No. 24-1295

IN THE

# Supreme Court of the United States

BRANDON PHILLIPS,
*Petitioner*,

v.

UNITED STATES,
*Respondent.*

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

## REPLY BRIEF FOR PETITIONER

Paul Enríquez
*Counsel of Record*
2 Massachusetts Ave. NE #1147
Washington, DC 20013
(202) 662-6000
paul.enriquez.law@gmail.com

Robert A. Long, Jr.
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000

*Counsel for Petitioner*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

This case is about an individual who is serving a significantly longer prison sentence because of three prior state-marijuana convictions that no longer exist. A 2022 amendment to the Missouri Constitution, which legalized marijuana, directed Missouri's courts to expunge most prior marijuana convictions as constitutionally void *ab initio*. Mr. Phillips objected to the district court's calculation of his Guidelines range, citing the Missouri Constitutional Amendment. The objection challenged the addition of nine criminal-history points based on his prior state-marijuana convictions. If these convictions are not counted, Mr. Phillips is subject to a Guidelines range of 41–51 months. The district court, however, imposed a 120-month sentence—nearly three times the low end, and more than twice the high end, of the range. That sentence contravenes basic principles of federalism by refusing to give effect to the Missouri Constitutional Amendment.

The Government makes several arguments in opposing certiorari but never grapples with this fundamental injustice.

The Government argues that the circuits are split over the proper interpretation of the Guidelines, but it has no meaningful response to Petitioner's argument that the term "expunged" has a plain meaning and the Guidelines, like statutes, must be given their plain and ordinary meaning. The Government raises ancillary arguments concerning the standard of review and the timing of the

expungements, but those arguments are foreclosed by precedent.

The circuits also disagree over the proper application of the post-*Booker* federal-sentencing process, which requires courts to (1) calculate a correct Guidelines range, and then (2) consider the § 3553(a) factors. The Government agrees with the minority of circuits that hold it is unnecessary for a sentencing court to calculate a correct Guidelines range, so long as the court makes a general statement that it would impose the same sentence based solely on the § 3553(a) factors. The Government fails to address the heart of the circuit split, which concerns whether such blanket statements may render *any* procedural error—not just § 3553(a)-related errors—harmless under *Gall v. United States*, particularly when, in cases such as this one, the sentencing court failed to adequately rule on a timely objection and imposed a sentence significantly greater than the Guidelines range.

This Court should grant the Petition to resolve the circuit splits on these important and recurring questions.

## ARGUMENT

### I. THE COURT SHOULD RESOLVE A CIRCUIT SPLIT OVER THE MEANING OF "EXPUNGED" CONVICTIONS

#### A. The Circuits on the Wrong Side of the Split Improperly Graft Limitations onto the Term "Expunged"

The Guidelines expressly state that "expunged convictions *are not counted*." USSG § 4A1.2(j) (emphasis added). The plain text means what it says: Expunged convictions must be excluded from a defendant's Guidelines range. *Cf. King v. Burwell*, 576 U.S. 473, 486 (2015) ("If the statutory language is plain, we must enforce it according to its terms.").

The Government does not dispute Petitioner's showing that, for over four centuries, the plain and ordinary meaning of the term "expunge" has been to "strike out," "erase," "declare null," "obliterate," and "destroy completely." Pet.18–20. Because the term "expunge" in the Guidelines has a plain and ordinary meaning, there is no occasion for further interpretation.

As the Petition notes, the circuits disagree regarding how sentencing courts treat expunged convictions under the Guidelines. Some circuits correctly apply the plain and ordinary meaning of "expunged." Other circuits have improperly grafted additional requirements onto the term based on a flawed reading of the Application Notes.

The circuits on the wrong side of the split acknowledge that the Guidelines do not expressly define "expunged." *E.g.*, *United States v. Hines*, 133 F.3d 1360, 1362 (CA10 1998). Rather than apply the plain meaning, these courts have grafted "right-restoration," "innocence," and "error-of-law" limitations onto the term "expunged" on the ground that Application Note 10 distinguishes expungements from pardons and set-aside convictions. *See* USSG § 4A1.2(j) A.N.10. But an Application Note cannot alter the plain meaning of the Guidelines; and in any event, the Notes are not inconsistent with the plain meaning of "expunged." Rather, they merely clarify that the terms "expunged," "set aside," and "pardon" are not interchangeable. *See id.*

Under the plain meaning of the term in the Sentencing Guidelines, a conviction is "expunged" if its record has been completely destroyed and the sentence rendered void. No additional limitations on the meaning of "expunged" are warranted.

