No. 23-____

In the Supreme Court of the United States

CHRISTOPHER KINZY, PETITIONER

v.

UNITED STATES

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 district court can insulate from vacatur a sentence based on an erroneously enhanced Guidelines range simply by stating, without explanation, that it would have imposed the same sentence absent the error (as the Fifth Circuit alone holds); or whether, to avoid resentencing, the district court must comply with this Court's clear command in *Gall v. United States*, 552 U.S. 38, 50 (2007), and *Rita v. United States*, 551 U.S. 338, 350, 356-57 (2007), to sufficiently explain why the sentence imposed is warranted even if the Guidelines range was wrong (as the Third, Sixth, Ninth, and Tenth Circuits hold).

RELATED PROCEEDINGS

Supreme Court of the United States:

Kinzy v. United States, No. 23A338 (Oct. 16, 2023) (order extending the time to file a petition for a writ of certiorari)

United States Court of Appeals (5th Cir.):

United States v. Kinzy, No. 22-30169 (July 26, 2023)

United States District Court (E.D. La.):

United States v. Kinzy, No. 2:21-cr-102 (Apr. 5, 2022)

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INTRODUCTION

This case presents an exceptionally important sentencing question on which the Fifth Circuit has, once again, taken an outlier view, flouting this Court's precedent, creating a lopsided circuit split, and undermining the fairness, integrity, and public perception of sentencing proceedings. Consider what happened: The district court erroneously enhanced Christopher Kinzy's Guidelines range from 41 to 51 months to 77 to 96 months—nearly doubling it. The court then sentenced Kinzy to 87 months—the midpoint of the erroneously enhanced range, and three years longer than the top of the correct range. As the court was about to adjourn after sentencing Kinzy, it conclusorily stated, with no explanation and after repeated prompting by the prosecutor, that it would have imposed the same sentence even if it had miscalculated the Guidelines range. The Fifth Circuit then affirmed, holding that, although the enhancement was erroneous and the sentencing colloquy was "troubling," App. 33a, circuit precedent constrained the panel to uphold the far-above-Guidelines sentence. App. 28a. That's because, in the Fifth Circuit, a Guidelines miscalculation is harmless where, as here, the district court provides merely "a simple statement that the court would have imposed the same sentence in the event of a guideline-calculation error." App. 33a n.13.

The panel recognized that Fifth Circuit precedent conflicts with decisions from the Third and Tenth Circuits. App. 33a n.13. And those aren't the only circuits that disagree. The Sixth and Ninth Circuits also hold that a Guidelines miscalculation is not harmless—meaning the sentence must be vacated—when the district court's alternative rationale is nothing more than

a "mere statement that it would impose the same above-Guidelines sentence no matter … the correct calculation." *United States v. Munoz-Camarena*, 631 F.3d 1028, 1031 (9th Cir. 2011) (per curiam); *see also United States v. O'Georgia*, 569 F.3d 281, 297 (6th Cir. 2009). Whatever its views on the circuit split, however, the Fifth Circuit failed to recognize that its precedent also conflicts with *this Court's* decisions. *Gall v. United States*, 552 U.S. 38, 50-51 (2007), and *Rita v. United States*, 551 U.S. 338, 350, 356-57 (2007), make clear that a district court must adequately explain its reasons for imposing a sentence to permit meaningful appellate review and to ensure fairness and confidence in the judicial system. That requirement is especially important when a judge imposes a sentence that falls outside the Guidelines range; by statute, the court "shall state" "the specific reason" for deviating from the Guidelines. 18 U.S.C. § 3553(c)(2).

The district court didn't do that here. It mistakenly believed that Kinzy's 87-month sentence was "within the guideline range." App. 62a. It wasn't—it exceeded Kinzy's correct Guidelines range "by three years" and was "nearly double the length of the midpoint of his correct range." App. 28a. The court then declared, simply "as an afterthought," that it would impose the same sentence even if it had miscalculated the range. App. 31a. That "perfunctory" statement, App. 33a, does not include any explanation for why Kinzy deserved a sentence more than *three years above* the top of the correct Guidelines range.

The district court's non-explanation for the above-Guidelines sentence is significant procedural error, in violation of *Rita* and *Gall*. And contrary to Fifth Circuit precedent, the error couldn't be harmless. For one

thing, the whole point of *Rita* and *Gall*'s rule is to permit meaningful appellate review of a sentencing decision committed to the sentencing judge in the first place. No adequate explanation, no meaningful review. For another thing, this Court's decisions make clear that a Guidelines miscalculation ordinarily *will* give rise to a reasonable probability of a different sentence absent the error, precisely because of the crucial role the Guidelines play. *See Molina-Martinez v. United States*, 578 U.S. 189, 198-200 (2016). "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. Relying on the wrong Guidelines range likely means a sentence that will change when the error is corrected, especially if the court has to explain why it is departing from the correct range. It also means a sentence that calls into question the integrity of the judiciary. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018).

Unlike the Fifth Circuit, the Third, Sixth, Ninth, and Tenth Circuits correctly hold that a non-Guidelines sentence based on a Guidelines miscalculation is not harmless and must be vacated when the sole rationale supporting the sentence is a perfunctory statement that the court would have imposed the same sentence no matter what. Those circuits follow this Court's clear guidance in *Gall* and *Rita*, holding that such a bare statement is at best an afterthought, not an adequate explanation.

The Court should grant review—or even summarily reverse. The question presented is exceptionally important for criminal defendants, who deserve to be fairly sentenced. The question is especially important for Kinzy, who received a sentence much higher than

what the Guidelines advise. And the question is critical for the integrity of judicial proceedings and the appearance of justice. The court of appeals expressly acknowledged the split, but was bound by its own precedent anyway. And this isn't the first time in recent years that the Court has had to intervene to address one of the Fifth Circuit's unfair, outlier approaches to Guidelines errors. In *Molina-Martinez*, the Fifth Circuit's outlier rule "fail[ed] to take account of the dynamics of federal sentencing," 598 U.S. at 201, and the Court unanimously reversed, *id.* at 191. And *Rosales-Mireles* produced a lopsided reversal, with the Court finding that the Fifth Circuit had "abused its discretion in applying an unduly burdensome" plain-error test that "seriously affect[ed] the fairness, integrity, and public reputation of judicial proceedings." 138 S. Ct. at 1911.

