NO. _____

In the Supreme Court of the United States

CURTIS DWAYNE MEDRANO,

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

Whether 18 U.S.C. §922(g)(1) comports with the Second Amendment as applied to a defendant whose most serious prior felony convictions are attempted burglary and vehicle theft?

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 take those routine assertions at value?

DIRECTLY RELATED PROCEEDINGS

United States v. Curtis Dwayne Medrano, No. 4:23-CR-42 (N.D. Tex. July 7, 2023)

United States v. Curtis Dwayne Medrano, No. 23-10713 (5th Cir. March 26, 2025)

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

PETITION FOR A WRIT OF CERTIORARI

Curtis Dwayne Medrano respectfully petitions 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 is reprinted on pages 1a–3a of the Appendix. The district court did not issue any written opinions.

JURISDICTION

The Fifth Circuit entered judgment on March 26, 2025. 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

Section 922(g)(1) of Title 18 reads in relevant part:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year
>
> ***
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Federal Rule of Criminal Procedure 52(a) provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT

I. FACTS

Petitioner Curtis Dwayne Medrano is a 30-year-old U.S. citizen, (Record in the Court of Appeals, at 235), seeking review of his conviction and sentence

for possessing a firearm following a felony conviction, 18 U.S.C. §922(g)(1). Pet.App.43a-46a. Between the time he was 17 years-old and 24 years old, Petitioner committed a series of property crimes, resulting in convictions for shoplifting, vehicle theft (three times), and, most seriously, attempted residential burglary. (Record in the Court of Appeals, at 240-243). More recently, he suffered convictions for misdemeanor family violence and evading arrest. (Record in the Court of Appeals, at 244-245). The evading arrest charge resulted in a three-day sentence of imprisonment, (Record in the Court of Appeals, at 244-245), arising under Tex. Penal Code §38.04. Petitioner received this conviction because he ran into a creek when police attempted to arrest him for outstanding warrants. (Record in the Court of Appeals, at 245).

The present case arose from a shooting on November 9, 2022. (Record in the Court of Appeals, at 237). According to Petitioner, a motorist deliberately swerved toward him on the road following a hostile exchange, after which Petitioner fired into the motorist's vehicle. (Record in the Court of Appeals, at 237). The motorist suffered serious injuries. (Record in the Court of Appeals, at 237). Police arrested Petitioner at his job. (Record in the Court of Appeals, at 237).

II. DISTRICT COURT PROCEEDINGS

The federal government indicted Petitioner for possessing a firearm after a felony conviction. (Record in the Court of Appeals, at 10). He moved to dismiss the indictment, contending that the Second Amendment did not permit Congress to forbid gun possession by felons. Pet.App. 25a-29a. The

government answered, citing the English Bill of Rights, and a failed proposal to include language like the Second Amendment in the Pennsylvania ratifying convention. Pet.App. 34a-36a. These two pieces of historical evidence, it contended, showed that the Second Amendment permitted the federal government to disarm persons with felony convictions. Pet.App. 34a-36a. The district court denied the motion in an electronic order with no commentary. (Record in the Court of Appeals, at 4)(docket sheet, referencing ECF 19). The defendant pleaded guilty, (Record in the Court of Appeals, at 64-65), and a Presentence Report (PSR) identified a Guideline range of 70-87 months imprisonment, stemming from a final offense level of 21 and a criminal history category of V. (Record in the Court of Appeals, at 251). The criminal history category, in turn, came from a criminal history score of 10. (Record in the Court of Appeals, at 245). One of these criminal history points came from Petitioner's 2022 evading arrest conviction. (Record in the Court of Appeals, at 244-245). In the absence of this one criminal history point, Petitioner's criminal history score would have been nine, his criminal history category would have been IV, and his Guideline range would have been 57-71 months imprisonment. *See* USSG Ch. 5A.

The District Court adopted the Guideline calculations of the PSR. Pet.App. 8a-9a. Finding that the case presented aggravating factors not adequately incorporated into the Guidelines, it imposed a sentence of 120 months imprisonment. Pet.App. 10a-12a. It said:

[w]hile the guidelines do make an adjustment for the injured party's in-juries, they inadequately do so.

After the injured party drove erratically and cut off the defendant and displayed an obscene gesture, the defendant, while driving down the road, fired nine rounds at the car. The injured party was seriously injured and others were at risk. The guidelines simply do not adequately address these injuries and the dangerousness of the conduct to others.
Pet.App. 11a-12a.

