NO. _____

In the Supreme Court of the United States

RAQUEL DELGADO CHAVEZ,

Petitioner,

v.

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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QUESTIONS PRESENTED

1.

Does the "depraved heart" theory of federal second-degree murder require a causal connection between the defendant's "depraved" conduct and the victim's death?

2.

Some sentencing judges routinely assert that they would have selected the exact same sentence regardless of any error in applying the Sentencing Guidelines. Should an appellate court rely on those routine assertions when deciding whether an error is harmless?

DIRECTLY RELATED PROCEEDINGS

United States v. Raquel Delgado Chavez, No. 5:23-CR-29 (N.D. Tex. Nov. 16, 2023)

United States v. Raquel Delgado Chavez, No. 23-11173 (5th Cir. Oct. 17, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Sentencing Guidelines

Rules

Other Authorities

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PETITION FOR A WRIT OF CERTIORARI

Raquel Delgado Chavez respectfully asks for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below was not selected for publication. It can be found at 2024 WL 4512339. The decision is reprinted at pages 1a–3a of the Appendix. The district court did not issue any written opinions, but its oral findings are reprinted at pages 19a–26a and 36a–42a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on October 25, 2024, and denied rehearing on November 22. Pet. App. 51a. This petition is timely under S. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

This case involves 8 U.S.C. § 1324(a)(1)(A)(ii) & (a)(1)(B)(iv); 18 U.S.C. § 1111(a); Federal Rule of Criminal Procedure 51; and U.S.S.G. §§ 2A1.2(a) & 2L1.1. These provisions are reprinted on pages 52a–57a of the Appendix.

STATEMENT

A. Facts

On a cold, blustery, and rainy day in November 2022, Petitioner Raquel Chavez and her husband were driving someone else's pickup truck across Texas, using backroads to avoid attention. Four unauthorized migrants were crowded onto a rear bench seat made for three. Pet. App. 20a–21a. As the truck approached the small town of Tahoka, Texas, a faster vehicle came up behind them. Ms. Chavez pulled to the right shoulder to allow that other car to pass. As she merged back into the main traffic lane, tragedy struck. The tires lost traction on the wet pavement. As the truck slid off the highway and tumbled, one of the passengers was ejected. He landed face-down on the ground, and the truck came to rest—upside down—on top of his body. 5th Cir ROA 138, 178, 198.[1] Other motorists immediately stopped to help and called 9-1-1. Authorities arrived within minutes, but they were too late: the victim suffered a "relatively quick death"

[1] The Presentence Investigation Report and related materials were filed under seal in the lower courts, so they are not reprinted in the Petition Appendix.

due to massive blunt-force trauma to the head and neck. Pet. App. 25a.

Everyone else survived. Responding motorists told emergency dispatchers that they saw three back seat passengers climb out of the truck and begin to flee on foot. Ms. Chavez was knocked unconscious and unable to free herself. App. 21a. After her husband pulled her from the wreckage, they, too, ran away. Authorities began to arrive "about 13 minutes" after the accident, but they were too late to save the victim. Pet. App. 21a.

That night, Ms. Chavez and her husband huddled together in a cold, abandoned house without medical attention. 5th Cir. ROA 199. The next day, authorities discovered the couple walking along the highway near the site of the crash. 5th Cir. ROA 181–82. Ms. Chavez was immediately hospitalized for "injuries to her head, face, chest, upper back, and both hips." 5th Cir.ROA 144.[2] While she recovered in the hospital, a state investigator conducted a lengthy bedside interview. Ms. Chavez admitted that she was driving the migrants to Dallas for money. She also told the detective that she saw the victim trapped under the truck but still alive and trying to free himself; that she "tried to help move the truck"; but "the truck didn't move." 5th Cir. ROA 199. No other witness reported anything like this to police. App. 22a; *see* 5th Cir. ROA 181–82.

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[2] According to Ms. Chavez's Presentence Investigation Report, she suffered "a concussion, right knee contusion, minor blunt chest injury, multisystem trauma, and pneumomediastinum (air in the chest cavity." 5th Cir. ROA 151.

B. District Court Proceedings

Ms. Chavez pleaded guilty to "transportation of an illegal alien resulting in death." Pet. App. 1a; *see* 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(B)(iv).

