)(1). As the Court notes often, Congress's use of the "mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Nat'l Ass'n of Home Builders v. Defs. of*

Wildlife, 551 U.S. 644, 661 (2007) (omission in original) (quoting *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). To be sure, *Williams* held that § 3742(f)(1) contains an implicit harmless-error exception. 503 U.S. at 202–03. But a high bar for deeming an error harmless honors the statute's plain command that a remand is required whenever it can be said that a sentence was "imposed as a result of an incorrect application of the sentencing guidelines." § 3742(f)(1).

Because, as the Court's and others' post-*Williams* holdings recognized, the Guidelines almost always are "the basis for the sentence." *Molina-Martinez*, 578 U.S. at 199 (emphasis removed) (quoting *Peugh*, 569 U.S. at 542). That necessarily is so if the judge sentences a person within the Guidelines, and it is just as so if "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it." *Id.*

Thus, a high bar "better protects the defendant's right to a sentence 'imposed pursuant to correctly applied law' and 'better effectuates the Guidelines' purpose to institute fair and uniform sentencing.'" *Langford*, 516 F.3d at 217 (quoting *United States v. Knight*, 266 F.3d 203, 210 (3d Cir. 2001)). Because "whether the Guidelines are mandatory or merely advisory, district courts are required by statute to consult them, and . . . a district court's misinterpretation of the Guidelines effectively means that it has not properly consulted the Guidelines." *Hazelwood*, 398 F.3d at 801 (citing 18 U.S.C. § 3553(a)(4)). So long as "it is *at least possible*, even under a non-mandatory guidelines system, that the judge, considering the proper Guideline range, would have" imposed a different sentence, there must be a remand. *Id.*

(emphasis added). Because "when the starting point for the § 3553(a) analysis is incorrect, the end point, i.e., the resulting sentence, can *rarely* be shown to be unaffected."[7] *Langford*, 516 F.3d at 217 (emphasis added).

B. The Ninth Circuit's standard for preserved errors is logically incompatible with the plain-error test from *Molina-Martinez* and *Rosales-Mireles*.

The Ninth Circuit's standard also is logically incompatible with the Court's holding that, on plain-error review, a defendant need only "'show a *reasonable probability* that, but for the error,' the outcome of the proceeding would have been different." *Molina-Martinez*, 578 U.S. at 194 (emphasis added) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82 (2004)). And that is so because, in this context, a "reasonable probability" is a settled term of art.

Molina-Martinez's articulation of the plain-error standard for Guidelines cases expressly lifted from the "reasonable probability" standard articulated in *Dominguez Benitez*. *Id.*; *see also Dominguez Benitez*, 542 U.S. at 82–83. And that standard is clear: "The reasonable-probability standard is not the same as, and *should not be confused with*, a requirement that a defendant prove *by a preponderance of the evidence* that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83 n.9 (emphases added). Thus, "[t]he question is not whether the defendant would more likely than not have received a different" outcome. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, the question is whether

[7] Such rare examples could include when "the sentence was dictated not by the erroneously calculated Guideline, but by a statutory minimum or maximum or another properly calculated Guideline." *Langford*, 516 F.3d at 215.

"the probability of a different result is '*sufficient to undermine confidence in the outcome*' of the proceeding." *Dominguez Benitez*, 542 U.S. at 83 (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). That is a "relatively low burden." *See Chinn v. Shoop*, 143 S. Ct. 28 (2022) (Jackson, J., dissenting from denial of certiorari).

True, the Court never precisely quantified what constitutes a "reasonable probability." But to see why the Ninth Circuit's harmless-error standard is wrong, all that matters is that a reasonable probability is less than a preponderance. Because that means, on plain-error review, if a defendant shows a 49.99% chance of prejudice, and the government shows a 50.01% chance of no prejudice, the defendant should prevail.[8]

But in the Ninth, Tenth, and Eleventh Circuits, an identical showing by each side would result in a finding of *no* prejudice in spite of—actually, *because of*—the defendant's diligent objection. And that is so because those circuits merely require the government to prove that it is more likely than not (say, a 50.01% chance) that a preserved Guidelines error is harmless. Even if the defendant responds by showing a 49.99% chance of prejudice, i.e., the same "reasonable probability" that sufficed on plain-error review, the defendant still loses.

The incongruence is untenable. If an erroneous Guidelines calculation establishes prejudice on plain-error review, there is no coherent reason why it does

[8] Because a prejudicial Guidelines error "ordinarily" will affect the "fairness, integrity, and public reputation of the proceedings," *Rosales-Mireles*, 138 S. Ct. at 1909, it follows that—on plain-error review—a clear Guidelines error, like this one, ordinarily warrants a remand, *see id.* at 1911.

not when the error is preserved. The very point of the stringent plain-error standard is to "induce the timely raising of claims and objections." *Puckett v. United States*, 556 U.S. 129, 134 (2009). That is so problems can be solved efficiently in lower courts—not lengthy appeals of simple cases like this one. *Id.* But in the Ninth, Tenth, and Eleventh Circuits, there is little incentive to object to a Guidelines error. Rather, it just triggers a tougher standard of review. That simply cannot be so. It also confirms that the Ninth Circuit's rule *must* be wrong.

CONCLUSION

Mr. Solis's case deserves the Court's review. The courts of appeals are hopelessly divided about when a preserved Guidelines error is harmless. That is an issue of exceptional importance because the Guidelines cannot encourage uniform sentences without a uniform standard of review. And Mr. Solis's case presents a strong vehicle to resolve that division—the issue is preserved, dispositive, and places the Ninth Circuit on the wrong side of a circuit split. If the Guidelines remain the "lodestar" of federal prison terms, *Molina-Martinez*, 578 U.S. at 200, fairness and precedent dictate that it cannot be so easy to declare the erroneous placement of that lodestar harmless. For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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