The District Court did not say at the hearing that the sentence would have been the same irrespective of the sentence. Pet.App. 10a-12a. But in boilerplate language, it did recite that claim in the Statement of Reasons. (Record in the Court of Appeals, at 261)("Even if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553.").

III. APPEAL

On appeal, Petitioner renewed his Second Amendment challenge to his conviction, contending that the government could use only the two pieces of historical evidence to the District Court. Initial Brief in *United States v. Medrano*, No. 23-10713, 2023 WL 8434068 at **5-9-17 (5th Cir. Filed November 30, 2024)("Initial Brief"). In the alternative, he contended that an expanded historical record could not justify the conviction because the Nation has no tradition of disarming felons anytime near Founding, and because any tradition of disarming those whose prior felonies established a propensity for violence would not reach the Defendant. Initial Brief, at **5, 18-22.

Petitioner also challenged his sentence on the ground that the District Court miscalculated his sentencing Guidelines and used the Guidelines in

determining the extent of an upward variance. *Id*., at **5-6, 23-39. Specifically, he noted that the Fifth Circuit had already held that the Texas offense of evading arrest resembled the offense of "Resisting Arrest," listed as a petty offense in USSG §4A1.2(c)(1), and exempt from criminal history points in the absence of a 60-day sentence or a year's Probation. *Id*., at **5-6, 23-28. He conceded that the defense failed to object on this basis in District Court but contended that the error merited relief on plain error. *Id*., at *23. As respects the error's effect on the sentence, Petitioner noted the language in the Statement of Reasons disclaiming reliance on the Guidelines. *Id*., at *30. But he contended that this language contradicted the live explanation for the sentence, which referenced the Guidelines in the determination of the sentence. *Id*., at *34. And he observed that the particular Judge included identical Guideline disclaimers in the Statement of Reasons or in the sentencing hearing as boilerplate. *Id*., at *32-33. The government relied on the disclaimer in support of the sentence, but did not contest Petitioner's assertion that the Judge routinely included identical language and did not produce any case in which the Judge omitted it. *See* Appellee's Brief in *United States v. Medrano*, No. 23-10713, 2025 WL 53196,**4, 12-15 (5th Cir. Filed Jan. 3, 2025).

The Fifth Circuit rejected the Second Amendment challenge. Pet.App. 1a-2a; *United States v. Medrano*, No. 23-10713, 2025 WL 915406, at *1 (5th Cir. March 26, 2025)(unpublished). It cited *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), for the proposition that the Second Amendment did not bar a criminal penalty for firearm possession by those with prior convictions

for vehicle theft. Pet.App. 2a; *Medrano*, 2025 WL 915406, at *1.

The Court of Appeals found that the District Court clearly or obviously erred in assessing criminal history points for Petitioner's prior evading arrest conviction. Pet.App. 3a; *Medrano*, 2025 WL 915406, at *1. Yet it affirmed, relying on the District Court's Guideline disclaimer. Pet.App. 3a; *Medrano*, 2025 WL 915406, at *2. It did not address the absence of the disclaimer from the live hearing, nor the District Judge's routine practice of including an identical disclaimer in the Statement of Reasons. Pet.App. 3a; *Medrano*, 2025 WL 915406, at *2. It simply took the disclaimer at face value and affirmed. Pet.App. 3a; *Medrano*, 2025 WL 915406, at *2.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO RESOLVE THE PROFOUND UNCERTAINTY, INCLUDING AN ACKNOWLEDGED CIRCUIT SPLIT, REGARDING THE CONSTITUTIONALITY OF 18 U.S.C. §922(G)(1) UNDER THE SECOND AMENDMENT.

A. The courts of appeals are divided.

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court held that when a firearm restriction contravenes the text of the Second Amendment, it is valid only to the extent that it is consistent with the nation's history and tradition of

valid firearm regulation. *Bruen*, 597 U.S. at 19. It rejected the notion that firearm regulations may be affirmed based on a sufficiently compelling governmental interest. *Id.*

