No. 23-226

In the Supreme Court of the United States

ANTONIO SOUL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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In its brief in opposition, the government ultimately does not dispute that the decision below created a circuit conflict. Instead, the government seeks to downplay that conflict by mischaracterizing the court of appeals' reasoning, suggesting that it is "somewhat unclear * * * whether the court found no reversible error here because it did not view this as a case in which recalculation of the Guidelines was necessary." Br. in Opp. 14. But the court of appeals plainly asserted the authority to "decide, on a

case-by-case basis, whether a district court's failure to properly calculate the new range constitutes reversible procedural error"—that is, whether error occurred at all. Pet. App. 10a. That was not harmless-error review; as the court of appeals acknowledged and has since reaffirmed, it was squarely rejecting the requirement to recalculate a First Step Act movant's sentencing range, which has been recognized by at least five other courts of appeals. The resulting conflict warrants the Court's review.

On the merits, the government does not defend the court of appeals' holding that recalculation is required only "[i]n some instances." Pet. App. 8a. The government instead argues that the error was harmless. But that argument runs smack into this Court's decision in *Molina-Martinez* v. *United States*, 136 S. Ct. 1338 (2016), under which a procedural error in sentencing is not harmless absent circumstances not present here. In any event, the question presented is limited to the interpretation of the First Step Act. There would be no need for the Court to address harmlessness in the first instance; in fact, doing so would be contrary to the Court's usual practice.

Finally, the government's passing suggestion that this case is an unsuitable vehicle because it arises in the revocation context is a red herring. Every court of appeals to address the question presented has held or assumed that challenges to revocation sentences are permissible under Section 404 of the First Step Act. There is no colorable reason why such sentences are different for purposes of the question presented here.

As this case comes to the Court, it presents a pristine opportunity to resolve a clear conflict among the courts of appeals on the interpretation of a federal statute, on a question of undisputed importance to the criminal justice system. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

1. This case squarely implicates a conflict with at least five other courts of appeals. The government does not dispute that the Third, Fourth, Seventh, Eighth, and Tenth Circuits require a district court to recalculate a movant's sentencing range as if Sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time of the offense before exercising its discretion to reduce the movant's sentence under the First Step Act. See Br. in Opp. 15-17. And both parties agree that those circuits apply harmless-error review when a district court fails to recalculate the sentencing range. See *ibid.*; Pet. 11-15.

The government argues only that, while there may be a circuit conflict, it is not "substantial" because the court of appeals applied harmless-error review. See Br. in Opp. 15. That is flatly wrong. The court of appeals unambiguously rejected the argument that failure to recalculate a movant's sentencing range always constitutes error in the first place. The court explained that, "[i]n some instances, it may be that the better practice is for a district court to calculate the new sentencing range," but "[i]n other instances, perhaps not." Pet. App. 8a. The court specifically rejected petitioner's textual argument for requiring recalculation, which was endorsed by the Seventh Circuit in *United States* v. *Corner*, 967 F.3d 662 (2020). See Pet. App. 9a & n.2 (noting that "the Seventh Circuit's analysis * * * is incorrect" and adding that the court "respectfully disagree[d]" with the Fourth Circuit as well). And while the court of appeals mentioned harmless-error review, see *id.* at 9a-10a, what it actually applied was "case-by-case" review of "whether a district court's failure to properly calculate the new range constitutes reversible procedural error," culminating in a conclusion that "the district court here did not abuse its discretion." *Id.* at 10a-

11a. Accordingly, the court of appeals has since reaffirmed (albeit in an unpublished opinion) that its decision in this case created a "circuit split" about whether "a district court *must* calculate a defendant's revised guidelines range." See *United States* v. *Joseph*, No. 21-12222, 2023 WL 4446356, at *4 n.4 (11th Cir. July 11, 2023), petition for cert. pending, No. 23-5755 (Oct. 6, 2023).[1]

2. For the same reason, the government errs when it suggests (Br. in Opp. 15) that petitioner's case would have been decided the same way in the other circuits. Those circuits apply harmless-error analysis, not the court of appeals' "case-by-case" analysis on whether error occurred at all. And as the Seventh Circuit has put it, "the nature of the error" in failing to recalculate a movant's Guidelines range typically "precludes a finding of harmlessness." *United States* v. *Blake*, 22 F.4th 637, 642 (2022). That is because an "exercise of discretion [that] was untethered from the correct calculation" is "by its very nature * * * not harmless." *United States* v. *Burris*, 29 F.4th 1232, 1239 (10th Cir. 2022).