The Fifth Circuit won't correct its precedent on the question presented here any more than it would correct its bespoke rules before *Molina-Martinez* and *Rosales-Mireles*, and this case is an ideal vehicle for correcting the court of appeals' approach. The Court should grant review or summarily reverse given this Court's clear guidance in *Gall*, *Rita*, *Molina-Martinez*, and *Rosales-Mireles*.

1. The Fifth Circuit's decision contravenes this Court's precedent, creates a circuit split, and is plainly wrong.

As the decision below made clear, Fifth Circuit precedent holds that a Guidelines miscalculation is harmless so long as the district court "considered the correct range" and provided a "simple statement" that "it would impose the same sentence either way." App. 22a, 33a n.13. Under that simple-statement rule,

an appellate court may uphold a sentence even though the district court did not identify the specific reasons for departing from the correct Guidelines range. The Fifth Circuit's categorical rule cannot be squared with *Gall* and *Rita*, which hold that a district court must articulate specific reasons for imposing a sentence, especially when the sentence deviates from the correct Guidelines range. *See Gall*, 552 U.S. at 46-51; *Rita*, 551 U.S. at 356-57. The Fifth Circuit's approach also contravenes *Molina-Martinez* and *Rosales-Mireles*, which underscore the critical anchoring role that the Guidelines play throughout the entire sentencing process and the Fifth Circuit's persistent failure to heed those basic principles.

Given its deviation from this Court's precedent, the Fifth Circuit's standard is also contrary to the rule in the Third, Sixth, Ninth, and Tenth Circuits, which follow *Gall* and *Rita*. Those circuits hold that a sentence that is based on a Guidelines miscalculation must be vacated (*i.e.*, the error is not harmless) when the district court fails to fully explain why it would have imposed the sentence notwithstanding the error. *See, e.g.*, *United States v. Raia*, 993 F.3d 185, 195 (3d Cir. 2021); *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008) (McConnell, J.); *Munoz-Camarena*, 631 F.3d at 1031 (9th Cir.); *O'Georgia*, 569 F.3d at 297 (6th Cir.). As then-Judge McConnell reasoned, a "perfunctory," "vague statement" does not suffice. *Pena-Hermosillo*, 522 F.3d at 1117-18.

The Fifth circuit's decision is wrong, and only this Court can correct it. *Gall* and *Rita* made clear that, consistent with 18 U.S.C. § 3553(c), a district court must explain, after giving serious consideration to the issue, the specific reasons for imposing a sentence that falls outside the correct Guidelines range. *See Gall*,

552 U.S. at 46-51; *Rita*, 551 U.S. at 356-57. The Fifth Circuit's conclusory-statement requirement is incompatible with *Rita* and *Gall*, so much so that the Court could summarily reverse rather than grant plenary review. A mere "simple statement that the [district] court would have imposed the same sentence in the event of a guideline-calculation error," App. 33a n.13, does not come close to this Court's adequate-explanation standard. That is especially true in cases like this one, where the district court imposed a sentence that exceeds *the top* of the correct Guidelines range by *three years*. Such a "major departure" necessarily requires a "significant justification." *Gall*, 552 U.S. at 50.

2. The question presented is important, and this case is an excellent vehicle for resolving it. The answer to the question presented will have a significant impact on individual liberty—especially Kinzy's—and it will affect public confidence in the judicial system. *See Rosales-Mireles*, 138 S. Ct. at 1908; *Molina-Martinez*, 578 U.S. at 198-200. This Court's resolution of the split will also affect the courts of appeals' ability to conduct meaningful appellate review. Moreover, this is the perfect vehicle to set the Fifth Circuit straight. The decision below expressly acknowledged the split, which is outcome-determinative: the harmless-error doctrine would not have applied had Kinzy been sentenced in the Third, Sixth, Ninth, or Tenth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-35a) is unpublished but available at 2023 WL 4763336. The district court's judgment (App. 36a-50a) and the sentencing transcript (App. 51a-66a) are unpublished.

JURISDICTION

The court of appeals entered its judgment on July 26, 2023. On October 16, 2023, Justice Alito extended the time to file a petition for a writ of certiorari to November 27, 2023. *See* 28 U.S.C. § 2101(c). This petition is timely filed on November 27. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 18 U.S.C. § 3553(a) and (c), are reproduced in the appendix. *See* App. 67a-70a.

STATEMENT

A. Legal background

1. Congress has instructed "the *sentencing judge*," in imposing a sentence, *Rita*, 551 U.S. at 347, to "make an individualized assessment" of the defendant's case," *Gall*, 552 U.S. 50. After considering the defendant, the offense, the objectives of sentencing (rehabilitation, retribution, deterrence, and incapacitation), and the Sentencing Guidelines, among other factors, the judge must "'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing." *Rita*, 551 U.S. at 348 (quoting 18 U.S.C. § 3553(a)). The sentence thus turns on "the individual case and the individual defendant before" the sentencing judge and the judge's "reasoned sentencing judgment." *Id.* at 357-58.

A key part of the district judge's process is "adequately explain[ing] the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. As this Court has reiterated, a district court must articulate specific reasons for imposing a given sentence. *Id.*

at 46-51; *Rita*, 551 U.S. at 356-58. And when a court imposes a sentence outside the Guidelines range, it "shall state in open court … the specific reason" for deviating from the Guidelines. 18 U.S.C. § 3553(c)(2). In other words, a trial court "must give serious consideration" to the Guidelines and it "must explain" its departure from the Guidelines "with sufficient justifications." *Gall*, 552 U.S. at 46. Any time a district court imposes a non-Guidelines sentence, it must give "an explanation adequate to the extent of the departure." *Peugh v. United States*, 569 U.S. 530, 543 (2013). That's true "even though the Guidelines are advisory." *Gall*, 552 U.S. at 46.

