No. 24-1295

In the Supreme Court of the United States

BRANDON PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying relief on petitioner's claim of Sentencing Guidelines error, where it found that his claim, if unpreserved, would fail plain-error review, or if preserved, would not change the outcome where the court of appeals stated—and the court of appeals had "no doubt"—that it would have imposed the same sentence even if the Guidelines range were lower.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 124 F.4th 522.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2024. A petition for rehearing was denied on January 28, 2025 (Pet. App. 49a). On April 21, 2025, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including May 28, 2025. On May 19, 2025, Justice Kavanaugh further extended the time within which to file a petition for a writ of certiorari to and including June 18, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner

was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner appealed, and the court of appeals remanded for resentencing based on an intervening circuit decision. 21-3339 C.A. Judgment (Dec. 5, 2022). On remand, the district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Resentencing Judgment 2-3. The court of appeals then vacated petitioner's lifetime federal-benefits ban but otherwise affirmed. Pet. App. 1a-9a.

1. In October 2018, petitioner was arrested for possessing fentanyl and cocaine base after falling asleep in the driver's seat of a car while in a drive-thru lane of a fast-food restaurant. Presentence Investigation Report (PSR) ¶¶ 12-13. In 2019, while petitioner was under investigation for drug trafficking, he was arrested on felony parole warrants. PSR ¶¶ 14-17. At the time of that arrest, he was in possession of two firearms and a large quantity of controlled substances, including fentanyl, heroin, and methamphetamine. PSR ¶¶ 18-19.

A federal grand jury in the Eastern District of Missouri charged petitioner with two counts of possessing fentanyl with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(viii); one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); and one count of possessing a firearm in furtherance of a drug-trafficking

crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Indictment 1-3.

Petitioner pleaded guilty to the Section 922(g)(1) offense in exchange for the government dismissing the other counts. Plea Agreement 1-3. The Probation Office calculated a base offense level of 24 under the Sentencing Guidelines based on its determination that petitioner had at least two felony convictions for controlled substance offenses. PSR ¶ 26. The presentence report described several prior Missouri controlled substance offenses, including convictions for possession of marijuana with intent to distribute; a 2008 conviction for second-degree trafficking of cocaine base; and 2008 and 2018 convictions for possession of marijuana. PSR ¶¶ 38-40, 43-44. Petitioner's criminal history score was 15, resulting in a criminal history category of VI. PSR ¶ 48.

The Probation Office also determined, based on petitioner's prior drug-trafficking offenses, that he qualified as an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). PSR ¶ 32. Under the ACCA, petitioner would be subject to a 15-year minimum sentence, see 18 U.S.C. 924(e)(1), and the Probation Office calculated a Guidelines range of 188 to 235 months of imprisonment. PSR ¶¶ 75-76. The Probation Office also concluded that petitioner was permanently ineligible for federal benefits pursuant to 21 U.S.C. 862(a)(1)(C), on the view that the offense for which he was being sentenced was his third or subsequent drug-distribution offense. PSR ¶¶ 95-96.

Petitioner filed several objections to the presentence report challenging whether his prior convictions were predicate convictions under the Guidelines and whether he was an armed-career criminal. D. Ct. Doc. 151, at 1-

4 (Aug. 12, 2021). Those objections were based on a 2018 statutory amendment to exclude hemp from the definition of marijuana in the federal drug schedule, see 21 U.S.C. 802(16) (2018), which made the Missouri definition of marijuana broader than current federal law for purposes of assessing whether a Missouri marijuana conviction is a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) or a "serious drug offense" under the ACCA, 18 U.S.C. 924(e). See D. Ct. Doc. 151, at 1-3.

Petitioner also asserted, during the sentencing hearing, that his 2018 marijuana-possession conviction was actually for a different person with the same name. Sent. Tr. 9-13. The district court stated that it would not consider that conviction and that it did not affect petitioner's criminal history category in any event. *Id.* at 13-14. The court then overruled petitioner's other objections and sentenced him to 188 months of imprisonment. *Id.* at 27-30, 46.