Section 922(g)(1) of Title 18 forbids the possession of firearms by most persons convicted of an offense punishable by more than a year's imprisonment. Since *Bruen*, "Section 922(g)(1)'s constitutionality has divided courts of appeals and district courts." Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range* 23-683, at 2 (June 24, 2024)("Supplemental Brief in Range"), *available at https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf , last visited June 24, 2025*. As the Ninth Circuit recently observed en banc, "[f]our circuits have upheld the categorical application of § 922(g)(1) to all felons." *United States v. Duarte*, 137 F.4th 743, 747 (9th Cir. May 9, 2025)(en banc)(citing *United States v. Hunt*, 123 F.4th 697, 707–08 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024); *Vincent v. Bondi*, 127 F.4th 1263, 1265–66 (10th Cir. 2025), and *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024), *cert. granted, judgment vacated*, 145 S.Ct. 1041 (2025)). The en banc Ninth Circuit joined this group in a decision that produced four separate opinions, including a partial dissent. *Duarte*, 137 F.4th at 762. In so doing, it overruled a panel opinion that had found the statute unconstitutional as applied to a person with prior convictions for vandalism, drug possession, and evading arrest. *United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024), *different results*

on rehearing 137 F.4th at 747 (9th Cir. May 9, 2025)(en banc). This brings the total number of courts rejecting all constitutional challenges to the statute to five.

But as the en banc Ninth Circuit court also recognized, two more Circuits, including the court below, "have left open the possibility that § 922(g)(1) might be unconstitutional as applied to at least some felons," *Id*. (citing *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024), and *United States v. Williams*, 113 F.4th 637, 661–62 (6th Cir. 2024))(emphasis in original), while the en banc Third Circuit has actually held the statute unconstitutional as applied to a man with a prior felony conviction for making a false statement to obtain food stamps, *Range v. Att'y Gen*., 124 F.4th 218, 222–23 (3d Cir. 2024)(en banc). Many District Courts, though not the majority, have also found the statute unconstitutional in individual cases. *See* Supplemental Brief in *Range*, at *4-5, nn.1-3 (collecting cases); *see also United States v. Gomez*, __F.Supp.3d__, 2025 WL 971337 (N.D. TX March 25, 2025)(marijuana possession), *appeal pending*. As the government observed last year, moreover, "[s]ome of those decisions have involved felons with convictions for violent crimes, such as murder, manslaughter, armed robbery, and carjacking." *Id.* at **4-5, & n.1.

Further, the Courts of Appeals have acknowledged extensive disagreement and uncertainty regarding certain methodological issues relevant to the resolution of *Bruen* challenges. These include the relevance of laws at Founding that did not directly regulate firearms, such as capital punishment and estate forfeiture, *compare Range*, 124 F.4th at 231 (capital punishment and estate forfeiture for non-

violent crime not relevant), *with Diaz*, 116 F.4th at 469-470 (giving dispositive weight to the availability of capital punishment for crimes analogous to the defendant's prior conviction); the status of pre-*Bruen* circuit precedent, *compare Vincent*, 127 F.4th at 1265–66 (circuit precedent unaffected, and collecting cases), *with Williams*, 113 F.4th at 648 (*Bruen* displaces earlier circuit precedent), and the significance of *dicta* in *Heller*, *Bruen*, and *Rahimi* regarding "presumptively valid" restrictions on firearm ownership, *compare Duarte*, 137 F.4th at 750 (relying heavily on such passages to affirm §922(g)(1)) *with Diaz*, 116 F.4th at 465-466 (declining to give them controlling weight). And Circuit opinions resolving challenges to §922(g)(1) frequently generate dissenting and concurring opinions, attesting to the pervasive uncertainty and disagreement in the area. *See Range*, 124 F.4th at 221 (six opinions, one dissent); *Duarte*, 137 F.4th at 745 (four opinions, one partial dissent)(reversing panel); *Williams*, 113 F.4th at 642 (concurring opinion from Judge concurring only in judgment in panel decision); *Atkinson v. Garland*, 70 F.4th 1018, 1019 (7th Cir. 2023)(dissent from panel decision).

B. This Court should resolve the uncertainty regarding the constitutional status of 18 U.S.C. §922(g)(1).

The issue merits intervention by this Court. There is a clear and acknowledged circuit split on the constitutionality of a federal statute. At least seven Circuits have weighed in, and there is relative balance as between those maintaining that the statute is always constitutional, on the one hand, and those

acknowledging its constitutional vulnerabilities, on the other. The split will therefore not resolve spontaneously. And as can be seen above, a substantial volume of lower court opinions provide an ample resource to assist this Court in the resolution of the matter.

