No. 23-578

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

REPLY BRIEF FOR PETITIONER

Claude J. Kelly
Samantha J. Kuhn
FEDERAL PUBLIC DEFENDER'S OFFICE
EASTERN DISTRICT OF LOUISIANA
500 Poydras St.
Suite 318
New Orleans, LA 70130

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Kyser Blakely
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTE

INTRODUCTION

This case presents an exceptionally important question on which the Fifth Circuit has 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. The question is whether a district court can appeal-proof a sentence based on Guidelines error simply by stating, without explanation, that it would have imposed the same sentence absent an error (as the Fifth Circuit alone holds); or whether the district court must follow *Gall v. United States*, 552 U.S. 38 (2007), and *Rita v. United States*, 551 U.S. 338 (2007), and adequately explain why the sentence is "sufficient, but not greater than necessary," *Rosales-Mireles v. United States*, 585 U.S. 129, 132-33 (2018), even assuming it miscalculated the Guidelines range (as the Third, Sixth, Seventh, Ninth, and Tenth Circuits hold). The Fifth Circuit expressly recognized the disagreement, App. 33a n.13, after defending its outlier rule, App, 28a-29a. And the government does not dispute that the Fifth Circuit affirms sentences based on Guidelines errors whenever the district court conclusorily states that it would have imposed the same sentence no matter what.

The facts highlight the need for plenary review, if not summary reversal. The district court determined that Christopher Kinzy's Guidelines range was 77 to 96 months, and after declaring that "[t]he sentence will be within the guideline range," App. 62a, it sentenced him to 87 months. Then, just as the court was about to adjourn, the government urged the court to appeal-proof its sentence given a dispute about the correct Guidelines range. The court first "appeared

confused" by "the Government's repeated request." App. 32a. The court then made a "perfunctory" statement, "as an afterthought," that it would have imposed the same sentence whatever the correct Guidelines range. App. 31a, 33a.

As it turns out, the district court miscalculated the range: it should have been 41 to 51 months—about *half* the length the court calculated. Thus, contrary to the court's assurance, the 87-month sentence wasn't "within the guideline range." App. 62a. It exceeded *the top* of the correct Guidelines range by *three years*. The district court didn't explain the specific reasons for such a significant departure, or why the departure was warranted after it had declared that the sentence would be *within* the Guidelines range. Yet the Fifth Circuit affirmed the sentence anyway, because its precedent "compelled" it to treat the Guidelines miscalculation as harmless, no matter the extent of the departure. App. 28a.

Gall and *Rita* forbid the Fifth Circuit's conclusory-statement rule. Those decisions hold that a district court must adequately explain the specific reasons for varying from the Guidelines, and remand is required when a district court fails to adequately explain a departure from the Guidelines range. The government cannot avoid *Gall* and *Rita* by arguing that neither decision involved a harmless error. By its very nature, *Gall*/*Rita* failure-to-explain error cannot be harmless.

The Fifth Circuit's rule also conflicts with the precedent of at least five circuits. *See United States v. Raia*, 993 F.3d 185, 195-96 (3d Cir. 2021); *United States v. O'Georgia*, 569 F.3d 281, 297 (6th Cir. 2009); *United States v. Asbury*, 27 F.4th 576, 581-82 (7th Cir. 2022); *United States v. Munoz-Camarena*, 631 F.3d

1028, 1031 (9th Cir. 2011); *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008). The government concedes (at 16) that the petition implicates a circuit split, and its efforts to downplay the conflict fail. Kinzy would have won vacatur in all those other circuits because "'a conclusory comment tossed in for good measure' is not enough to make a guidelines error harmless." *Asbury*, 27 F.4th at 581. The alternative rationale "must be 'detailed.'" *Id.*

The district court's "perfunctory" "afterthought" falls well below that standard, App. 31a, 33a, especially given that the court departed upward from the correct Guidelines range after anchoring the sentence to the Guidelines: "The sentence *will be within* the guideline range." App. 62a (emphasis added). The Court should hold—whether on plenary review or by summary reversal—that the Fifth Circuit's outlier rule is wrong. The circuits on the other side of the split all would have required resentencing. Indeed, the panel noted that "at least" the Third and Tenth Circuits require "a more detailed explanation" than the district court provided. App. 33a-34a & n.13.