Applying the "adequate explanation" standard is straightforward. "The sentencing judge should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for" imposing the given sentence. *Rita*, 551 U.S. at 356. When a district court imposes a sentence *within* the Guidelines range, it does not necessarily need to provide a "lengthy explanation," *id.* at 356-57, and appellate courts may presume that a sentence is reasonable if it is within the correct Guidelines range, *id.* at 341. But when a district court imposes a sentence *outside* the Guidelines range, "the judge *will* explain *why* [it] has done so." *Id.* at 357 (emphases added). It "must explain," "with sufficient justifications," the reasons for deviating from the Guidelines, *Gall*, 552 U.S. at 46, consistent with the "uncontroversial" principle that a major departure should be supported by a more significant justification than a minor one," *id.* at 50; *see also Peugh*, 569 U.S. at 541-43. And, in reviewing the reasonableness of the sentence, the court of appeals may consider "the extent of a deviation" from the Guidelines. *Gall*, 552 U.S. at 47.

2. "[F]ailing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range"—is a "significant procedural error." *Gall*, 552 U.S. at 51. It is particularly significant because it impedes the appellate court's ability to review the sentence.

A court of appeals can "consider the substantive reasonableness of the sentence imposed" only if "the district court's sentencing decision is procedurally sound." *Id.*; *see Rosales-Mireles*, 138 S. Ct. at 1910 (court must ensure district court made no procedural error "[b]efore [it] can consider the substantive reasonableness of a sentence"). The sentencing judge, not the appellate court, "sees and hears the evidence, makes credibility determinations, … [and] has access to, and greater familiarity with, the individual case and the individual defendant." *Gall*, 552 U.S. at 51-52. Additionally, the sentencing judge "is charged in the first instance with determining whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is 'sufficient, but not greater than necessary.'" *Rosales-Mireles*, 138 S. Ct. at 1910 (quoting 18 U.S.C. § 3553(a)).

A sentence based on "an incorrect Guidelines range" raises "particularly serious" concerns, *Molina-Martinez*, 578 U.S. at 198-99, because the Guidelines are the "starting point" and "lodestar" for sentencing, *id.* at 200. "[D]istrict courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," and although they are not binding, "the Guidelines serve as 'a meaningful benchmark' in the initial determination of a sentence." *Rosales-Mireles*, 138 S. Ct. at 1904. "In the usual case, then, the systemic function of the selected Guidelines range *will affect* the sentence." *Molina-*

Martinez, 578 U.S. at 200 (emphasis added). An error in calculating the Guidelines range therefore "can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.* at 198. In "the ordinary case," receiving a sentence under "an incorrect, higher Guidelines range" establishes prejudice and mandates vacatur under even the heightened plain-error standard of review. *Id.* at 200-01; *see Rosales-Mireles*, 138 S. Ct. at 1911.

B. Factual and procedural background

1. Christopher Kinzy pleaded guilty to one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). App. 1a-2a. The district court calculated a base offense level of 20, because it (mistakenly) thought that Kinzy had a prior felony conviction for a crime of violence, which (if true) would have triggered an enhancement under U.S.S.G. § 2K2.1(a)(4)(A). *See* App. 3a. The (erroneous) resulting Guidelines range was 77 to 96 months' imprisonment. *Id.* The court sentenced Kinzy to 87 months' imprisonment, almost at the midpoint of the incorrect range. App. 4a. The correct range, without the erroneous enhancement, was 41 to 51 months. *See* App. 24a.

2. This case concerns what the district court said—and *didn't* say—at the sentencing hearing. The record is, as the court of appeals put it, "troubling." App. 33a.

The sentencing hearing was brief. App. 51a-66a. The district court overruled Kinzy's objection to the § 2K2.1(a)(4)(A) enhancement, ruling that his prior state-law conviction for resisting police qualified as a crime of violence. *See* App. 56a-57a. The court identified the (mistaken) Guidelines range, 77 to 96 months'

imprisonment, and gave Kinzy and his counsel a chance to present mitigating evidence. App. 57a-62a. The court noted that "[t]he sentence will be within the guideline range." App. 62a. The court then sentenced Kinzy to 87 months' imprisonment. *Id.* at 62a, 65a.

After pronouncing Kinzy's sentence, the court advised him of his appellate rights, ordered that he be remanded to the custody of the U.S. Marshals, and attempted to adjourn the hearing. The government then interjected, asking the court to conclusorily appeal-proof the sentence:

> THE COURT: It is ordered that the defendant be remanded to the custody of the United States Marshal Service to begin serving the sentence. If there's nothing further—
>
> [GOVERNMENT]: Your Honor, … I would ask your Honor, in light of the fact there's no waiver of appeal in this case, I would ask whether your Honor has considered the alternative guidelines range suggested by the defendant and whether you would have imposed the same sentence had that alternative guideline range been in effect. If your honor has considered that.
>
> THE COURT: Will you submit this in writing, please, submit this in post sentencing brief.
>
> [DEFENSE]: Your Honor, it sounds that the Court hasn't made the decision to impose the sentence regardless, and we just ask that the sentence remain as is, that it not be extended further, he's ready to begin his term, you know. We're ready to conclude this matter. I don't think there needs to be a further—

> THE COURT: What are you requesting, Mr. [prosecutor]?
>
> [GOVERNMENT]: So, your Honor, I guess if your Honor has considered the alternative guideline suggested by the defendant and then would have imposed the same sentence anyway, then should this case be appealed and the Fifth Circuit find that the Court committed error with respect to the guidelines calculations, that error would arguably be harmless error since you would have imposed the same sentence.
>
> THE COURT: The sentence that I crafted is what I believe is appropriate for the defendant in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question.
>
> [GOVERNMENT]: Thank you, your Honor.
>
> THE COURT: Court's adjourned.
>
> [DEFENSE]: Please note our objection for the record. Thank you.

App. 65a-66a.