The matter is profoundly weighty. Two Circuits (the Third and Ninth) have dealt with the issue en banc, demonstrating that it meets the standards for discretionary review. And these two en banc treatments of the issue drew nine amici, further attesting to its importance. *See Range*, 124 F.4th at 221; *Duarte*, 137 F.4th at 745. More than 6,000 people suffered conviction for violating this statute in Fiscal Year 2024 alone, almost all of whom went to prison. United States Sentencing Commission, *Quick Facts, 18 U.S.C. §922(g) Firearms Offenses*, at 1, *last visited May 22, 2025, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY24.pdf* . And of course most states have comparable statutes, which means that the true number of persons incarcerated each year for possessing a firearm after a felony conviction may be many times this number. *See e.g.* Alaska Stat. § 11.61.200(a)(1), (b)(1)-(3); Ariz. Rev. Stat. Ann. §§ 13-904(A), (B); 13-905; 13-906; Cal. Penal §§ 12021, 4852.17; Col. Rev. Stat. § 18-12-108.

The lack of clear answers about the constitutionality of this statute (and its state analogues) is intolerable for many reasons. First, there is a strong possibility that substantial numbers of Americans are in prison, and that more will go to

prison, for the exercise of a fundamental constitutional right. That should be anathema in a free constitutional republic. Second, and conversely, the lack of clarity as to the scope of the Second Amendment right to own a firearm after a felony conviction may deter lawful prosecutions of criminal activity, jeopardizing public safety. Third, this lack of clarity may deter constitutionally protected conduct, or encourage reliance on mistaken beliefs about the scope of a constitutional right, resulting in illegal conduct and imprisonment. *See United States v. Schnur*, 132 F.4th 863, 871 (5th Cir. 2025)(Higginson, J., concurring)(expressing concern about the notice problems that flow from uncertainty regarding the constitutional status of §922(g)(1)).

C. This case well presents the issue.

The present case is an apt vehicle to resolve the uncertainty. The issue is fully preserved, as Petitioner filed a detailed motion to dismiss the indictment based on the Second Amendment. Pet. App. 25a-29a. He pressed the issue at the Fifth Circuit, Initial Brief at **7-22, and the Fifth Circuit resolved it on the merits, *Medrano*, 2025 WL 915406, at *1; PetApp. 1a-2a.

Further, Petitioner's challenge could well be resolved in his favor; at a minimum, it does not present factors that could cause the case to be resolved on narrow, unilluminating grounds. The defendant was not on parole, probation, or supervised release, which has been held to strip citizens of their Second Amendment rights until discharged. *See United States v. Giglio*, 126 F.4th 1039, 1045 (5th Cir. 2025). The defendant possessed a firearm that was lawful in itself, not a machinegun, sawed-off shotgun, or other

kind of weapon that might be outside the scope of the Second Amendment. *See Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016). And although Petitioner pleaded guilty, he did not sign a plea agreement or waive appeal. *See* (Record in the Court of Appeals, at 3-7)(docket sheet).

Petitioner has been previously convicted of multiple felonies, but this will be true of anyone presenting a challenge to §922(g)(1). Theft offenses predominate among them, the most serious of which is burglary. *See* (Record in the Court of Appeals, at 240-245). The most recent research persuaded the Sentencing Commission to classify burglary as a non-violent offense. *See* USSG App. C, Amendment 798 (August 1, 2016), *available at https://www.ussc.gov/guidelines/amendment/798 , last visited June 23, 2025.* If this Court requires that the defendant's prior felonies show him to be a danger to the community, Petitioner could prevail. Indeed, his collection of prior felonies – serious but not including violence – may be ideal to identify the relevant Second Amendment line.

II. THE COURTS OF APPEALS HAVE DIVIDED ON THE LEVEL OF DEFERENCE TO GRANT DISTRICT COURTS THAT DISCLAIM THE IMPACT OF THE GUIDELINES ON THE SENTENCE CHOSEN. THE ROUTINE USE OF SUCH DISCLAIMERS GRAVELY UNDERMINES THE CONGRESSIONAL GOAL OF SENTENCING UNIFORMITY, WHICH IT SOUGHT TO ACHIEVE AT SIGNIFICANT PAINS, CREATING A SENTENCING COMMISSION, A REGULAR CYCLE OF GUIDELINE AMENDMENTS, AND AUTHORIZING APPELLATE REVIEW OF GUIDELINE

APPLICATION DECISIONS. THE PRESENT CASE IS AN EXCELLENT VEHICLE TO ADDRESS THE ISSUE.

Although advisory only, *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines play a central role in federal sentencing. The district court must begin each sentencing determination by correctly calculating them, and mistakes in their application constitute reversible error. *Gall v. United States*, 552 U.S. 38, 49, 50 (2007). Indeed, this Court presumes that Guideline error affects the sentence imposed. *Molina-Martinez v. United States*, 578 U.S. 189 (2016).