During the pendency of petitioner's appeal, the court of appeals decided *United States* v. *Perez*, 46 F.4th 691 (8th Cir. 2022), abrogated by *Brown* v. *United States*, 602 U.S. 101 (2024). In *Perez*, the court adopted the view that a state offense is a "serious drug offense" that can support sentencing under the ACCA only if the state drug schedule is a categorical match to the federal Controlled Substances Act at the time of the federal firearm offense. *Id.* at 699. Following that decision, the court of appeals granted the parties' joint motion to remand for petitioner to be resentenced without the ACCA enhancement. 21-3339 C.A. Judgment; 21-3339 Joint Mot. to Remand (Nov. 28, 2022).

2. Although the court of appeals had taken the view in *Perez* that a "serious drug offense" under the ACCA

requires a categorical match between the state and federal drug schedules at the time of the federal firearm offense, it had recognized that the term "controlled substance offense" in Section 4B1.2(b) of the Sentencing Guidelines is not limited to definitions of controlled substances in the federal Controlled Substances Act, see *United States* v. *Henderson*, 11 F.4th 713, 717-719 (8th Cir. 2021), cert. denied, 142 S. Ct. 1696 (2022), and that whether a prior state conviction is a controlled substance offense for purposes of the Guidelines is based on the law at the time of the state conviction without reference to current state law, see *United States* v. *Bailey*, 37 F.4th 467, 469-470 (8th Cir. 2022) (per curiam), cert. denied, 143 S. Ct. 2437 (2023). Accordingly, the Probation Office again determined that petitioner's base offense level under the Guidelines was 24, because he had at least two prior controlled substance offenses. Resentencing PSR ¶ 21. Petitioner's Guidelines range was 110-120 months of imprisonment. *Id.* ¶ 31.

Petitioner objected to the Probation Office's calculations, asserting that his criminal history was overstated in light of a recent change to the Missouri Constitution by referendum that legalized some marijuana possession, regulated recreational marijuana sales, and created a process for the expungement of some marijuana convictions. D. Ct. Doc. 193 (Jan. 27, 2023); see Mo. Const. Art. XIV, § 2. He asked the district court to "revisit[ ]" its "views as to marijuana convictions and their impact." D. Ct. Doc. 193, at 2; Pet. App. 2a. At the time of the Probation Office's new presentence report and the date of his resentencing, however, petitioner's criminal history was unchanged from the original presentence report—no prior conviction had been expunged. See Pet. App. 2a-3a.

At the resentencing hearing, petitioner objected to another criminal history point for a different conviction that he said was not his, and the court confirmed it would not consider that conviction or the 2018 conviction petitioner challenged at the first sentencing hearing because eliminating those convictions would not change petitioner's criminal history category. Resentencing Tr. 4-7, 9.[1] But the district court overruled petitioner's objection that his criminal history was overstated; determined that his marijuana convictions were "controlled substance offenses" for purposes of the Guidelines; and sentenced petitioner to 120 months of imprisonment. *Id.* at 18, 28; Resentencing Judgment 2.

The district court explained that its sentence was informed by the nature and circumstances of the offense, including petitioner's possession of thousands of lethal doses of fentanyl, along with cocaine base and heroin. See Resentencing Tr. 26. The court noted petitioner's multiple previous drug convictions; observed that he was on parole when some of those offenses were committed; and recounted that during one prior offense he "ran from an alley carrying a rifle" to resist arrest, threw the gun into a car with two children inside, and "hit one of the kids in the head." *Id.* at 26-27. And the district court determined that a 120-month sentence was appropriate based on the sentencing factors set forth in 18 U.S.C. 3553(a). Resentencing Tr. 28.

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[1] The district court did not determine whether petitioner's objections to prior convictions were meritorious. See Resentencing Tr. 9. After appellate briefing was complete, petitioner submitted documents to the court of appeals showing that the 2018 marijuana conviction in presentence report was for a defendant with a middle name different from petitioner's. See 23-2678 C.A. Sealed Mot. for Judicial Notice of State-Court Records, Ex. 3 (Jun. 3, 2024).