3. The court of appeals affirmed, holding that although the district court miscalculated Kinzy's Guidelines range and sentenced him at the midpoint of that (incorrect) range and three years above the top of the correct range, the error was harmless. *See* App. 12a-34a. The court of appeals recognized that Fifth Circuit precedent conflicts with Third and Tenth Circuit precedent. App. 33a n.13.

a. The court of appeals first held that Kinzy's prior state-law conviction for resisting police *was not* a crime of violence under U.S.S.G. § 2K2.1(a)(4)(A), and that the district court erred in calculating the Guidelines range. *See* App. 12a-19a. The range should have been 41 to 51 months, not 77 to 96 months. *See* App. 24a. The court observed that Kinzy's 87-month sentence "exceeds the top of [Kinzy's] correct sentencing range by three years." App. 28a; *see* App. 1a-2a.

b. The court of appeals nevertheless affirmed Kinzy's sentence—which "is nearly *double* the length of the midpoint of his *correct* range" and "sits at the very *center* of a range whose calculation rests on a *legal error*," App. 28a (emphases added)—because Fifth Circuit precedent "compelled" the panel to conclude that the district court's error was harmless. *Id.*; *see also* App. 19a-35a. The court recognized that Fifth Circuit precedent conflicts with precedent from the Third and Tenth Circuits, and that the split is outcome-determinative. App. 33a n.13 (citing decisions).

i. Under Fifth Circuit precedent, a Guidelines miscalculation is harmless so long as the district court stated that it "considered the correct range" and provided a "simple statement" that "it would impose the same sentence either way." App. 22a, 33a n.13. The court of appeals held that the district court satisfied the simple-statement requirement because it said, in response to the government's question *after* "the court attempted to adjourn the hearing," App. 30a: "The sentence that I crafted is what I believe is appropriate for the defendant in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question." App. 31a.

As the court of appeals acknowledged, that lone and "perfunctory" statement is not *an explanation*: "The court said that the same sentence would have resulted 'under either scenario,' *without explaining why*, if Kinzy's conviction were *not* a crime of violence, the court would have decided to vary upward by three years, nearly doubling the guideline range." App. 33a (first emphasis added). The court of appeals also noted that the perfunctory statement was "an afterthought," "made only at the Government's repeated request" in an "attempt to insulate the sentence on appeal." App. 31a-32a.

"These troubling aspects of the record" prompted the panel to admit that "its application" of binding Fifth Circuit precedent left it "unsettle[d]." App. 30a, 33a. But because it was "bound" by that precedent, the panel was "compelled to conclude that [Kinzy's] sentence must stand." App. 28a.

ii. The court of appeals acknowledged that the harmless-error doctrine would not have applied had Kinzy been sentenced in the Third or Tenth Circuit. *See* App. 33a n.13. Both of those circuits, the panel recognized, "demand[] more than [the Fifth Circuit]." *Id.* at 34a n.13. Rather than require "a simple statement that the court would have imposed the same sentence in the event of a guideline-calculation error"—which is all that the district court gave here—the Third and Tenth Circuits require district courts to "fully explain[]" their alternative rationale. *Id.* at 33a n.13 (quoting *Raia*, 993 F.3d at 196). As then-Judge McConnell aptly put it, "a vague statement" does not suffice. *Pena-Hermosillo*, 522 F.3d at 1117.

REASONS FOR GRANTING THE PETITION

This case presents an acknowledged circuit split over an exceptionally important question involving the harmless-error doctrine in the sentencing context. What's more, the Fifth Circuit's outlier rule conflicts with this Court's precedent. This petition is therefore the perfect candidate for either plenary review or summary reversal.

I. The Fifth Circuit's decision contravenes this Court's precedent, creates a circuit split, and is plainly wrong.

As the decision below made clear, Fifth Circuit precedent holds that a Guidelines miscalculation is harmless so long as the district court "considered the correct range" and provided a "simple statement" that "it would impose the same sentence either way." App. 22a, 33a n.13. Under that simple-statement rule, an appellate court may uphold a sentence even though the trial court did not identify the specific reasons for departing from the correct Guidelines range.

The Fifth Circuit's rule disregards *Gall* and *Rita*, which hold that a trial court must articulate specific reasons for imposing a sentence, especially when the sentence deviates from the correct Guidelines range. *See Gall*, 552 U.S. at 46-51; *Rita*, 551 U.S. at 356-57. The Fifth Circuit's standard is also contrary to *Molina-Martinez* and *Rosales-Mireles*, which confirm the key anchoring role that the Guidelines play from the beginning to end of the sentencing process. Moreover, and as the Fifth Circuit itself recognized, its simple-statement rule is contrary to the rule in the Third and Tenth Circuits, which follow *Gall* and *Rita*. (In fact, the Fifth Circuit is even more of an outlier than the panel recognized, because the Sixth and Ninth

Circuits also share the Third and Tenth Circuits' correct adherence to this Court's precedent.)

The Fifth Circuit's decision is wrong, and only this Court can correct it. In *Gall* and *Rita*, this Court made clear that a district court must adequately explain the "specific reason," 18 U.S.C. § 3553(c)(2), for imposing a sentence that falls outside the applicable Guidelines range. *See Gall*, 552 U.S. at 46-51; *Rita*, 551 U.S. at 356-57. The Fifth Circuit's conclusory-statement rule does not comport with the adequate-explanation standard. That is especially true in cases like this one, where the district court imposed a sentence that exceeds *the top* of the correct Guidelines range by *three years*. Such a "major departure" necessarily requires a "significant justification." *Gall*, 552 U.S. at 50. A simple statement cannot suffice. The Court should grant plenary review—or even summarily reverse.

II. The question presented is important, and this case is an ideal vehicle for resolving it. "The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious." *Molina-Martinez*, 578 U.S. at 199. Individual liberty thus hangs in the balance whenever there is a Guidelines-related error, and risking "unnecessary deprivation of liberty" "undermines the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles*, 138 S. Ct. at 1908. Moreover, the question presented is inescapably intertwined with appellate review, which cannot be meaningful if a district court fails to explain the reasons for imposing a given sentence. The question presented is also outcome-determinative: the harmless-error doctrine would not have applied had Kinzy been sentenced in the Third, Sixth, Ninth, or Tenth Circuit.

I. Fifth Circuit precedent contravenes this Court's decisions, creates a circuit split, and is plainly wrong.

The Fifth Circuit's conclusory-statement rule is an outlier. It is at odds with *Gall* and *Rita*; it conflicts with decisions from the Third, Sixth, Ninth, and Tenth Circuits; and it is plainly wrong, to the point of meriting summary reversal. Only this Court can correct the Fifth Circuit's erroneous approach and protect the fairness, integrity, and public perception of sentencing proceedings.