The government fails to cite any case treating as harmless a district court's failure to recalculate a movant's sentencing range in similar circumstances. Of the cases the government cites finding harmlessness, one involved a failure to recalculate a Guidelines range that would have fallen below the statutory range. See *United States* v. *Sanders*, No. 21-2643, 2022 WL 4104024, at *2 (7th Cir. Sept. 8, 2022). Another involved an erroneously low Guidelines calculation. See *United States* v. *Troy*, 64

[1] In that case, the court of appeals proceeded to hold that the circuit conflict on the question presented was not implicated because "the district court assumed that the relevant drug quantity was five grams of crack cocaine and correctly set forth the applicable statutory maximum penalty and guidelines range based on this drug quantity." *Joseph*, 2023 WL 4446356, at *4 n.4.

F.4th 177, 182-184 (4th Cir. 2023), cert. denied, No. 22-7832 (Oct. 2, 2023). And the others either involved issues other than the recalculation of the sentencing range as if Sections 2 and 3 of the Fair Sentencing Act were in effect at the time of the offense, see *United States* v. *Moore*, 50 F.4th 597, 602 (7th Cir. 2022); *United States* v. *Shepard*, 8 F.4th 729, 733 (8th Cir. 2021), or failed to articulate the basis for treating the error as harmless, see *United States* v. *Williams*, No. 20-7802, 2022 WL 7973696, at *2 (4th Cir. Oct. 14, 2022).

As the government acknowledges, at least five courts of appeals have held that a district court is required to recalculate a movant's sentencing range as if Sections 2 and 3 of the Fair Sentencing Act were in effect at the time of the offense. Unlike the court of appeals here, those courts apply harmless-error review, not a case-by-case inquiry into whether there was any error at all. Because the court of appeals here held that a recalculation was not always required, there is a square circuit conflict—as the court of appeals has twice recognized.

B. The Decision Below Is Incorrect

As discussed above, the court of appeals squarely held that recalculation is not always required, regardless of whether the failure to recalculate constitutes harmless error. That holding is inconsistent with the text of the First Step Act, which presumes that a district court will conduct a "complete review of the motion on the merits." Pub. L. No. 115-391, § 404(c), 132 Stat. 5222; see Pet. 18-20. It is also at odds with this Court's recognition that "the First Step Act directs district courts to calculate the Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense" and that the required calculation "anchors the sentencing proceeding."

Concepcion v. *United States*, 142 S. Ct. 2389, 2402 n.6 (2022) (alteration and citation omitted); see Pet. 20.

The government offers no response to those points. Instead, it weakly argues that the district court's error was harmless. See Br. in Opp. 12-14. But this Court "ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance." *Ring* v. *Arizona*, 536 U.S. 584, 609 n.7 (2002). For that reason, any open question on harmlessness is no impediment to review of the discrete antecedent question on the interpretation of the First Step Act.

In any event, the district court's failure to recalculate petitioner's sentencing range is not harmless. To begin with, although the district court could have denied relief *after* recalculating the sentencing range (including the enhancement) based on the retroactive changes in the First Step Act, that alone is not a basis for finding the procedural error to be harmless. See, *e.g.*, *United States* v. *Barner*, 572 F.3d 1239, 1248 (11th Cir. 2009); *Burris*, 29 F.4th at 1239; *Blake*, 22 F.4th at 642; *United States* v. *Holder*, 981 F.3d 647, 651 (8th Cir. 2020).