The parties extensively litigated whether Ms. Chavez should be sentenced as though she had committed murder. The Sentencing Guideline for alien-smuggling offenses includes a cross-reference to "the appropriate homicide guideline" if "death resulted" that applies "if the resulting offense level is greater than" U.S.S.G. § 2L1.1(a)–(b). *See* U.S.S.G. § 2L1.1(c)(1).

The district court decided that Ms. Chavez had committed second-degree murder, so it sentenced her under U.S.S.G. § 2A1.2. App. 20a. The court recognized that her actions *before* the accident would not constitute murder: "[I]f it were just a rollover—an inadvertent rollover crash and one too many in the back seat, I doubt the government or the probation officer would be advocating for the second-degree murder cross-reference." App. 11a. The court also recognized that nothing Ms. Chavez *should have* done for the victim after the crash would have saved him. Other motorists had already called 9-1-1 while Ms. Chavez was still trapped inside the truck; when authorities arrived minutes later, the victim was already deceased. Pet. App. 22a, 25a.

Ms. Chavez objected that a death and extremely reckless behavior are not sufficient to prove second-degree murder: the "extreme recklessness required" for second-degree murder "has to *contribute to* the death." Pet. App. 10a (emphasis added). The district

court disagreed: When Ms. Chavez fled the scene, "she did not know that any attempt to save [the victim] would be futile. We know that now, but she did not know that then." Pet. App. 25a. The second-degree murder guideline called for a sentence of 168–210 months in prison. Pet. App. 27a.

After emphasizing that her abandonment of the victim was "depraved-heart, second-degree murder," The court sentenced her to 192 months of imprisonment, followed by five years of supervised release. Pet. App. 38a–40a. Despite a lengthy and contested hearing over the propriety of the cross-reference to second-degree murder, the court asserted a belief that the elevated guideline range did not affect the sentence:

> I inform both sides that, although I believe the guideline calculations announced today were correct, to the extent they were incorrectly calculated, I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the 3553(a) factors.

Pet. App. 40a.

C. Appeal

On appeal, Ms. Chavez renewed her argument that, as a matter of law, second-degree murder required proof of *concurrence* between *mens rea* (depraved heart) and *actus reus* (an act or omission that causes, or at least contributes to, the victim's death). *See* Chavez C.A. Initial Br. 19–29; Chavez C.A. Reply Br. 1–11. She also challenged the district court's

assertion that it would have imposed the "same sentence without regard to" the erroneous guideline range. Chavez C.A. Initial Br. 29–34; Chavez C.A. Reply Br. 11–21. On the second point, she emphasized that the judge who sentenced her routinely asserts that he would have imposed the same sentence regardless of the guideline range. She provided quotations from seventeen sentencing transcripts to prove the point. *See* Pet. App. 58a–63a. She also pointed out that the district court never considered the how the alien-smuggling guideline accounts for both risky behavior *and* the causation of death in the absence of a cross-reference, and therefore never considered the 57–71 month range that would apply after both enhancements. *See* U.S.S.G. § 2L1.1(b)(6), (b)(7)(D). She pointed to Sentencing Commission data revealing that 82% of smuggling cases involving a "death" enhancement were sentenced within or below the advisory guideline range. Chavez C.A. Initial Br. 29–34.

The Fifth Circuit rejected Ms. Chavez's arguments and affirmed her murder-predicated sentence: "The district court did not err in concluding that Delgado Chavez acted in the extreme when she neglected her duty to render aid to her passenger and callously left him to die to avoid any consequences." App. 2a. The court held in the alternative that "any error" in sentencing her as a murderer "was harmless." App. 2a. The court relied on its precedent holding that "a guidelines calculation error is harmless when the district court considers the correct guidelines range and indicates that it would impose the same sentence if that range applied." App. 2a. The appellate court did not mention the 57–71 month range that would have

applied under U.S.S.G. § 2L1.1(a)–(b). The court relied heavily on the district court's statement "that it would have imposed the same sentence for the same reasons even if the involuntary manslaughter guideline had applied." App. 3a.