A. The Fifth Circuit's conclusory-statement rule violates *Gall* and *Rita*'s adequate-explanation standard.

The Fifth Circuit's rule—an alternative rationale for a sentence based on an incorrect Guidelines range is procedurally reasonable and insulated from vacatur so long as the district court provided a "simple statement" that "it would impose the same sentence either way," App. 22a, 33a n.13—flouts this Court's decisions holding "that a major departure [from the Guidelines] should be supported by a … significant justification," *Gall*, 552 U.S. at 50, rather than a conclusory statement. As explained (at 7-8), *Rita* held that a district court must articulate the specific reasons for imposing a sentence. *See* 551 U.S. at 356-58. And *Gall* further held that the district court "must explain," "with sufficient justifications," the specific reasons for varying from the Guidelines, 552 U.S. at 46, and that the adequacy of the explanation necessarily turns on "the extent of the departure," *Peugh*, 569 U.S. at 543 (citing *Gall*, 552 U.S. at 51).

The Court has also made clear that, without such an explanation, there can be no "meaningful appellate

review." *Gall*, 552 U.S. at 50. An appellate court cannot evaluate "the substantive reasonableness of a sentence" without first ensuring that the district court committed "no significant procedural error." *Rosales-Mireles*, 138 S. Ct. at 1910. At the same time, there is "a reasonable probability" of a different sentence when the district court sentences a defendant under "an incorrect, higher Guidelines range," *Molina-Martinez*, 578 U.S. at 200-01, and "a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings," *Rosales-Mireles*, 138 S. Ct. at 1910. Given "the real and pervasive effect the Guidelines have on sentencing"—by design, *Molina-Martinez*, 578 U.S. at 198-99—a court of appeals cannot be sure that a Guidelines error has not affected the sentence unless the judge's "explanation … make[s] it clear that the judge based the sentence he or she selected on factors independent of the Guidelines," *id.* at 200.

The Fifth Circuit's conclusory-statement rule cannot be reconciled with *Gall* and *Rita*—or *Molina-Martinez* and *Rosales-Mireles*. What's more, its application is particularly concerning here because the trial court varied "upward by three years, nearly doubling the [correct] guidelines range." App. 33a. As explained, the court of appeals was "compelled to conclude" that the district court's erroneous Guidelines calculation was harmless because the district court provided, merely "as an afterthought," a "perfunctory" reason for imposing the sentence. App. 28a, 31a, 33a.

That holding is incompatible with *Gall* and *Rita*. A simple statement that the trial court would have imposed the same sentence notwithstanding a Guidelines miscalculation is not an "explanation," with "sufficient justifications," for deviating from the

correct Guidelines range. *Gall*, 552 U.S. at 46, 51. Moreover, a categorical simple-statement rule ignores the requirement that any time a district court imposes a non-Guidelines sentence, it must give "an explanation adequate to the extent of the departure." *Peugh*, 569 U.S. at 543.

The conclusory-statement rule also openly conflicts with *Molina-Martinez* and *Rosales-Mireles*. Kinzy's case provides a stark example: even when the district court says that it will impose a sentence "within the guideline range," App. 62a—the *incorrect* range—and thus expressly pegs the sentence to the Guidelines, the Fifth Circuit's rule lets it somehow find that there is no probability of a different sentence under *the correct* range. That's contrary to *Molina-Martinez*, which makes clear that sentencing courts "*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," and that, given the Guidelines' anchoring effect, miscalculating the Guidelines range "can be particularly serious." 578 U.S. at 198-99. That point ought to be a matter of common sense. Under the Fifth Circuit's approach, the Guidelines don't matter only when the district judge miscalculates and relies on them, and then cease to matter when they are correctly calculated to provide a much lower range. The sheer incomprehensibility of that approach also underscores why the Fifth Circuit's rule is contrary to *Rosales-Mireles*, because it undermines the integrity and fairness of judicial proceedings.

A simple statement simply will not suffice in every scenario. Yet in the Fifth Circuit, a simple statement is all that is ever required, even in cases where, as here, the district court imposes a sentence that exceeds the top of the correct Guidelines range by three

years and nearly doubles the correct range. *See* App. 28a. As the Court explained in *Molina-Martinez*, the Fifth Circuit's rule "fails to take account of the dynamics of federal sentencing," 578 U.S. at 201—the very dynamics this Court has repeatedly explained.

B. Unlike the Fifth Circuit, other courts of appeals follow *Gall* and *Rita*.

The Fifth Circuit stands alone in affirming sentences solely because the district court conclusorily states it would have imposed the same sentence absent a Guidelines error. Other courts of appeals follow *Gall* and *Rita*, requiring the district court to explain *why* it would have imposed the same sentence or else perform that important work on remand.

1. As the court of appeals recognized, the Third and Tenth Circuit follow *Gall* and *Rita* and would have remanded for resentencing.

The panel below openly acknowledged that the Fifth Circuit's conclusory-statement rule conflicts with decisions from the Third and Tenth Circuits. *See* App. 33a n.13. In the Fifth Circuit, a "perfunctory" "afterthought" triggers the harmless-error doctrine. App. 31a-33a. But in the Third and Tenth Circuits, a "perfunctory" statement does not, *Pena-Hermosillo*, 522 F.3d at 1118, because "[s]uch a bare statement is at best an afterthought" "devoid of any justification," which is an essential component to "meaningful" appellate review. *United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008). Unlike the Fifth Circuit, the Third and Tenth Circuits have expressly relied on *Gall* and *Rita* when analyzing the proper application of the harmless-error doctrine in cases involving Guidelines miscalculations. *See Pena-Hermosillo*, 522 F.3d at

1116-1117; *Smalley*, 517 F.3d at 213-16. And contrary to the Fifth Circuit, the Third and Tenth Circuits hold that a sentence based on a Guidelines miscalculation must be vacated—*i.e.*, the miscalculation is not harmless—when the district court fails to fully explain why it would have imposed the same sentence notwithstanding the error. A "vague statement that the sentence is appropriate" falls well short of that requirement. *Pena-Hermosillo*, 522 F.3d at 1117.

a. In *Raia*, the Third Circuit recently reaffirmed its rule that a Guidelines error *is not* harmless when the district court does not fully explain why it would have imposed the sentence notwithstanding the error. *See* 993 F.3d at 195-96. This rule reflects the reality that it is "exceedingly rare" for an "an erroneous Guidelines calculation [to] not affect the sentencing process and the sentence ultimately imposed." *United States v. Hester*, 910 F.3d 78, 91 (3d Cir. 2018).