The government's other arguments fail, too. The government complains that the question presented is not "clearly preserved." Opp. 9. But Kinzy wasn't required to "demand overruling of [the] squarely applicable" Fifth Circuit precedent, and the Fifth Circuit "passed upon" the question anyway. *United States v. Williams*, 504 U.S. 36, 41, 44 (1992). And while the government claims that the Court has denied cert on similar issues before, in many of those cases there was no holding of Guidelines error.

The Court should grant plenary review or summarily reverse.

ARGUMENT

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

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

1. *Gall* and *Rita* hold that district courts "must adequately explain" their specific reasons for varying from the Guidelines. *Gall*, 552 U.S. at 50; *see Rita*, 551 U.S. at 356-57. The greater the variance, the greater the required explanation, *Gall*, 552 U.S. at 50, because the adequacy of the explanation turns on "the extent of the departure," *Peugh v. United States*, 569 U.S. 530, 543 (2013). *See* Pet. 7-8.

Gall and *Rita* foreclose the Fifth Circuit's rule that Guidelines miscalculations are harmless whenever the district court provides a "perfunctory," "simple statement" that it would have imposed the same sentence absent a miscalculation, no matter the extent of the departure. Pet. 17-19. A conclusory statement isn't an "explanation" for deviating from the correct Guidelines range. *Gall*, 552 U.S. at 46, 51. Nor does the Fifth Circuit's categorical rule respect the principle "that a major departure should be supported by a more significant justification than a minor one." *Id.* at 50.

The government retorts that *Gall* and *Rita* "simply addressed the proper procedure for imposing a sentence," not "the circumstances in which an error would be harmless." Opp. 10. But given the nature of the error, the failure to "adequately explain," *Gall*, 552 U.S. at 50, why a departure from the Guidelines is appropriate requires a remand—the error cannot be

harmless. Indeed, without an adequate explanation, the reviewing court has *no basis* to hold the error harmless. *Id.* at 50-51. That's why the Fifth Circuit's rule flouts those precedents and why those precedents didn't need to discuss harmless error.

2. The Fifth Circuit's conclusory-statement rule is also contrary to *Molina-Martinez v. United States*, 578 U.S. 189 (2016), and *Rosales-Mireles*, which instruct that the Guidelines are a critical anchor throughout the sentencing process. Pet. 9-10, 17-19.

The government's primary response is that Guidelines errors may be harmless if "the 'record' … shows that 'the district court thought the sentence it chose was appropriate irrespective of the Guidelines range.'" Opp. 10. But Guidelines miscalculations are presumptively prejudicial "in most cases." *Molina-Martinez*, 578 U.S. at 200; *see Rosales-Mireles*, 585 U.S. at 139. *Molina-Martinez* emphasizes the district court's duty to "explain the decision to deviate from" the correct Guidelines range, 578 U.S. at 199, and *Rosales-Mireles* explains "the relative ease of correcting [any] error" on remand in scenarios where the district court failed to adequately explain the departure, 585 U.S. at 140. Unless the district court gave "a detailed explanation of the reasons the selected sentence is appropriate," the standard practice is to remand. *Molina-Martinez*, 578 U.S. at 200. A "perfunctory" "afterthought" doesn't come close to meeting that standard, App. 31a, 33a, especially where, as here, the upward departure is significant.

The government also claims that Fifth Circuit harmless-error precedent doesn't "diminish the guidelines' 'anchoring role'" or "harm the integrity of the judicial system," because it "simply identifies cases,

like this one, where the sentencing court found [the Guidelines'] to be overwhelmed by other[] [factors]." Opp. 11-12. But the district court here did no such thing. Even the Fifth Circuit couldn't deny that the sentencing court's "perfunctory" "statement was made as an afterthought, at the very end of the sentencing hearing, after imposition of the sentence." App. 31a, 33a.

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

1. Only the Fifth Circuit affirms sentences under the harmless-error doctrine when the district court conclusorily states, without explanation, that it would have imposed the same sentence notwithstanding a Guidelines miscalculation. Relying expressly on *Gall* and *Rita*, five circuits hold the opposite: A Guidelines miscalculation is harmless only when the district court *adequately explains* why it would have imposed the same sentence notwithstanding a miscalculation. A "cursory explanation [of the] alternative rationale" doesn't suffice. *Peña-Hermosillo*, 522 F.3d at 1117. *See* Pet. 20-24.