The district court also made clear that "notwithstanding the objections that have been lodged in this case, both today and previously, I would impose the same sentence, by way of variance or otherwise, based on my evaluation of the [Section] 3553(a) factors." Resentencing Tr. 28. The court explained that the sentence was "based on the conduct, the criminal history, and * * * the marginal acceptance of responsibility by [petitioner]" and that "the aggravating circumstances in this case far outweigh the mitigating factors." *Ibid.*

The district court also again determined that petitioner was permanently ineligible for federal benefits pursuant to 21 U.S.C. 862(a)(1)(C). Resentencing Judgment 7.

3. The court of appeals vacated the federal-benefits ban but otherwise affirmed. Pet. App. 1a-9a. The court took judicial notice of the fact that, after resentencing, three of petitioner's Missouri marijuana convictions had been expunged pursuant to the change in Missouri law. *Id.* at 2a-3a & n.1.[2] The court determined, however, that the changes to petitioner's criminal history did not require resentencing. *Id.* at 3a-5a.

The court of appeals observed, but did not definitively decide, that plain-error review "most likely" applied to petitioner's Guidelines claim because he did not raise the issue of expungement with the district court

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[2] After appellate briefing was complete, petitioner submitted documents showing that his 2003, 2006, and 2015 convictions for possession with intent to distribute marijuana had been expunged by a Missouri court. See 23-2678 C.A. Sealed Mot. for Judicial Notice of State-Court Records, Exs. 1-2 (expungement records for 2006 and 2015 convictions); 23-2678 C.A. Second Sealed Mot. for Judicial Notice of a State-Court Record, Ex. 1 (Aug. 16, 2024) (expungement record for 2003 conviction).

or request postponement of his resentencing to pursue expungement, but had instead only "urged the [district] court to 'revisit[ ]' its 'views' about marijuana." Pet. App. 3a; see D. Ct. Doc. 193, at 2. And the court of appeals determined that petitioner could not succeed on plain-error review because "there are no clear answers" about whether the prior convictions were properly included. Pet. App. 4a. In particular, the court observed that "the timing raises tricky questions about retroactivity" and that it was not clear whether the expunged convictions should be counted to calculate criminal history under Sentencing Guidelines § 4A1.2(j), pursuant to which convictions that are set aside for reasons unrelated to constitutional invalidity, innocence, or mistake of law are counted. Pet. App. 4a; see Sentencing Guidelines § 4A1.2, comment. (n.6).

The court of appeals further determined that even if petitioner had preserved an expungement-related objection, and plain-error review did not apply, relief was nonetheless unwarranted because the outcome of the sentencing proceeding would not have changed. Pet. App. 5a. The court explained the district court's finding that "'the aggravating factors . . . far outweigh[ed] the mitigating' ones" and that "Phillips had reoffended on parole and possessed nearly 20,000 'lethal doses' of fentanyl." *Ibid.* (brackets in original). And in light of the district court's sentencing explanation and its explicit statement that it would impose the same sentence based on the Section 3553(a) factors even if a lower Guidelines range had applied, the court of appeals had "no doubt" that the district court would have imposed the same sentence even if a sufficient objection was made. *Ibid.*

The court of appeals separately concluded, however, that petitioner was entitled to plain-error relief from

the federal-benefits ban on plain-error review. Pet. App. 6a-9a. It observed that petitioner's federal conviction was for possessing a firearm, not for distributing drugs, and his Missouri convictions were for possessing marijuana, not distributing it. *Id.* at 6a-7a. The court further determined that the error affected petitioner's substantial rights and was the type of error that should be corrected on plain-error review. *Id.* at 6a-8a.

ARGUMENT

Petitioner contends (Pet. 11-33) that he is entitled to relief for the inclusion of Missouri marijuana convictions, some of which have now been expunged, in the calculation of his Sentencing Guidelines range. The court of appeals correctly denied relief, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Petitioner claims (Pet. 18-21) that the court of appeals misinterpreted the term "expunged" in Sentencing Guidelines § 4A1.2(j), which provides that "[s]entences for expunged convictions are not counted" when calculating a defendant's criminal history category. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines because the U.S. Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). Congress has charged the Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348; see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) (similar). By conferring that authority on the Commission, Congress indicated that it expects the Commission, not this Court, "to play [the] primary role in resolving conflicts" over the

interpretation of the Guidelines. *Buford* v. *United States*, 532 U.S. 59, 66 (2001) (citing *Braxton*, 500 U.S. at 347-348). Review by this Court of Guidelines decisions is particularly unwarranted in light of *Booker*, which rendered the Guidelines advisory only. 543 U.S. at 245.