The Missouri Constitutional Amendment declares prior marijuana convictions and sentences "legally invalid," as if the defendant "had never been arrested, convicted, or sentenced for the offense." Mo. Const. art. XIV, § 2(8)(b). The Amendment further directs courts "to issue an order to expunge all records and files related to the arrest, citation, investigation, charge, adjudication of guilt, [and] criminal proceedings." *Id.*

Here, the Eighth Circuit's flawed analysis led to its conclusion that "some 'expunged convictions' do 'not count,'" while "[o]thers do." App.4a. This directly

contradicts the Guidelines, which expressly state that "expunged convictions are not counted." USSG § 4A1.2(j). Mr. Phillips's state-marijuana-conviction records have been wholly erased, and the convictions vacated and expunged as legally invalid under the Missouri Constitution. Accordingly, the convictions have been "expunged" under the plain meaning of that term and cannot be counted for federal-sentencing purposes.

### B. The Treatment of Expunged Convictions Under the Guidelines Is a Recurring, Purely Legal Matter

Relying on *Braxton v. United States*, 500 U.S. 344 (1991), and *Buford v. United States*, 532 U.S. 59 (2001), the Government argues that this Court should not review the Eighth Circuit's decision because the "Sentencing Commission can amend the Guidelines to eliminate" any conflicts or errors. Opp.9–10. *Braxton* and *Buford* are inapposite for several reasons.

First, these cases involved phrases without a plain and ordinary meaning. *See Braxton*, 500 U.S. at 347 (granting certiorari to consider meaning of the phrases "containing a stipulation" and "specifically establishes"); *Buford*, 532 U.S. at 61 (concerning interpretation of the phrase "consolidated for sentencing"). Unlike the term "expunged," the phrases in *Braxton* and *Buford* lacked a plain meaning.

Second, this Court "ch[o]se not to resolve" the dispute concerning one contested phrase in *Braxton* because "the [Sentencing] Commission ha[d] already undertaken a proceeding" to resolve the circuit split.

500 U.S. at 348–49. That is not the case here. Moreover, this Court in *Braxton* proceeded to interpret the phrase "specifically established." *Id.* at 349–51.

The key issue in *Buford* was whether a deferential or de novo standard of review applied. 532 U.S. at 62–64. This Court explained that the interpretive issue was "a minor, detailed, interstitial question of sentencing law, buried in a judicial interpretation of an application note to a Sentencing Guideline." 532 U.S. at 65. The Court contrasted *Buford* with cases involving "a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an individual [G]uideline, in order to determine their basic intent." *Id.* This case presents just such a recurring, purely legal matter, concerning a term ("expunged") in an individual Guideline.

### C. Precedent Forecloses the Government's Ancillary Arguments

The Government urges the Court to deny review on grounds that (1) the plain-error-review standard applies, and (2) Missouri courts had not entered the expungements at the time of sentencing. Opp.10–12. These arguments contravene this Court's precedents.

#### *1. Plain-Error Review Is Inappropriate*

The Government concedes the district court "was aware of the Missouri [C]onstitutional [A]mendment" during resentencing, and that Mr. Phillips "raised it to the district court." Gov't C.A. Br. 15, 18. But the Government misstates that objection, asserting that

Petitioner merely asked the district court to "revisit" its views on marijuana. Opp.8, 11.

The record disproves that assertion. Mr. Phillips filed a written objection articulating the following:

1. "The PSR overstate[d] [his] criminal history."
2. The PSR included "three" "marijuana convictions [that] are the basis [for] 9 criminal[-]history points."
3. Inclusion of those 9 points improperly "elevated [Mr. Phillips] to a Criminal[-]History Category VI."
4. Counting the prior marijuana convictions constituted error because "the State of Missouri by referendum ha[d] legalized possession of marijuana."
5. The above "facts and factors important to the sentencing determination remain[ed] in dispute."
6. The objection formally requested that the court "amend" or "change the PSR consistent with each and all" of the above disputed "facts and factors."

C.A.Add.20–21 (R.Doc.193, 1–2).

The record clearly shows that Mr. Phillips lodged an objection that his Guidelines calculation was incorrect because, following the recent enactment of Missouri's Constitutional Amendment legalizing marijuana, his criminal history was overstated based on the PSR's inclusion of three prior state-marijuana convictions amounting to nine criminal-history points.

This objection was more than sufficient to present and preserve Mr. Phillips's Guidelines-error claim. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord*, *e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–79 (1995) (same); *United States v. Robinson*, 744 F.3d 293, 300 n.6 (CA4 2014) ("Although [defendant] did not make [the] precise argument before the district court, [he] did challenge [the inclusion of a prior marijuana sentence in] his criminal[-]history score, and thus preserved his claim.").

On appeal, Mr. Phillips sharpened his argument in support of the Guidelines-error claim by pointing to the subsection containing the expungement provision in the Constitutional Amendment. "Having raised a [Guidelines-error] claim [below]," Mr. Phillips "could have formulated any argument [he] liked in support of [his] claim [on appeal]" without triggering plain-error review. *Yee*, 503 U.S. at 535. By "adding a finer point to his objection raised below," *United States v. Hope*, 28 F.4th 487, 495 (CA4 2022), he simply enhanced "the quality and depth of argument ... on appeal." *Sec'y, U.S. Dep't of Lab. v. Preston*, 873 F.3d 877, 883 n.5 (CA11 2017).