Ms. Chavez sought rehearing en banc, but the Fifth Circuit denied her petition. Pet. App. 51a. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEPARTED FROM CENTURIES OF ANGLO-AMERICAN LEGAL TRADITION AND EVERY KNOWN FEDERAL OR STATE APPELLATE CASE ABOUT "DEPRAVED HEART" MURDER

Ms. Chavez did not commit second-degree murder. Nothing she did (or didn't do) before the crash even approached the level of "wanton disregard" of human life that would support a finding of "depraved heart" murder. And nothing she did (or didn't do) after the crash changed, or could have changed, the tragic outcome of the accident itself. She was innocent of murder as a matter of law.

A. This case turns on the federal statutory definition of "murder."

When deciding whether to apply a guideline cross-reference for murder, "[c]ourts look to the federal murder statute," 18 U.S.C. § 1111(a). *United States v. Mills*, 126 F.4th 470, 474 (6th Cir. 2025); accord *United States v. Lemus-Gonzalez*, 563 F.3d 88, 92 & n.7 (5th Cir. 2009). Under that definition, "[m]urder is the unlawful killing of a human being with malice

aforethought." 18 U.S.C. § 1111(a). The statute "divides murderous behavior into two parts: a specifically defined list of 'first-degree' murders and all 'other' murders, which it labels 'second-degree.'" *Lewis v. United States*, 523 U.S. 155, 169 (1998).

Malice aforethought includes intentional, purposeful murders, but also includes killings caused by a so-called "depraved heart." Professor LaFave provides a laundry list of actions that have presented "the very high degree of unjustifiable homicidal danger" necessary for depraved-heart murder:

> firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into the caboose of a passing train or into a moving automobile, necessarily occupied by human beings; throwing a beer glass at one who is carrying a lighted oil lamp; playing a game of "Russian roulette" with another person; shooting at a point near, but not aiming directly at, an-other person; driving a car at very high speeds along a main street; shaking an infant so long and so vigorously that it cannot breathe; selling "pure" (i.e., undiluted) heroin.

2 Wayne R. LaFave, *Substantive Criminal Law* § 14.4(a) (3d ed.). "A very risky omission will suffice where there is a duty to act." *Id.*

B. Murder requires concurrence between the *mens rea* and *actus reus*.

A basic tenet of Anglo-American criminal requires proof of concurrence between *mens rea* and *actus reus*. "Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind and an evil-doing hand.'" *United States v. Bailey*, 444 U.S. 394, 402, (1980) (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952)) (cleaned up).

From William Blackstone[3] to Joel Prentiss Bishop[4] to Oliver Wendell Holmes[5] to Robert Jackson[6] to

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[3] "And, as a vitious will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act *consequent upon* such vitious will." 5 William Blackstone, *Commentaries on the Laws of England* 21 (St. George Tucker ed. 1803) (emphasis added).

[4] "The doctrine is also a general one, probably universal, that, to constitute an offence, the act and intent must concur in point of time." 1 Joel P. Bishop, *Commentaries on the Criminal Law* 204 & n.5 (3d ed. 1865).

[5] "[E]ven a dog distinguishes between being stumbled over and being kicked." O.W. Holmes, Jr., *The Common Law* 3 (1882); *see also id.* at 54 ("On the other hand, there must be actual present knowledge of the present facts which make an act dangerous. The act is not enough by itself.").

[6] "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil." *Morissette v. United States*, 342 U.S. 246, 251–52 (1952).

Wayne LaFave[7]—all agree that a wrongful action must flow from a wrongful state of mind.

C. Ms. Chavez did not commit murder.

According to Professor LaFave, the "easiest cases" to illustrate the absence of concurrence "are those in which the bad state of mind follows the physical conduct, for here it is obvious that the subsequent mental state is in no sense legally related to the prior acts or omissions of the defendant." 1 LaFave, *supra*, § 6.3.

Here, the district court correctly found that "any attempt to save" the victim after he was ejected from and crushed by the tumbling pickup truck "would be futile." Pet. App. 25a. "We know that now" because multiple other people called for help, even before Ms. Chavez escaped from the truck. Authorities were already on their way, but they would not arrive in time to save the victim. Thus, as a matter of law, *even if* Ms. Chavez's flight from the scene was malicious, it did not contribute to the victim's death. Returning to the elements, her actions before and leading up to the accident caused or contributed to his death, but they were not malicious. And her actions after the death did not "kill" the victim or contribute to his death in any way. She did not kill him *with malice aforethought*.