No sound reason exists to depart from that practice here. Indeed, review of the asserted error would be especially unwarranted because the court of appeals addressed the issue only through the lens of plain-error review. See Pet. App. 3a-5a. When a defendant fails to object to an alleged error in the district court, he may not obtain relief from that error on appeal unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See *Puckett* v. *United States*, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citation omitted).

To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)) (brackets in original). If those prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 467 (citations and internal quotation marks omitted; brackets in original). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

Although petitioner (Pet. 10 & nn.5-6) asserts that he preserved an objection that his expunged convictions should not be included in his criminal history calculation, the court of appeals determined that plain-error review "most likely" applied, Pet. App. 3a, and it does. Petitioner's objection to the presentence report at resentencing did not argue that the Missouri referendum on marijuana retroactively expunged his convictions, nor did petitioner seek to postpone his resentencing in order to seek expungement. See *ibid.* The objection petitioner makes now was not in fact preserved merely through a request that the district court "revisit[]" its views as to the effect of marijuana convictions. *Ibid.*; see D. Ct. Doc. 193, at 2.

The court of appeals correctly determined that the district court did not plainly err by considering the not-yet-expunged convictions to calculate petitioner's Guidelines range. None of the decisions cited by petitioner (Pet. 15-17) suggests otherwise, or indicates any circuit disagreement that would warrant this Court's review. In two of the three decisions, the convictions had—unlike petitioner's convictions—been expunged at the time of sentencing. See *United States* v. *Beaulieau*, 959 F.2d 375, 380 (2d Cir. 1992) (defendant's prior juvenile conviction had been "ordered sealed" under state statute before the presentence report was prepared); *United States* v. *Hidalgo*, 932 F.2d 805, 806 (9th Cir. 1991) (district court had included a prior juvenile conviction that had been "set aside").

Those decisions also involve juvenile convictions, which are already excluded from a defendant's criminal history calculation under the Guidelines except in narrow circumstances. See Sentencing Guidelines § 4A1.2(d). And the third decision, *United States* v.

Doe, 980 F.2d 876 (3d Cir. 1992), does not involve the Sentencing Guidelines and interprets a term ("set aside," not "expunged") in a federal statute that is not at issue here. See *id.* at 878.

Moreover, there would be no plain error even if the convictions *had* been expunged by the time of resentencing. See Pet. App. 4a-5a. Although Sentencing Guidelines § 4A1.2(j) provides that "[s]entences for expunged convictions are not counted" when determining the defendant's criminal history category, Application Note 10 explains that sentences resulting from convictions that are set aside by state procedures "for reasons unrelated to innocence or errors of law"—*e.g.*, "in order to restore civil rights or to remove the stigma associated with a criminal conviction"—are "to be counted." Sentencing Guidelines § 4A1.2, comment. (n.10).

As petitioner acknowledges (Pet. 11-15), courts have consistently recognized that convictions that are set aside to restore civil rights or remove stigma, in contrast to convictions that are set aside due to the defendant's innocence or a legal error, are not considered "expunged" convictions under the Guidelines. And especially because the court below had itself done so in binding precedent, see *United States* v. *Townsend*, 408 F.3d 1020, 1025 (8th Cir. 2005), any error in including petitioner's convictions—even if they had been expunged when the district court conducted the resentencing—could not have been plain, because petitioner's expungements would not be based on innocence or legal error.

