No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHANCE JOSEPH SENECA,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether errors in calculating the Sentencing Guidelines are rendered categorically harmless by the district court's routine assertion that the Guidelines would make no difference to the choice of sentence?

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The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *United States v. Seneca*, No. 23-30075, 2023 WL 8253754 (5th Cir. Nov. 29, 2023), and is set forth at App. 001.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 3553 provides, in relevant part:

> **(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> * * *
>
> (4) the kinds of sentence and the sentencing range established for--
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
>
> * * *
>
> (5) any pertinent policy statement--

> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> * * *

18 U.S.C. § 3553(a).

Federal Rule of Criminal Procedure 52 provides:

> (a) **Harmless error**. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) **Plain error**. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

FED. R. CRIM. Proc. 52.

STATEMENT OF THE CASE

The petitioner Chance Joseph Seneca is a gay man who kidnapped and attempted to murder another gay man. Before completing the crime, Seneca had a change of heart and called the police, a decision that saved his would-be victim's life.

Seneca pled guilty to one count of kidnapping in violation of 18 U.S.C. § 1201(a)(l). ROA.268. Seneca refused to plead guilty to (and the government later dismissed) a separate charge of hate crime with intent to kill in violation of 18 U.S.C. § 249(a)(2)(A)(ii). ROA.269, 276-79.

Much of the voluminous and complex proceedings in this case involved whether Seneca was subject to the hate crime sentencing enhancement under U.S.S.G. § 3A1.1(a). Seneca argued that he is a gay man and harbored no animosity toward gay men or men in general and did not select the victim because of his gender or sexual

orientation. Seneca complained that the enhancement was being applied to him because he was a gay man and, therefore, his victims came from his same community of gay men. ROA.372-75. The government argued that no finding that Seneca harbored animus towards gay men was required under § 3A1.1(a). ROA.428. This is an unsettled issue of the law.

At the sentencing hearing, the court heard testimony and argument concerning the enhancement and ultimately ruled that the hate crime enhancement in § 3A1.1(a) applied, adopting the governments expansive reading of § 3A1.1(a). ROA.224-28. The court's ruling on the hate crime enhancement raised Seneca's Sentencing Guidelines range from to 235-293 months imprisonment to 324-405 months imprisonment.

The court imposed an upward variant sentence of 540 months. ROA.256. After imposing the sentence, the court made the following standard inoculating statement:

> There has been a dispute here and objections to the Guideline range. The Court adopted the Guideline range based on its ruling on the objections, but I also calculated what that Guideline range would have been without those objections, and taking it all together, my consideration of 3553 and those differing Guideline ranges, the sentence that I have imposed is the sentence I would impose even if the Court has in some way erred in calculating the applicable Guideline range based on all the information presented to the Court in this proceeding.

ROA.259. The inoculating statement by the court prompted an objection from Seneca's counsel:

> I have one more thing, Your Honor. I'm going to make an objection for appeal purposes. I'm going to object to, I guess, the Court's statement that the Court would impose the same 45-year sentence notwithstanding the ruling on the hate crime enhancement. I'm going to object to that for the following reasons.

> I have to be specific for appeal purposes, but I'm going to object because there are orders of magnitude difference in the amount of upward variance to get to 45 years that comes from the Guideline with the hate crime enhancement, 324 to 405, or the Guideline without it, which is 235 to 293, and we're talking about like decades more time.
>
> My understanding of the law on upward variances or upward departures, you know, that the Court has to give sufficient reasons. The Court gave some reasons today certainly, but that those reasons kind of have to be tethered to how big of a variance we're talking about, and I just -- I would respectfully say I think those reasons are different, whether you're coming from 293 or whether you're coming from 405.
>
> So I just would, like I said, object to that statement that the sentence would be the same. I think this hearing is different and I think my arguments are going to be different if the hate crime enhancement is different. I just want to try to make that record in case it ever becomes relevant in the future.

ROA.260-61. The court responded: "Understood. And you have your record." ROA.261. The judgment was entered on January 25, 2023. ROA.101. In the statement of reasons filed with the judgment contained the following entry: "In the event the Guideline determination(s) made in this case are found to be incorrect, the court would impose a sentence identical to that imposed in this case. (18 U.S.C. § 3553(a))." ROA.349. On January 31, 2023, Seneca timely filed a notice of appeal. ROA.107.