In *Smalley*, for example, the Third Circuit vacated a sentence based on a Guidelines miscalculation even though the district court "stated that it would have given [the defendant] the same sentence … even if it had" calculated the Guidelines range incorrectly. 517 F.3d at 214; *see id.* at 214-15. That "bare statement," the court explained, was "at best an afterthought" and "devoid of any justification for deviating *eight months* above the upper-end of the properly calculated Guidelines range." *Id.* at 215 (emphasis added). Because the district court did not explain its alternative rationale, the court of appeals could not conduct a "meaningful review of the reasonableness of the sentence." *Id.* Therefore, the Third Circuit vacated and remanded for resentencing. *Id.* at 216.

Hester is another example where the Third Circuit vacated a sentence based on a Guidelines error even though the trial court "provided an explicit statement that it intended to rectify a likely Guidelines miscalculation when imposing the sentence." 910 F.3d at 91. Because that statement did not explain the reason for the variance, and because the Third Circuit does not "rely on conjecture" to decide whether a district court "would have imposed the same sentence absent the error," the court of appeals remanded for resentencing. *Id.* at 91-92.

Additionally, in *United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011), the Third Circuit held that a Guidelines miscalculation was not harmless, because the trial court failed to explain why it would have imposed the sentence notwithstanding the error. There, "the District Court said only that it would have imposed the same sentence even absent the 8-level enhancement, without explaining what the Guidelines range would have been without the enhancement, and without explaining why an upward departure or variance would be merited from that range." *Id.* The court of appeals thus "[could not] say whether the resulting sentence on remand [would] be identical to that already imposed." *Id.* at 154.

b. In *Pena-Hermosillo*, the Tenth Circuit vacated a sentence based on a Guidelines miscalculation even though the district court stated that the "sentence is the most reasonable sentence upon consideration of all the factors enumerated in [18 U.S.C. § 3553]," and that it would have imposed "the same sentence" "even if" it had calculated the Guidelines range incorrectly. 522 F.3d at 1117; *see id.* at 1117-18. Such a "cursory" and "perfunctory explanation," the Tenth Circuit held,

is insufficient to invoke the harmless-error doctrine. *Id.* at 1117-18.

As then-Judge McConnell stated, a district court's alternative rationale for the sentence—*i.e.*, its reason for imposing the sentence even if it had miscalculated the Guidelines—is "procedurally unreasonable" if it amounts to nothing more than "a vague statement that the sentence is appropriate under § 3553(a)." *Id.* at 1117. That is especially true when the variance from the correct Guidelines range is significant. *Id.* (citing *Gall*, 552 U.S. at 597; *Rita*, 551 U.S. at 357). "Indeed, it is hard … to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation." *Id.*

2. Other courts of appeals likewise follow *Gall* and *Rita* and will remand for resentencing where a district court conclusorily states it would impose the same sentence absent a Guidelines error.

Although the decision below expressly recognized disagreement only with the Third and Tenth Circuits' approach, other courts follow that same approach—*i.e.*, the approach established in *Gall* and *Rita*.

In *Munoz-Camarena*, 631 F.3d at 1031, for example, the Ninth Circuit rejected the government's argument that a remand was unnecessary because the district court's error was harmless. The Ninth Circuit made clear that it didn't matter that "[t]he district court stated that it was going to sentence Munoz-Camarena to 65 months regardless of whether the four- or eight-level enhancement applied and also

stated that it would apply the same sentence if the Ninth Circuit were to order resentencing." *Id.* at 1030. Relying on *Gall*, the Ninth Circuit held that "[a] district court's mere statement that it would impose the same above-Guidelines sentence no matter … 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." *Id.* at 1031. Indeed, the Ninth Circuit continued, the district "court must explain, among other things, the reason for the *extent* of a variance," and because "[t]he extent necessarily is different when the range is different," "a one-size-fits-all explanation ordinarily does not suffice." *Id.* And the error couldn't be harmless, because, given the failure to explain the variance, the court could not be "convinced that the district court would impose the same sentence if the correct Guidelines range was 'kept in mind throughout the process.'" *Id.* The Ninth Circuit continues to follow *Munoz-Camarena*. *See, e.g.*, *United States v. Vederoff*, 914 F.3d 1238, 1248-49 (9th Cir. 2019).

The Sixth Circuit has taken a similar approach, holding that the harmless-error doctrine could not save an above-Guidelines sentence that was based on a Guidelines miscalculation, because it could not assume "that the district court would nonetheless impose an identical sentence in the form of a variance," or "review the reasonableness of such a result," where the district court failed to provide an explanation in the first place. *O'Georgia*, 569 F.3d at 297.

C. The Fifth Circuit's decision is wrong, and only this Court can correct it.

1. The Fifth Circuit's rule—that a conclusory statement that the district court would have imposed the same sentence no matter what makes a Guidelines error harmless—does not satisfy this Court's "adequate explanation" standard. The Court should summarily reverse if it does not grant plenary review.

Because a district court "must explain" "with sufficient justifications," *Gall*, 552 U.S. at 46, "the specific reason[s]" for deviating from the correct Guidelines range, 18 U.S.C. § 3553(c)(2), and because the "degree of variance" from the Guidelines "is surely relevant," *Gall*, 552 U.S. at 41, 47, there is no basis for holding that a district court's deviation from the Guidelines is "procedurally reasonable" when all it provides is "a vague statement that the sentence is appropriate under § 3553(a)," *Pena-Hermosillo*, 522 F.3d at 1117. Such a "perfunctory," *id.* at 1118, and "bare statement," *Smalley*, 517 F.3d at 215, falls well short of this Court's "adequate explanation" standard. It also does not permit the court of appeals to conclude that the district court in fact "would impose the same above-Guidelines sentence no matter what the correct calculation" is, because the perfunctory analysis does "not flow from an initial determination of the correct Guidelines range" and does not explain "the reason for the *extent* of a variance." *Munoz-Camarena*, 631 F.3d at 1031.