The government invokes this Court's decision in *Molina-Martinez* v. *United States*, 136 S. Ct. 1338 (2016). See Br. in Opp. 12-13. But the Court held there that, "[w]hen 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." 136 S. Ct. at 1345. Although there may not be a reasonable probability of a different outcome where "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," that exception applies only where a district court's "detailed explanation"

somehow "make[s] it clear that the judge based the sentence he or she selected on factors independent of the Guidelines." *Id.* at 1346-1347. Here, the district court merely stated that it "would decline to reduce [petitioner's] term of imprisonment because of [his] continued lawless behavior" "even if [petitioner] were eligible" for Section 404 relief. Br. in Opp. 14 (quoting Pet. App. 37a). That is miles away from "a detailed explanation of the reasons the selected sentence is appropriate." *Molina-Martinez*, 136 S. Ct. at 1346-1347.

Indeed, the Tenth Circuit has already rejected that theory of harmless error in the context of the First Step Act. In a case in which the district court explained that "it would deny relief regardless of the correct Guidelines calculation," the Tenth Circuit held that the failure to recalculate the movant's sentencing range was not harmless. *Burris*, 29 F.4th at 1239. The government makes no effort to distinguish that decision.[2]

That said, there is no need for this Court to address the question of harmlessness; consistent with its usual practice, the Court can remand for the court of appeals to address it in the first instance. All the question presented requires this Court to decide is whether the court of appeals correctly interpreted the First Step Act. Tellingly, on that question, the government puts up no defense.

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[2] Nor does the fact that petitioner accepted an enhancement in his plea agreement render the error harmless. See Br. in Opp. 13-14 & n.4. The government cites no case recognizing such a theory of harmlessness. And to the extent the government suggests that a recalculation would result in the same Guidelines range, see *id.* at 18, that is obviously a matter for the district court on remand if the Court resolves the question presented in petitioner's favor.

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The government does not dispute that the district court's failure to recalculate petitioner's sentencing range threatens the core purpose of the First Step Act. Nor does the government dispute that the district court's failure to do so has meaningful consequences for federal prisoners and their communities—as explained in an amicus brief joined by some of the Nation's most populous States (and unusually opposing the federal government's position in a criminal case). See District of Columbia et al. Br. 11-24.

The government instead suggests, without elaboration, that "the revocation context would complicate further review of any question about the procedures for considering a Section 404 motion." Br. in Opp. 18-19. But there is nothing different about the revocation context. The government concedes that the First Step Act "authorizes a district court to reduce a revocation sentence where the revoked term of supervised release was itself imposed for a 'covered offense.'" *Id.* at 18. And courts routinely decide First Step Act cases involving revocation sentences. See, *e.g.*, Pet. App. 5a; *United States* v. *Gonzalez*, No. 22-2607, 2023 WL 2642914 (3d Cir. Mar. 27, 2023); *United States* v. *Gill*, No. 21-2287, 2022 WL 3330361 (8th Cir. Aug. 12, 2022); *United States* v. *Self*, No. 21-50019, 2021 WL 3949247 (5th Cir. Sept. 2, 2021); *Corner*, *supra*; *United States* v. *Triplett*, 836 Fed. Appx. 719, 721 (10th Cir. 2020); *United States* v. *Woods*, 949 F.3d 934 (6th Cir. 2020); *United States* v. *Venable*, 943 F.3d 187 (4th Cir. 2019). Nothing about the question presented turns on whether the sentence was imposed for revocation of supervised release; the government does not deign to explain why it would.

* * * * *

The court of appeals held that a district court is not required to recalculate a movant's sentencing range before denying a First Step Act motion. That is inconsistent with the statutory text, this Court's decision in *Concepcion*, and the decisions of at least five other courts of appeals. The government does not defend the court of appeals' interpretation of the statute; its discussion of harmless error is both incorrect and irrelevant to the certiorari decision. And the government does not dispute that the question presented is an exceptionally important one for the criminal justice system. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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