The panel acknowledged the conflict with the Third and Tenth Circuits. App. 33a n.13. In those courts, as in the Sixth, Seventh, and Ninth Circuits, Guidelines error isn't harmless when the district court's alternative rationale is a "mere statement that it would impose the same above-Guidelines sentence no matter … the correct calculation." *Munoz-Camarena*, 631 F.3d at 1031 (9th Cir.); *see Raia,* 993 F.3d at 195-96 (3d Cir.); *O'Georgia*, 569 F.3d at 297 (6th Cir.); *Asbury*, 27 F.4th at 581-82 (7th Cir.); *Peña-Hermosillo*, 522 F.3d at 1117 (10th Cir.). That's especially true where, as here, the variance from the

correct Guidelines range is significant. As then-Judge McConnell explained, "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." *Peña-Hermosillo*, 522 F.3d at 1117. In the Third, Sixth, Seventh, Ninth, or Tenth Circuits, Kinzy would have won resentencing.

2. The government concedes (Opp. 16) that the petition implicates a circuit split. Its efforts to downplay the 5–1 conflict fail.

a. The government first claims that the conflict doesn't warrant review because the decision below is "unpublished" and "the Fifth Circuit has not definitively addressed the extent to which a district court must provide an explanation of the rationales underlying its conclusion that the same sentence is warranted regardless of the correct guidelines range." Opp. 12.

First, the decision below is unpublished because the panel simply applied longstanding Fifth Circuit precedent, as it was "compelled" to do. App. 28a. The conclusory-statement rule binds every Fifth Circuit panel, just as it "bound" the panel below. *Id.*

Second, the decision below makes clear that the Fifth Circuit *has* definitively addressed what triggers harmless error in cases involving Guidelines errors. Fifth Circuit "jurisprudence" requires only a "simple statement"; it "does not … require[] that district courts offer a more detailed explanation of the alternative sentence." App. 33a & n.13. Here, for instance, the district court issued its perfunctory statement "without explaining why" a Guidelines error wouldn't

have mattered, and the court of appeals still held the error harmless. App. 33a.

b. The government next argues that courts have held Guidelines-calculation errors harmless in circumstances like those here, and that any "formal differences … in the articulated requirements for a harmless-error determination … have little substantive effect and do not create a conflict warranting this Court's review." Opp. 13. A decision the government cites, *United States v. Caraway*, 74 F.4th 466 (7th Cir. 2023), shows why that's wrong.

Caraway applied Seventh Circuit caselaw holding that a Guidelines error may be harmless when the district court provides a "detailed explanation" of the appropriateness of the sentence notwithstanding an error. *Id.* at 468-69. Although "a sentencing judge 'need not belabor the obvious,'" "conclusory comments" do not suffice. *Id.* Indeed, the Seventh Circuit has determined that harmless error "is a high bar" in Guidelines miscalculation cases, *United Sates v. Bravo*, 26 F.4th 387, 396 (7th Cir. 2022), and it has reminded district courts that "'a conclusory comment tossed in for good measure' is not enough to make a guidelines error harmless," *Asbury*, 27 F.4th at 581. For instance, if a district court imposes a sentence based on a Guidelines "range of 235 to 293 months," even though the correct range is "151 to 188 months," the court must explain "why the difference between" the ranges "did not provide useful guidance for sentencing that particular defendant." *Id.* at 582.

Kinzy would have won resentencing in the Seventh Circuit. The district court erroneously calculated the Guidelines range as 77 to 96 months rather than 41 to 51 months, and imposed an 87-month sentence.

App. 24a. While the court said it would have imposed the same sentence regardless, it never explained *why* the significantly different ranges were unimportant. That silence doesn't clear the Seventh Circuit's "high bar" for harmless error, *Bravo*, 26 F.4th at 396, especially given that the district court said the "sentence will be within the guideline range," App. 62a. Likewise, the Ninth Circuit wouldn't have found the error harmless, *Munoz-Camarena*, 631 F.3d at 1031, as the government implicitly admits (Opp. 15-16).

c. The government claims that the district court here "said more" than the district court in *Peña-Hermosillo*. Opp. 14. That's wrong. Here, the court stated that it "would have imposed the same sentence" because it "reflects the seriousness of [the] offense, [Kinzy's] criminal history, and also protects the public." App. 66a. In *Peña-Hermosillo*, the court stated that the "sentence is the most reasonable sentence upon consideration of all the factors enumerated in [18 U.S.C. § 3553]." 522 F.3d at 1117. The only difference between those statements is that the district court here paraphrased some of the § 3553 factors, whereas the court in *Peña-Hermosillo* cross-referenced those factors. The statements are substantively indistinguishable. Thus, the only reasonable conclusion is that Fifth Circuit precedent squarely conflicts with Tenth Circuit precedent.