On November 29, 2023, the United States Court of Appeals for the Fifth Circuit affirmed Seneca's sentence. The Fifth Circuit refused to reach Seneca's arguments concerning the district court's incorrect application of the hate crime enhancement in § 3A1.1(a), instead relying on the court's inoculating statement because, "the court considered the applicable Guidelines sentencing range both with and without the challenged enhancement and affirmed it would give the same sentence either way." App. 1

REASONS FOR GRANTING THE WRIT

Each year, thousands of people are imprisoned for breaking federal laws. This case focuses on a common issue that arises when trial judges make mistakes in calculating the appropriate sentencing range under the Sentencing Guidelines. In many districts, courts recite a routine inoculating statement at the imposition of sentence that the Sentencing Guidelines would make no difference to its choice of sentence. The courts of appeals are divided on how to handle that frequently recurring situation. Most have held that such calculation errors must be corrected, vacating the sentence and remanding for resentencing. Others—like the Fifth Circuit below—hold that a judge's boilerplate disclaimer categorically makes any Guidelines calculation errors *per se* harmless and immune from appellate review. The result is that defendants, like Seneca, receive a diminished right to be sentenced under correctly calculated Sentencing Guidelines and important Guideline legal questions, like the hate crime question raised in this case, are left undecided by the courts of appeals.

The Guidelines play a "central role in sentencing" and frequently are determinative of the actual sentence. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341 (2016). "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh v. United States*, 569 U.S. 530, 541 (2013).

Because of the centrality of the Guidelines, "district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," and "improperly calculating[] the Guidelines range" constitutes "significant procedural error." *Gall v. United States*, 552 U.S. 38, 50 n.6, 51 (2007) (emphasis added). Even if the sentencing court "decides that an outside-Guidelines sentence is warranted," it "must give serious consideration" to "the extent of the deviation" and variances from the Guidelines range must be accompanied by a "justification * * * sufficiently compelling to support the degree of the variance." *Id.* at 50; *see also Pepper v. United States*, 562 U.S. 476, 508 (2011) (Breyer, J., concurring in part and concurring in judgment) ("[T]he law permits the court to disregard the Guidelines only where it is 'reasonable' for a court to do so." (citing *United States v. Booker*, 543 U.S. 220, 261-262 (2005)). After all, the Guidelines warrant respect as "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall*, 552 U.S. at 46. They therefore serve as the "benchmark" for any sentence, even a non-Guidelines one. *Id.* at 49.

This Court has squarely held that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49. And when reviewing a sentence on appeal, "the appellate court * * * must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range * * * or failing to adequately explain the chosen sentence—including an explanation for any deviation

from the Guidelines range." *Id.* at 51.

Despite this unequivocal guidance, there is an entrenched circuit split over whether "improperly calculating[] the Guidelines range" is rendered categorically harmless if the sentencing court announces that it considers the Guidelines unimportant for its sentence. In the decision below, the Fifth Circuit, applying circuit precedent, held that when the sentencing court recites a form statement that it considered the applicable Guidelines sentencing range both with and without the challenged enhancement and affirmed it would give the same sentence either way, any error by the sentencing court in calculating the Guidelines is categorically harmless. App. 1. The Eighth and Eleventh Circuit dispose of sentencing appeals similarly. *See United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2021); *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021).

But had petitioner been sentenced in the Second, Third, Seventh, Ninth, or Tenth Circuits, the court of appeals would have vacated the sentence and remanded so that the sentencing court could resentence the defendant having first considered the presumptively reasonable properly calculated Guidelines sentencing range. The Seventh Circuit's recent analysis of the issue exemplifies the rationale for rejecting district judges' efforts to exempt their non-Guidelines sentences from appellate scrutiny. In *United States v. Asbury*, 27 F.4th 576 (7th Cir. 2022), the sentencing court rejected the defendant's objections to the PSR and added: "[I]f I made an error in the Guideline calculation in terms of offense level, that would not affect my sentence. I'm basing my sentence on the Section 3553(a) factors and the exercise of

my discretion after placing a lot of thought into this sentencing hearing." *Id.* at 579. The Seventh Circuit rejected the conclusion that the sentencing court's statement rendered its sentencing errors harmless, holding that while sentencing courts have discretion to fashion sentences under 18 U.S.C. § 3553, this discretion does not "permit the judge to nullify the Guidelines by way of a simple assertion that any latent errors in the Guidelines calculation would make no difference to the choice of sentence." *Id.* at 581. Reasoning that sentencing decisions at every level of the judiciary must be made by reference to the appropriate Guidelines calculation, "'a conclusory comment tossed in for good measure' is not enough to make a Guidelines error harmless." *Ibid.*