The Guidelines thus function as a "framework," *Molina-Martinez*, 589 U.S. at 192, an "anchor," *id*. at 204, a "lodestar," *id*. at 200, and a "benchmark and starting point," *Gall*, 552 U.S. at 49, in federal sentencing. That characterization is both doctrinal and empirical. From an empirical standpoint, most sentences fall within the Guidelines, and Guideline errors tend actually to affect the sentence imposed. *Molina-Martinez*, 589 U.S. at 199-200. Doctrinally, the central role of the Guidelines manifests in a presumption of reasonableness for within-Guideline sentences, *Rita v. United States*, 551 U.S. 338, 341 (2007), in the defendant's ex post facto rights in the Guideline Manual, *Peugh v. United States*, 569 U.S. 530 (2013), and in the District Court's duty to explain out-of-range sentences, *Rita*, 551 U.S. at 357. The practice of some Courts of Appeals -- blindly accepting statements by the District Court calculated to engineer a finding of harmless error -- undermines the special role of the Guidelines in federal sentencing. Moreover, it conflicts with the rule of several other Courts of Appeals. This Court should intervene.

A. The lower courts are divided.

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)).

Like the Eighth Circuit, the Eleventh Circuit allows sentencing judges to disclaim any reliance on the Guidelines, even after extensive litigation about them. 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.").

The Second, Third, Ninth, and Tenth Circuits have all rejected routine disclaimers like the one in this case. The Second Circuit has warned every sentencing court that it 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 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)).

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.").

But the decision below—like most published Fifth Circuit decisions—follows 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 not universally applied. Pet. App. 3a. The district court here *never* considered how the guidelines would be calculated without criminal history points assessed for the evading arrest conviction – the defendant did not call the error to the District Court's attention. And in cases of preserved error, the Fifth Circuit has said that a District Court need not actively consider, nor even mention, the Guideline range ultimately vindicated on appeal, so long as it "entertains arguments as to the proper guidelines range." *United States v. Kinzy*, No. 22-30169, 2023 WL 4763336, at *9 (5th Cir. July 26, 2023), *as revised* (Aug. 24, 2023), *cert. denied*, 144 S. Ct. 2682 (2024)(quoting *United States v. Nanda*, 867 F.3d 522, 531 (5th Cir. 2017))(internal citations omitted).

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*, 578 U.S. at 199 (quoting *Peugh*, 569 U.S. at 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." *Molina-Martinez*, 578 U.S. at 204. As this Court has observed, Sentencing Commission "statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 578 U.S. at 199. That strongly suggests that judges who routinely make Guideline disclaimers understate the Guidelines' effect on their ultimate selection of sentence and overestimate the probability of an above-range departure in the absence of a Guideline error.

And a review of cases from the same courtroom suggests that Guideline disclaimers are indeed routine. *See United States v. Hott*, 866 F.3d 618, 622 (5th Cir. 2017)("'[e]ven if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553.'")(same judge as the case at bar); *United States v. Garcia*, 647 Fed. Appx. 408, 410 (5th Cir. 2016)(unpublished)("Because the district court stated in its Statement of Reasons that '[e]ven if the guidelines calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553,' the Government has made the required showing.")(same judge); *United States v. Montgomery*, 634 F. App'x 127, 131 (5th Cir. 2015)(unpublished)("Furthermore, the district court in this case stated that '[e]ven if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553.'")(same judge); *Tanksley*, 848 F.3d at 353 ("Here, the district court stated that '[e]ven if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. §

3553.'")(same judge); *United States v. Bravo*, No. 20-10008, 2021 WL 1561385 (5th Cir. Apr. 20, 2021)(unpublished)("In its Statement of Reasons, the district court also noted that, '[e]ven if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553.'")(same judge); *see also United States v. Bazemore*, No. 14–10381, 608 F. App'x 207, 216 (5th Cir. 2015)(unpublished)("…the district court stated that it would have imposed the same sentence regardless of whether it incorrectly applied the enhancement.")(same judge). Far from identifying "unusual circumstances," these statements suggest a hostility to the important process of appellate review. Notably, the government, which has every incentive to contest the routine nature of disclaimers from this Judge, and with a transcript at its disposal of every appealed case in the district, never contested this characterization.