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[7] 1 Wayne R. LaFave, *Subst. Crim. L.* § 6.3 (3d ed.).

D. This appears to be the first and only case in which an American court held that a defendant committed murder based malicious conduct *after* the victim was accidentally but mortally wounded beyond any hope of help.

It is always hard to prove a negative, but the parties to this case have yet to identify even a one other case in which an American court found that a defendant killed "with malice aforethought" based on actions (or omissions) *after* the victim's death became inevitable. In every one of Professor LaFave's examples of "depraved heart" murder, the extremely reckless action actually caused the victim's death. *See* 2 LaFave, *supra*, § 14.4(a) at nn. 23–32.

This was also true of previous Fifth Circuit decisions applying a second-degree murder cross-reference: the "extremely reckless" conduct *actually caused* the victim's death. *See Lemus-Gonzales*, 563 F.3d at 91 (Defendant crashed during a drunken, high-speed, and insanely reckless attempt to evade police in a minivan packed to the brim with migrants.); *United States v. Escobedo-Moreno*, 781 F. App'x 312, 317 (5th Cir. 2019) (Defendant failed to inform Border Patrol that a migrant was trapped inside a cramped compartment, where he eventually asphyxiated.); *United States v. Hicks*, 389 F.3d 514, 529–30 (5thCir. 2004) (Defendant shot at the illuminated light bar atop an occupied police car; one of the shots struck one of the officers and killed him).

To be sure, courts have affirmed homicide convictions where the defendant *failed to render aid* to an already injured victim. But in every one of those

cases, the victim *could have survived* with timely assistance. *See United States v. Conatser*, 514 F.3d 508, 517–18 (6th Cir. 2008); *United States v. Kerlin*, No. 21-4619, 2023 WL 2010754, at *2–3 (4th Cir. Feb. 15, 2023); *United States v. Sarracino*, 340 F.3d 1148, 1157–58 (10th Cir. 2003); *People v. Knapp*, 113 A.D.2d 154, 157 (N.Y. App. Div. 1985); *State v. Shane*, No. A06-1581, 2008 WL 660543, at *5 (Minn. App. Mar. 11, 2008).

II. THE COURT SHOULD GRANT THE PETITION AND HOLD THAT A DISTRICT COURT CANNOT OPT OUT OF APPELLATE REVIEW BY ROUTINE DISCLAIMER.

The Fifth Circuit held that "any error" in sentencing Ms. Chavez as a murder "was harmless." Pet. App. 2a. That is a hard pill to swallow. Murder has long been regarded as among the most heinous crimes, and categorically different from other types of homicide. *See e.g. Marlowe v. United States*, 129 S. Ct. 450, 450–51 & n.2 (2008) (Scalia, J., dissenting) (discussing the vast differences in appropriate punishment between murder and negligent homicide).

The Fifth Circuit reached its surprising "harmless" holding based on a line of precedent allowing a sentencing judge to opt out of appellate review by asserting that he would have imposed the same sentence, regardless of any guideline error. Pet. App. 2a–3a (citing *United States v. Richardson*, 676 F.3d 491, 511–12 (5th Cir. 2012) & *United States v. Duhon*, 541 F.3d 391, 396 (5th Cir. 2008)). The decision below thus followed the wrong side of an entrenched circuit split.

A. The lower courts are divided.

1. In the Eighth and Eleventh Circuits, a sentencing decision is automatically insulated from appellate review if "the district court explicitly states that it would have imposed the same sentence of imprisonment regardless of the underlying Sentencing Guideline range." *United States v. Peterson*, 887 F.3d 343, 349 (8th Cir. 2018) (quoting *United States v. Davis*, 583 F.3d 1081, 1094–95 (8th Cir. 2009)). The decision below is very similar to *United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2021): "Even if applying the voluntary manslaughter cross-reference was procedural error, we conclude that such error was harmless because the district court stated that it would have varied upward had it not applied the cross-reference."