As the Seventh Circuit explained, permitting such conclusory assertions to insulate sentencing errors from appellate review would circumvent the need for the judge in every case to correctly calculate a baseline Guidelines sentencing range and explain sentencing decisions departing from that range, and therefore is fundamentally inconsistent with Guidelines sentencing. "There are no 'magic words' in sentencing." *Asbury*, 27 F.4th at 581. "If there were, the judge would have no incentive to work through the Guideline calculations: she could just recite at the outset that she does not find the [G]uidelines helpful and proceed to sentence based exclusively on her own preferences." *Ibid.*

Other Circuits have issued similar rulings condemning inoculating statements. *See United States v. Seabrook*, 968 F.3d 224, 233–34 (2d Cir. 2020) (The "district court cannot insulate its sentence from our review by commenting that the

Guidelines range made no difference to its determination" because "the Guidelines, although advisory, are not a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge."); *United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) ("a statement by a sentencing court that it would have imposed the same sentence even absent some procedural error does not render the error harmless" because "it must still begin by determining the correct alternative Guidelines range and properly justify the chosen sentence" in relation to it); *United States v. Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (sentencing error was not harmless despite district court's statement that "it would have given the same sentence *** if it had applied" the Guidelines as the defendant requested does not make the error harmless); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reversing because of district court's Guidelines miscalculation notwithstanding the district court's statements "that it would have imposed the same sentence" regardless of the Guidelines).

And while the Fourth and Sixth Circuits give some deference to the district court's assertion that any Guidelines miscalculations would be harmless, they additionally require an independent assessment of the reasonableness of the sentence to be "certain" the error was harmless on appeal. Thus, in most circuits, petitioner's case would have been reversed and remanded for a new sentencing hearing. Only in the Fifth, Eighth, and Eleventh Circuits can a district court effectively opt out of Guidelines sentencing and immunize its Guidelines calculation errors by announcing that "the Sentencing Commission's expert judgment," *Spears v. United States*, 555

U.S. 261, 266 (2009) (per curiam), matters so little to it that the sentencing court need not even bother calculating that benchmark correctly.

The Fifth Circuit's rule is fundamentally incompatible with Congress's decision to adopt a nationwide system of Guidelines sentencing to promote uniformity. It conflicts with Congress's establishment of defined sentencing factors which provide that sentence courts must consider "the sentencing range established * * * by the Sentencing Commission." 18 U.S.C. § 3553(a)(4)(A)(i). And it conflicts with this Court's precedent, which establishes that sentencing "should begin" with "correctly calculating the applicable Guidelines range," and that appellate courts "must first ensure" the district court did not "improperly calculat[e] the Guidelines range," *Gall*, 552 U.S. at 49-51, to facilitate appellate review and ensure it can assess the substantive reasonableness of the sentence. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018) ("Before a court of appeals can consider the substantive reasonableness of a sentence, '[i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.'").

The Guidelines remain the benchmark for sentencing; regardless of what they say, judges tend to sentence in the shadow of the Guidelines, and so changes in calculation matter even to non-Guidelines sentences. Reflecting that fact, this Court has repeatedly held that even unobjected-to Guidelines calculations errors must ordinarily be corrected under the more-exacting rubric of plain error review because the failure to correctly calculate the range "can, and most often will, be sufficient to

show a reasonable probability of a different outcome absent the error." *Rosales-Mireles*, 138 S. Ct. at 1907 (emphasis added). And by creating an irrebuttable presumption that the district court's blanket statement as to the irrelevance of the Guidelines is dispositive to the harmless error analysis, the Fifth Circuit's rule is contrary to Rule 52(a), which places the burden on the government to prove error is harmless after reviewing the entire record. *United States v. Davila*, 569 U.S. 597, 607 (2013).

The question recurs frequently and is unquestionably important in light of the centrality of the Guidelines in sentencing. Petitioner's case is an ideal vehicle to settle this frequently occurring issue. The court's ruling on the hate crime enhancement below raised Seneca's Sentencing Guidelines range from to 235-293 months imprisonment to 324-405 months imprisonment—a nearly decade increase in his potential sentence. The sole reason offered by the Fifth Circuit to affirm the sentence was the district court's statement it would have given the same sentence either way. App. 1. There is no question that this issue was squarely presented and addressed below. And this case starkly illustrates the consequences of the split. This Court's review is warranted to restore uniformity to federal sentencing law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this February 27, 2024,

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