d. Third and Sixth Circuit decisions confirm that the Fifth Circuit's rule is an outlier. Pet. 21-22, 24. The government argues that Kinzy "does not identify" any Third or "Sixth Circuit decision requiring resentencing where a district court provided an explanation like the one provided here." Opp. 14-15. But the *law* in those circuits clearly conflicts with the law in the Fifth Circuit: "even an explicit statement

that the same sentence would be imposed under a different Guidelines range is insufficient if that alternative sentence is not also a product of the entire [mandatory] sentencing process." *Raia*, 993 F.3d at 196. To justify an alternative sentence, a sentencing court "must begin with a correct Guidelines calculation and reason from that starting point to the appropriate sentence based on the facts of the individual case and the exercise of the District Court's discretion pursuant to 18 U.S.C. § 3553." *United States v. Smalley*, 517 F.3d 208, 211 (3d Cir. 2008). Simply paraphrasing the § 3553 factors and calling the sentence appropriate is a "perfunctory" statement that doesn't make the error harmless. *O'Georgia*, 569 F.3d at 297. Because all the district court did here was paraphrase some of the § 3553 factors, App. 66a, both the Third and Sixth Circuits would have required resentencing.

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

A. The question presented is indisputably important. Pet. 28-32. The government's only response is that the Court has denied petitions raising "similar issues." Opp. 5-6. That's wrong.

First, the conflict in those cases wasn't outcome-determinative because "the district court did not err in calculating [the] advisory guidelines range." Opp. 16, *Brooks v. United States*, No. 22-5788 (U.S.); *see also, e.g.*, Opp. 17, *Irons v. United States*, No. 22-242 (U.S.) (no error); Opp. 16, *Brown v. United States*, No. 20-6374 (U.S.) (no clear error). Indeed, in many of those cases the panel never determined whether the district court erred, *see, e.g.*, App. 3a, *Snell v. United States*, No. 20-6336 (U.S.), and instead simply

"assume[d] that the district court made a mistake," App. 2a, *Irons*, No. 22-242. Here, however, the panel held that "the district court erred" in calculating the Guidelines range. App. 2a, 12a-19a. This case is an ideal vehicle.

Second, past denials are no reason to deny review. When opposing cert in *Molina-Martinez*, for instance, the government argued that the Court had "previously denied review in several cases raising the question presented." Opp. 8, No. 14-8913. The Court granted cert anyway.

It should do the same here. This case is the perfect vehicle, and the need for review is greater than ever. The government doesn't dispute that it urges district courts to appeal-proof sentences, just as it did here. *See* App. 30a-32a. The Seventh Circuit, for instance, has "noticed the frequency with which sentencing judges are relying on inoculating statements" and has reiterated that "a conclusory comment" doesn't suffice. *Asbury*, 27 F.4th at 581. The Fifth Circuit, meanwhile, has reaffirmed its conclusory-statement rule, claiming it "has a degree of merit" and is "reasonable and fair." App. 28a, 30a. The problem will only get worse absent this Court's intervention.

Lastly, the pending petition in *Houston v. United States*, No. 23-6841 (U.S.), doesn't "raise[] a similar issue." Opp. 6 n.*. The question there is whether reviewing courts may invoke harmless error to affirm a sentence based on a supposed Guidelines error without first determining "whether the District Court in fact miscalculated the Sentencing Guidelines range" and, if so, what the correct Guidelines range would be. Pet. 21, No. 23-6841. The question here is different,

because it focuses on what a district court must say to justify applying the harmless-error doctrine.

B. This case is an ideal vehicle. Pet. 33-34. The government claims the question presented isn't "clearly preserved" because Kinzy didn't raise it below and the panel "did not pass upon its merits." Opp. 9. That's wrong. The panel was "bound by" Fifth Circuit precedent, App. 28a, 33a, which it *defended* as "reasonable and fair," App. 30a. That's sufficient. The panel "passed upon" the issue, and this Court doesn't require petitioners to "demand overruling of a squarely applicable" circuit precedent. *Williams*, 504 U.S. at 41, 44.

CONCLUSION

The petition should be granted.

Respectfully submitted.

Claude J. Kelly
Samantha J. Kuhn
FEDERAL PUBLIC DEFENDER'S OFFICE
EASTERN DISTRICT OF LOUISIANA
500 Poydras St., Suite 318
New Orleans, LA 70130

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Kyser Blakely
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Counsel for Petitioner

April 30, 2024