Like the Eighth Circuit, the Eleventh Circuit allows sentencing judges to disclaim any reliance on the sentencing guideline range, even after extensive litigation about the guidelines. In the court's own words, a routine disclaimer is "'all we need to know' to hold that any potential error was harmless." *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021) (quoting *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)); accord *United States v. Grady*, 18 F.4th 1275, 1291 (11th Cir. 2021) (citing *Keene*, 470 F.3d at 1348–49) ("[A] guidelines error is harmless if the district court unambiguously expressed that it would have imposed the same sentence, regardless of the guidelines calculation.").

2. The Second, Third, Ninth, and Tenth Circuits have all rejected routine disclaimers like the one below. Sentencing judges in the Second Circuit should "not try to answer the hypothetical question of whether or not it definitely would impose the same sentence on remand if [the court of appeals] found particular enhancements erroneous." *United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011). "Nor do we believe that criminal sentences may or should be exempted from procedural review with the use of a simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Id.*; *see also United States v. Seabrook*, 968 F.3d 224, 233–34 (2d Cir. 2020) ("[T]he district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did.").

In the Third Circuit, a disclaimer statement doesn't render a guideline error harmless. The sentencing court would have to conduct a full, three-step sentencing process before selecting a valid alternative sentence: (1) calculate the correct guideline range as a starting point; (2) decide whether to depart under the guidelines; and then (3) weigh the 18 U.S.C. § 3553(a) factors to determine whether a variance is appropriate. *United States v. Wright*, 642 F.3d 148, 155–54 & n.6 (3d Cir. 2011).

The Ninth Circuit agrees: a guideline error is harmless only if the district court "performs its sentencing analysis twice." *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (quoting *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir.

2011)) (cleaned up). A "mere statement" that the court would impose the same sentence "'no matter what the correct calculation cannot, without more, insulate the sentence from remand' if "the court's analysis did not flow from an initial determination of the correct Guidelines range.'" *Id.* (quoting *Munoz-Camarena*, 631 F.4d at 1031).

Unlike the court below, the Tenth Circuit would give "little weight to the district court's statement that its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.'" *United States v. Gieswein*, 887 F.3d 1054, 1062–63 (10th Cir. 2018). The Tenth Circuit "has rejected the notion that district courts can insulate sentencing decisions from review by making such statements." *Id.* (citing *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1109 (10th Cir. 2008)).

3. The Fifth Circuit cannot easily be sorted into one camp or the other. Some panels agree with the Second, Third, Ninth, and Tenth Circuits. *See*, e.g., *United States v. Ritchey*, 117 F.4th 762, 767 (5th Cir. 2024) ("This statement is relevant to the harmless error inquiry, but it is not decisive."); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017) ("Nonetheless, it is not enough for the district court to say the same sentence would have been imposed but for the error."); *United States v. Martinez-Romero*, 817 F.3d 917, 925–26 (5th Cir. 2016) ("The court stated three times that even if the 16–level enhancement for the attempted kidnapping was incorrect, it would nonetheless impose the same 46–month sentence." Even so, the "sentencing error [was] not harmless.").

Most published decisions follow the Eighth and Eleventh Circuits' approach—a district court's guideline disclaimer is enough to make the error harmless. *See*, e.g., *United States v. Reyna-Aragon*, 992 F.3d 381, 387–89 (5th Cir. 2021); *United States v. Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir. 2021); *United States v. Redmond*, 965 F.3d 416, 420–21 (5th Cir. 2020); *United States v. Vega-Garcia*, 893 F.3d 326, 328 (5th Cir. 2018); *United States v. Guzman-Rendon*, 864 F.3d 409, 411–12 (5th Cir. 2017). In *United States v. Richardson*, 676 F.3d 491, 512 (5th Cir. 2012), the court suggested that the district court must first have "considered all of the possible guidelines ranges that could have resulted if it had erred" in calculating the guidelines. But, as this case shows, that requirement is negotiable. The district court here *never* considered how U.S.S.G. § 2L1.1(b)(6) and (b)(7)(D) would apply given its findings about Ms. Chavez's state of mind, and it never considered the (probable) guideline range of 57–71 months.