2. Petitioner also contends (Pet. 23-33) that the court of appeals erred in relying on its determination that petitioner would not have received a lower sentence even if the later-expunged convictions were not included in his Guidelines calculation. That contention

does not warrant this Court's review. As a threshold matter, the absence of any error that is plain in the district court's application of the Sentencing Guidelines means that relief was properly denied irrespective of the lower courts' discussion of whether petitioner's sentence would change under a different Guidelines calculation. In any event, this Court has repeatedly denied petitions for writs of certiorari that have raised claims like petitioner's.[3] The same result is warranted here.

a. In *Molina-Martinez* v. *United States*, 578 U.S. 189 (2016), this Court analyzed an error in the calculation of the Sentencing Guidelines under plain-error review. See *id.* at 194. The Court recognized that when the "record" in a case shows that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," the reviewing court may determine that "a reasonable probability of prejudice

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[3] See, *e.g.*, *Sullivan* v. *United States*, cert. denied, No. 25-5357 (Nov. 17, 2025); *Slater* v. *United States*, cert. denied, No. 24-7208 (Oct. 14, 2025); *Kinzy* v. *United States*, 144 S. Ct. 2682 (2024) (No. 23-578); *Brooks* v. *United States*, 143 S. Ct. 585 (2023) (No. 22-5788); *Irons* v. *United States*, 143 S. Ct. 566 (2023) (No. 22-242); *Brown* v. *United States*, 141 S. Ct. 2571 (2021) (No. 20-6374); *Rangel* v. *United States*, 141 S. Ct. 1743 (2021) (No. 20-6409); *Snell* v. *United States*, 141 S. Ct. 1694 (2021) (No. 20-6336); *Thomas* v. *United States*, 141 S. Ct. 1080 (2021) (No. 20-5090); *Torres* v. *United States*, 140 S. Ct. 1133 (2020) (No. 19-6086); *Elijah* v. *United States*, 586 U.S. 1068 (2019) (No. 18-16); *Monroy* v. *United States*, 584 U.S. 980 (2018) (No. 17-7024); *Shrader* v. *United States*, 568 U.S. 1049 (2012) (No. 12-5614); *Savillon-Matute* v. *United States*, 565 U.S. 964 (2011) (No. 11-5393); *Effron* v. *United States*, 565 U.S. 835 (2011) (No. 10-10397); *Rea-Herrera* v. *United States*, 557 U.S. 938 (2009) (No. 08-9181); *Mendez-Garcia* v. *United States*, 556 U.S. 1131 (2009) (No. 08-7726); *Bonilla* v. *United States*, 555 U.S. 1105 (2009) (No. 08-6668). Another petition raising similar issues is currently pending. See *Medrano* v. *United States*, No. 24-7508 (filed June 24, 2025).

does not exist" for purposes of plain-error review, "despite application of an erroneous Guidelines range." *Id.* at 200; see *id.* at 204 (indicating that a "full remand" for resentencing may be unnecessary when a reviewing court is able to determine that the sentencing court would have imposed the same sentence "absent the error").

The court of appeals made such an assessment here. See Pet. App. 5a. Although, as discussed above, see p. 11, *supra*, petitioner's Guidelines claim is properly subject to plain-error review, the court of appeals found the record sufficiently clear to illustrate that even if plain-error review did *not* apply, relief would be unwarranted. See Pet. App. 5a. While *Molina-Martinez* concerned the requirements of plain-error review under Rule 52(b), the principle it recognized applies with equal force in the context of harmless-error review of preserved errors under Rule 52(a), in which the government (rather than the defendant) "bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734. And prejudice is lacking in this case irrespective of which party bears that burden.

As the court of appeals recognized (Pet. App. 5a), the record contains multiple indications that the district court would have imposed the same 120-month sentence even if it had not considered petitioner's later-expunged marijuana convictions in calculating his Guidelines range. Indeed, the district court said so explicitly at the sentencing hearing, when it made clear that "notwithstanding the objections that have been lodged in this case, both today and previously, I would impose the same sentence, by way of variance or otherwise, based on my evaluation of the [Section] 3553(a) factors." Resentencing Tr. 28.