2. Here, the court of appeals upheld a sentence that exceeded the top of Kinzy's correct Guidelines range "by three years," App. 28a, because the Fifth Circuit requires nothing more "than a simple statement that the court would have imposed the same

sentence in the event of a guideline-calculation error," App. 33a n.13. That rule is wrong, especially when applied in a case where, as here, the district court imposed a sentence *outside* the Guidelines range, *see Gall*, 552 U.S. at 46; *Rita*, 551 U.S. at 357, after declaring that the sentence imposed "will be within the guideline range," App. 62a.

Rita said that a district court "*will* explain *why*" it has "impose[d] a sentence outside the Guidelines." 551 U.S. at 357 (emphases added). And *Gall*, elaborating on *Rita*, made "clear that a district judge *must* give *serious consideration* to the extent of any departure from the Guidelines and *must explain* [its] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case *with sufficient justifications*." 552 U.S. at 46 (emphases added).

The Fifth Circuit's simple-statement rule violates *Rita* and *Gall*, and the Court could summarily reverse if it chooses not to grant plenary review. Indeed, the facts here highlight just how erroneous (and consequential) the Fifth Circuit's outlier rule is. As explained, the district court gave a "perfunctory" statement generically alluding to the § 3553(a) factors as its rationale for deviating from the Guidelines, "nearly doubling" the correct range, App. 33a: "The sentence that I crafted is what I believe is appropriate for the defendant in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question." App. 31a; *see supra* pp. 11-12.

That statement does not come close to this Court's "adequate explanation" standard. The district court did not "set forth enough to satisfy the appellate court

that [it] considered the parties' arguments and [had] a reasoned basis," *Rita*, 551 U.S. at 356, for imposing "a term of imprisonment that exceeds the top of [Kinzy's] correct sentencing range by three years" App. 28a. Indeed, even the Fifth Circuit seemed to recognize that the district court failed to explain the significant deviation "with sufficient justifications." *Gall*, 552 U.S. at 46. "The court said that the same sentence would have resulted 'under either scenario,' *without explaining why*, if Kinzy's conviction were *not* a crime of violence, the court would have decided to vary upward by three years, nearly doubling the guideline range, *and why* it would have landed at the center of the heightened (and wrong) range." App. 33a (first and third emphases added). Indeed, the court of appeals recognized that the district court's perfunctory statement was "an afterthought," "made only at the Government's repeated request" in an "attempt to insulate the sentence on appeal." App. 31a, 32a, 35a.

Given the context, there simply is no way the district court could have fulfilled its obligation to give "serious consideration" to "the extent of the deviation" and whether there was a "significant justification" for the "major departure" from the Guidelines. *Gall*, 552 U.S. at 46, 50. Nor was there any way for the court of appeals to determine that there was no "reasonable probability of a different" sentence absent the error. *Molina-Martinez*, 578 U.S. at 200. Sentencing judges "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. Here, the district court's adherence to the erroneous Guidelines range meant a sentence right at the midpoint of that incorrect range, plus an assertion that the sentence "will be within the guideline range," App. 62a, rather than

any assertion that "the judge based the sentence … on factors independent of the Guidelines," *Molina-Martinez*, 578 U.S. at 200. With no way to judge what would have happened had the court kept the *correct* Guidelines range in mind through the process, the only course is to vacate and remand for resentencing.

3. Only this Court can correct the Fifth Circuit's test. Even though applying the Fifth Circuit's simple-statement rule left the panel "unsettle[d]," the panel nonetheless defended the court's outlier rule, asserting that it "has a degree of merit" and "may be both reasonable and fair." App. 28a, 30a. That conclusion is wrong, but it shows that the Fifth Circuit is unlikely to revisit its fundamental misunderstanding of federal sentencing and this Court's precedents, even on such an important issue, without this Court's intervention.

II. The question presented is important, and this case is an ideal vehicle for resolving it.

The question presented is crucial, and few cases present a better vehicle for resolving it.

A. The question presented is important.

The question presented is critically important for criminal defendants. A Guidelines error of the kind that occurred here imposes an unacceptable risk that the defendant will spend additional, unwarranted time in prison. Failing to ensure that the district court would in fact have imposed the same sentence for reasons it can articulate thus undermines public confidence in the judicial system, as this Court recently reiterated in *Rosales-Mireles*, *see* 138 S. Ct. at 1907-08. What's more, the question presented is inescapably intertwined with meaningful appellate review: the court of appeals can have no confidence in the notion that the district court would have imposed

the same sentence without the error if the district court doesn't even provide a cursory explanation for that assertion. This Court has granted review twice in recent years—in *Molina-Martinez* and *Rosales-Mireles*—to address the Fifth Circuit's outlier, defendant-unfriendly approaches to Guidelines errors. The Fifth Circuit's unfair approach to conclusory sentence insulation likewise undermines confidence in our justice system, and again warrants this Court's intervention.

1. As *Molina-Martinez* and *Rosales-Mireles* make clear, the Guidelines' important anchoring role throughout sentencing means that an error in calculating the Guidelines range ordinarily will establish a "a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 578 U.S. at 198; *see supra* pp. 9-10. Thus, individual liberty hangs in the balance whenever there is a Guidelines error that increases the defendant's sentencing range. This case is the perfect example. The correct Guidelines range (after adjustments) should have been 41 to 51 months, not 77 to 96 months. *See* App. 24a. When the district court sentenced Kinzy to 87-months, it imposed "a term of imprisonment that exceeds the top of his correct sentencing range by *three years*." App. 28a (emphasis added). That upward departure is presumptively prejudicial, *see Molina-Martinez*, 578 U.S. at 200, and obviously so, which is why the Fifth Circuit panel went out of its way to acknowledge the inherent unfairness of applying that court's outlier rule. *See* App. 28a-35a.

As the Court reiterated in *Rosales-Mireles*, "an error resulting in a higher range than the Guidelines provide usually establishes that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration." 138 S. Ct at

1907 (quoting 18 U.S.C. § 3553(a)). That means the prisoner faces a "prospect of additional 'time behind bars'"—and that's "not some theoretical or mathematical concept," because "'[a]ny amount of actual jail time' is significant" in its "severe consequences for the incarcerated individual [and] for society." *Id.*

As other courts of appeals correctly recognize, a district court's unexplained statement that it would have imposed the same sentence absent a Guidelines error provides no confidence for the assertion and raises grave concerns of additional prison time. That risk is especially unwarranted, and this Court's review is particularly important, because the Fifth Circuit's simple-statement standard flouts this Court's clear guidance in *Gall* and *Rita*. *Supra* pp. 17-20. It's bad enough that defendants may suffer from unnecessary deprivations of liberty, but it's even worse when the unnecessary deprivations are the result of a legal standard that is incompatible with Supreme Court precedent.