B. Experience and data suggest that most guideline disclaimers are wrong.

"[W]hen a Guidelines range moves up or down, offenders' sentences tend to move with it." *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016) (quoting *Peugh v. United States*, 569 U.S. 530, 544 (2013)) (cleaned up). This Court has recognized that, "in most cases" where the "court mistakenly deemed applicable an incorrect, higher Guidelines range," that error will affect a defendant's substantial rights. *Id.* at 200.

In an "ordinary case," the Sentencing Guidelines "serve as the starting point for the district court's decision and anchor the court's discretion in selecting an appropriate sentence." *Id.* at 204. Until the very end of the sentencing hearing, this case followed the ordinary path. The district court told Ms. Chavez it needed to resolve the dispute about murder "to figure out what the advisory guideline range is *before we can go on*." Pet. App. 7a. (emphasis added). After argument from both attorneys, the court made detailed findings that were relevant to the murder cross-reference and to the guideline calculation. Pet. App. 19a–26a.

After overruling Ms. Chavez's objection and adopting the U.S.S.G. § 2A1.2 guideline range, the court continued to refer to that range when considering the parties' arguments under 18 U.S.C. § 3553(a). *See* Pet. App. 31a (32 months would be a large "percent reduction" from the 2A1.2 range); Pet. App. 32a (Sentencing statistics relied upon by the defense were "not from the second-degree murder cross-reference"); Pet. App. 39a (The parties' arguments convinced the court to sentence below the top and above the bottom of the calculated range).

Aside from its references to the guideline range, the district court *also* repeatedly referenced its erroneous conclusion that Ms. Chavez committed murder: Though her crime was not as bad as others, "make no mistake, it is still depraved-heart, second-degree murder under these circumstances. Pet. App. 38a.

The court's closing disclaimer—that it "would have imposed the same sentence without regard to that

range" and "would have done so for the same reasons"—was the first suggestion that the court would impose a significant upward variance in the alternative.

As Ms. Chavez demonstrated below, the vast majority of courts that applied U.S.S.G. § 2L1.1(b)(7)(D) ultimately selected a sentence within or below the resulting guideline range.[8] This Court has observed the same pattern for *all* sentences: "The Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 578 U.S. at 199.

That means judges who routinely make guideline disclaimers almost certainly understate the guidelines' effect on the ultimate sentence and overestimate the probability of an above-range departure if the error had not been committed. And the evidence available in this case suggests that the sentencing court makes the same or a similar disclaimer in all or nearly all sentencing hearings. *See* Pet. App. 58a–63a. Far from identifying "unusual circumstances," these statements suggest a hostility to the important process of appellate review.

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[8] For Fiscal Years 2018–2022, district courts applied Guideline 2L1.1(b)(1)(D) in 108 cases. In 98 of those cases (92.5%), the court also applied a cumulative enhancement for "creating a substantial risk of death or serious bodily injury to another person." And of the 108 cases where death resulted, 66 were sentenced within the resulting guideline range and 23 were sentenced below the range without a government motion. Chavez C.A. Initial Br. 34 (discussing the U.S. Sentencing Commission's Individual Sentencing Datafiles, online at https://www.ussc.gov/research/datafiles/commission-datafiles .

C. This case is an ideal vehicle for the Court to address routine guideline disclaimers.

The district court mistakenly believed that Ms. Chavez committed murder, and mistakenly believed that the Sentencing Commission recommended a sentence of 168–210 months in prison. Consistent with those beliefs, it ordered her to serve 192 months in prison.

The court was wrong. In fact, the Sentencing Guideline for her smuggling offense provided enhancements for creation of risk and for causation of death. *See* U.S.S.G. § 2L1.1(b)(6), (b)(7)(d). Unlike second-degree murder, these cumulative enhancements *do not* require concurrence between the risky conduct and the tragic result. Applied correctly, the guidelines recommended a sentence of between 57–71 months. The median sentence for a smuggling crime where death resulted was 71 months. *See* Chavez C.A. Reply Br. 34.

Without knowledge of any of this, the district court asserted it would have imposed the same 192-month prison sentence even without the error. Pet. App. 40a. This Court should grant the petition for certiorari to decide whether a routine disclaimer is enough to insulate an erroneous sentence from appellate review.

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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