The district court explained that its sentence was informed by the nature of and circumstances of the offense, including petitioner's possession of thousands of lethal doses of fentanyl, along with cocaine base and heroin. Resentencing Tr. 25-26; see Pet. App. 5a (noting that petitioner "possessed nearly 20,000 'lethal doses' of fentanyl"). The district court also explained that petitioner had committed some offenses while on parole and in one instance "ran from an alley carrying a rifle," "fled and resisted arrest," and "hit [a child] in the head" when he threw the rifle into a car with two children. Resentencing Tr. 27. As the court of appeals put it, petitioner "was too dangerous for a shorter sentence." Pet. App. 5a.

b. The court of appeals' factbound assessment of the record in this case, and the sufficiency of petitioner's showing of a reasonable probability of a different outcome had the later-expunged convictions been excluded from the Guidelines calculation, does not warrant this Court's review. See Sup. Ct. R. 10; see also, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (explaining that the Court ordinarily does not "grant * * * certiorari to review evidence and discuss specific facts"). Contrary to petitioner's contention (Pet. 23-28), the court of appeals' decision does not implicate a disagreement among the courts of appeals that requires this Court's intervention.

Petitioner characterizes the court of appeals' decision as holding that a district court "need only state that it 'would impose the same sentence' to survive an appeal" on a Guidelines issue. Pet. 27-28. But the district court's statement that it would have imposed the same sentence notwithstanding petitioner's objections is not the only evidence in the record that petitioner suffered

no prejudice from the asserted error. Instead, as just discussed, the record shows that the district court would have reached the same outcome irrespective of any Guidelines error. Indeed, the record in petitioner's case contains the very indications that this Court highlighted in *Molina-Martinez*—statements from the district court that it believed the sentence it imposed was appropriate regardless of the Guidelines range. See 578 U.S. at 200-201. And the out-of-circuit decisions that petitioner cites as conflicting, see Pet. 24-27, do not indicate that those circuits would have reached a different result in the particular circumstances of this case.

In *United States* v. *Smalley*, 517 F.3d 208 (2008), for example, the Third Circuit declined to find a Guidelines-calculation error harmless where the district court "did not explicitly set forth an alternative Guidelines range," *id.* at 214, and where its "alternative sentence" was accompanied by a "bare statement" that was "at best an afterthought, rather than an amplification of the Court's sentencing rationale," *id.* at 215; see *United States* v. *Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) (concluding that *Smalley* required a remand for resentencing). Here, in contrast, the court made clear that it was aware of the relevant "objections," but would impose the same sentence "by way of variance or otherwise," based on petitioner's "conduct," "criminal history" and "marginal acceptance of responsibility." Resentencing Tr. 28.

The Second Circuit in *United States* v. *Seabrook*, 968 F.3d 224 (2020), was unconvinced—based on the record before it—that the district court's choice of sentence was independent of the asserted errors in calculating the Guidelines range. See *id.* at 233-234 (observing that, "[t]ellingly," the district court "'returned multiple

times'" to the Guidelines in "framing its choice of the appropriate sentence," and had also declined the government's suggestion to take a Guidelines factor into account under Section 3553(a)) (citation omitted). And in *United States* v. *Munoz-Camarena*, 631 F.3d 1028 (9th Cir. 2011) (per curiam), the defendant's claim of a Guidelines error had been validated by an intervening decision of this Court, and the Ninth Circuit found the district court's explanation of its sentence "insufficient to explain the extent of the variance from the correct Guidelines range." *Id.* at 1029-1031.

In *United States* v. *Peña-Hermosillo*, 522 F.3d 1108 (2008), the Tenth Circuit declined to determine "when, if ever, an alternative holding based on the exercise of *Booker* discretion could render a procedurally unreasonable sentence calculation harmless." *Id.* at 1117-1118. Instead, it resolved the case on a different ground—namely, that the district court's alternative sentence itself did not satisfy the requirement of procedural reasonableness because the court "offer[ed] no more than a perfunctory explanation for" it. *Id.* at 1118. And in *United States* v. *Ibarra-Luna*, 628 F.3d 712 (2010), the Fifth Circuit could not "state with the requisite certainty * * * that the district court would have imposed precisely the same sentence" in a case where—unlike here—the district court "did not state whether th[e] sentence was influenced by its Guidelines calculations or based instead on independent factors." *Id.* at 719; see *id.* at 716.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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