2. "The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles*, 138 S. Ct. at 1908. "Unlike 'case[s] where trial strategies, in retrospect, might be criticized for leading to a harsher sentence,' Guidelines miscalculations ultimately result from judicial error." *Id.* When errors are caused by courts alone, and "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," "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity"? *Id.* (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.)).

Contrast the significant risk of undermining the public's confidence in the judiciary with the simplicity of remanding for resentencing. "A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Id.* Remanding for resentencing may not be "costless," but it also "does not invoke the same difficulties as a remand for retrial does." *Id.* Thus, on balance, individual liberty and the integrity of the judiciary far outweigh the negligible concerns associated with remanding for resentencing.

3. A district court's explanation for imposing a sentence is vital to the function of an appellate court, which must determine whether the district court properly considered the factors in 18 U.S.C. § 3553(a) and gave "sufficient justifications" for departing from the Guidelines. *Gall*, 552 U.S. at 46, 51. Whether a "deviation from the Guidelines range" is "reasonable" is often a critical question on appeal, and the district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* at 50-51. Absent that adequate explanation, an appellate court has no way of verifying that "the district court's sentencing decision is procedurally sound." *Id.* at 51.

This case proves the point. All the court of appeals had to work with was a single, perfunctory statement that was an afterthought rather than an affirmative and carefully reasoned decision. *Supra* pp. 26-27. The result is that Mr. Kinzy has no explanation for his sentence—leaving him in the dark as to why he must serve three years longer in prison than the Guidelines recommend—*or* any meaningful review of his lengthy sentence by an appellate court.

4. This Court has recognized the importance of reining in the Fifth Circuit's too-often-misguided approach to Guidelines errors. In *Molina-Martinez*, the Court granted cert to review a Fifth Circuit decision because the "the Fifth Circuit stands generally apart from the other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors." 578 U.S. at 198. The Court then concluded that the Fifth Circuit's "approach is incorrect," *id.*, because it "fails to take account of the dynamics of federal sentencing," *id.* at 201. Just a few years later, in *Rosales-Mireles*, the Court took up another Fifth Circuit decision because that court's "articulation of [the plain-error test's] fourth prong is out of step with the practice of other Circuits." 138 S. Ct. at 1906; *see id.* at 1906 n.1 (citing 5 other circuits). The Court held that the Fifth Circuit "abused its discretion," *id.* at 1911, by applying an "unduly restrictive" standard, *id.* at 1906, that, left unchecked, would "seriously affect the fairness, integrity, and public reputation of judicial proceedings" by leaving serious Guidelines errors uncorrected, *id.* at 1911.

The Fifth Circuit standard here—that a district court erroneously calculating the defendant's Guidelines range can prevent vacatur and resentencing simply by stating, without explanation, that it would have imposed the same sentence—is just as out-of-step, wrongheaded, and important to correct as the sui generis rules the Fifth Circuit applied until *Molina-Martinez* and *Rosales-Mireles*. The Court should intervene, whether to grant plenary review or summarily reverse.

B. This case is an ideal vehicle.

This case is an ideal vehicle for resolving the question presented. The decision below "passed upon" the harmless-error issue, *United States v. Williams*, 504 U.S. 36, 41 (1992), and it expressly recognized that the Third and Tenth Circuits "require more" than the Fifth Circuit does. App. 33a n.13. The split is outcome-determinative, too: had Kinzy been sentenced in the Third or Tenth Circuit, the district court's error in calculating Kinzy's base offense level under the Guidelines would not have been harmless, because its "perfunctory," *Pena-Hermosillo*, 522 F.3d at 1118, "bare statement is at best an afterthought," *Smalley*, 517 F.3d at 215, which doesn't suffice in those circuits.

Smalley removes any doubt as to whether the split is outcome-determinative. There, the Third Circuit vacated and remanded for resentencing because the district court's alternative rationale was "devoid of any justification for deviating *eight months* above the upper-end of the properly calculated Guidelines range." *Id.* (emphasis added). Here, by contrast, the district court imposed a sentence "that exceeds the top of [Kinzy's] correct sentencing range by *three years*," App. 28a (emphasis added), "without explaining why, if Kinzy's conviction were *not* a crime of violence, the court would have decided to vary upward by three years, nearly doubling the guideline range, and why it would have landed at the center of the heightened (and wrong) range." App. 33a. Because the upward departure here is greater than the upward departure in *Smalley*, and because "the extent of the required explanation varies according to the circumstances of the case," *Pena-Hermosillo*, 522 F.3d at 1117, there can be no question that had Kinzy been sentenced in the Third or Tenth Circuit (or the Sixth or Ninth Circuit),

the Guidelines error would not have been harmless and the court of appeals would have remanded for resentencing.

Lastly, there are no alternative holdings, jurisdictional problems, or other procedural impediments that would prevent this Court from reaching and resolving the question presented. If the Court holds that a Guidelines error *is not* harmless when the district court does not fully explain why it would have imposed the sentence notwithstanding the error, then Kinzy will be entitled to resentencing.

* * *

The Court should grant review. The Court could also summarily reverse, rejecting the Fifth Circuit's outlier rule given *Gall*, *Rita*, *Molina-Martinez*, and *Rosales-Mireles*, and hold that the Third, Sixth, Ninth, and Tenth Circuits are right: a sentence based on a Guidelines miscalculation must be vacated when the district court's only rationale for imposing the non-Guidelines sentence is a simple statement that it would have imposed the sentence no matter what. Two wrongs—a Guidelines miscalculation and a failure to explain—don't make a right.

CONCLUSION

The Fifth Circuit has once again adopted an outlier view on an exceptionally important Guidelines-error question, splitting with other courts of appeals. Only this Court can resolve the acknowledged split. The Court should grant review or summarily reverse.

Respectfully submitted.

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