C. The practice of routinely disclaiming Guideline error in every case undermines the role of the Guidelines and frustrates Congressional policy

The Guidelines seek to promote proportionality uniformity of sentence among similarly situated offenders. *Rita*, 551 U.S. at 349. And appellate review of Guideline questions is important to that goal. Review provides public information about the meaning of Guidelines, resolving ambiguities that might afflict all litigants in the Circuit. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 151 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334 (describing the right to appellate review "essential to assure that the

guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."). This process also alerts the Sentencing Commission that an Amendment might be necessary. *Rita*, 551 U.S. at 350; *Braxton v. United States*, 500 U.S. 344, 348 (1991).

Acceptance of routine Guideline disclaimers undermines this framework because it provides a way to avoid meaningful scrutiny of Guideline application questions. Many judges, after all, regard the Guidelines as complicated and cumbersome. *See United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005)(Carnes, J., concurring)("The *Booker* decision did not free us from the task of applying the Sentencing Guidelines, some provisions of which are mind-numbingly complex and others of which are just mind-numbing."). District courts that do not wish to trouble with them, or that do not wish to trouble with them more than once, may be tempted to insulate all sentences from review by issuing a simple Guideline disclaimer. Indeed, distinguished Circuit judges have encouraged such disclaimers precisely to avoid the need to avoid frustrating and difficult Guideline adjudications. *See Williams*, 431 F.3d at 773 (Carnes, J., concurring).

Widespread acceptance of Guideline disclaimers also diminishes the anchoring force of the Guidelines in federal sentencing. Indeed, a concurring and dissenting opinion of the Fourth Circuit has argued that this is already the condition of federal sentencing:

> The evolution of our harmless error jurisprudence has reached the point where any procedural error may be

> ignored simply because the district court has asked us to ignore it. In other words, so long as the court announces, without any explanation as to why, that it would impose the same sentence, the court may err with respect to any number of enhancements or calculations. More to the point, a defendant may be forced to suffer the court's errors without a chance at meaningful review. Gall is essentially an academic exercise in this circuit now, never to be put to practical use if district courts follow our encouragement to announce alternative, variant sentences. If the majority wishes to abdicate its responsibility to meaningfully review sentences for procedural error, the least it can do is acknowledge that it has placed Gall in mothballs, available only to review those sentences where a district court fails to cover its mistakes with a few magic words.

Gomez-Jimenez, 750 F.3d at 390 (Gregory, J., concurring and dissenting in part)(emphasis added).

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

In previous cases where the Court has denied certiorari, there was some doubt about whether the district court actually erred. Not so here. The Court of Appeals expressly found that the District Court erred, and that it did so clearly or obviously. Pet. App. 3a; *Medrano*, 2025 WL 915406, at *1 ("Because the sentence for Medrano's prior evading arrest conviction

was not a term of imprisonment of at least thirty days or a term of probation of more than one year, and because the offense of evading arrest is not similar to the instant offense of possession of a firearm by a felon, either facially or in the factual background of Medrano's offenses, the district court committed a clear or obvious error in assessing one criminal history point to Medrano for this offense.")(citing USSG §4A1.2(c)(1)).

Other factors make the present case an ideal vehicle to resolve the conflict between the circuits regarding the status of Guideline disclaimers. The District Court here affirmatively referenced the Guidelines when explaining the sentence, suggesting that they played some role in the selection of the punishment. *See* Pet.App. 11a-12a ("[w]hile the guidelines do make an adjustment for the injured party's in-juries, they inadequately do so."). It never stated that the sentence would be the same under different Guidelines when conducting the sentencing hearing itself, waiting until the Statement of Reasons when the parties could not question the assertion. *See* Pet.App. 11a-12a. And it never considered the true Guideline range. All of these factors tend to suggest that the Judge's disavowal of the Guidelines could not survive reasonable scrutiny. As such, the case cleanly presents the question of whether such statements must be taken at face value.

The sole vehicle objection here is the absence of an objection in District Court, which requires plain error review rather than ordinary review for harmless error. *United States v. Olano*, 507 U.S. 725, 734 (1993). But insofar as the prejudice analysis is concerned,

harmless and plain error review "require[] the same kind of inquiry, with one important difference: (In plain error review,) [i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734. And this Court has already held that the mere numerical difference in the Guideline range occasioned by Guideline error can (and usually will) carry the defendant's burden of persuasion. *Molina-Martinez*, 578 U.S. at 207.

If anything, the absence of an objection gives the District Court's disclaimer less weight, not more. A District Court that hears from the parties regarding the significance of a particular Guideline issue might credibly state that it is not material to their decision-making process. But here the court was not aware of the potential error at all, and is accordingly ill-disposed to decide whether it would have changed its thinking.

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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