*2. The Expungements Were Timely*

The Government argues that the district court properly counted not-yet-expunged convictions in the Guidelines range. But the Constitutional Amendment took effect before Mr. Phillips's resentencing, and it

mandated retroactive expungement of his convictions. That the Amendment afforded Missouri's courts limited time to complete the administrative-expungement process is no reason to ignore a fully effective Missouri Constitutional Amendment. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.").

The Eighth Circuit's "failure to apply [the] newly declared [C]onstitutional [Amendment] to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322; *accord Henderson v. United States*, 568 U.S. 266, 270, 276–77 (2013) (applying the same principle to direct appeals, even when the defendant did "not object[] in the trial court"). This Court reaffirmed that principle in *United States v. Booker*, declaring that its constitutional and statutory holdings applied "to all cases on direct review." 543 U.S. 220, 268 (2005).

In the context of new laws that establish lower penalties, this Court has held that when a defendant is sentenced during "a period *after* the new [law]'s effective date but *before*" implementation, courts must apply the new law and adjust "sentence[s] in accordance with the new minimums" to prevent "disparities and uncertainties," even if implementation is "not yet ready." *Dorsey v. United States*, 567 U.S. 260, 281–82 (2012). The Missouri Constitution sets a limited time for Missouri courts to carry out the administrative process for expunging marijuana-related convictions. This process does not alter Mr. Phillips's substantive rights to the

expungements under the Constitution. Accordingly, the three marijuana-related convictions that were mandated to be, and have been, duly expunged are not properly included in Mr. Phillips's Guidelines-range calculation.

## II. THE COURT SHOULD RESOLVE A CIRCUIT SPLIT OVER WHETHER SENTENCING COURTS CAN IMMUNIZE ANY PROCEDURAL ERRORS BY STATING THEY WOULD, REGARDLESS OF THE GUIDELINES, IMPOSE THE SAME SENTENCE BASED ON THE § 3553(A) FACTORS

### A. The Minority Approach Short-Circuits the Post-*Booker* Sentencing Framework

The Government agrees with the minority of the circuits holding that it is sufficient for a district court to make a general statement that it would impose the "same sentence" regardless of the correct Guidelines range. That approach short-circuits the post-*Booker* federal-sentencing scheme.

This Court has held that federal-sentencing proceedings involve a two-step process. First, "district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). Second, once district courts have "***correctly*** calculat[ed] the applicable Guidelines range," they must also "consider all of the § 3553(a) factors," which assist courts in determining whether the sentence is unreasonable. *Id*. at 49–50 (emphasis added).

This two-step process is more than a mere suggestion. District courts have "discretion to depart from the Guidelines," *Molina-Martinez v. United States*, 578 U.S. 189, 193 (2016), but not to bypass the statutory-based, two-step process before imposing a sentence, *see Peugh v. United States*, 569 U.S. 530, 536–37 (2013); *United States v. Asbury*, 27 F.4th 576, 581 (CA7 2022) ("The statute does not give the judge the option to bypass the [G]uidelines.").

Establishing a correct Guidelines range at Step 1 is essential because the "Guidelines will anchor both the district court's discretion and the appellate review process." *Peugh*, 569 U.S. at 549. District courts cannot "nullify the [G]uidelines" with a conclusory statement that the court would have ruled the same way regardless of the correct Guidelines range. *Asbury*, 27 F.4th at 581.

"When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 578 U.S. at 198. Here, the district court failed to calculate the correct Guidelines range by a substantial margin. That error was far from harmless. There is strong evidence that the Guidelines-range error influenced the sentencing process because the court imposed a sentence at the top of the range it (erroneously) believed was correct.

### B. The Majority Approach Safeguards Against the Types of Procedural Errors Enumerated in *Gall*

The district court's procedural errors were not confined to its Guidelines-range miscalculation. The decision to ignore the Missouri Constitutional Amendment-related objection led to additional procedural errors under *Gall*.

In *Gall*, this Court clarified that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range," courts of appeals "must first ensure that the district court committed no significant procedural error." 552 U.S. at 51. This Court noted that procedural errors may include:

1. "[F]ailing to calculate (or improperly calculating) the Guidelines range";
2. "[F]ailing to consider the § 3553(a) factors";
3. "[S]electing a sentence based on clearly erroneous facts";
4. "[F]ailing to *adequately explain* the chosen sentence—including an explanation for any deviation from the Guidelines range."

*Id.* (emphasis added).

The Second, Third, Fifth, Seventh, Ninth, and Tenth circuits require sentencing courts to follow the two-step, post-*Booker* sentencing framework, which helps avoid the types of procedural errors enumerated in *Gall*. In contrast, the Eighth and Eleventh circuits have held that sentencing decisions may be "inoculated" against appellate review, so long as the

sentencing court recites that it would impose the same sentence based solely on the § 3553(a) factors.

The minority approach is wrong. This Court does not limit errors stemming from "fail[ures] to adequately explain" only to explanations concerning the § 3553(a) factors. *See id*. Here, the district court failed to "adequately explain the chosen sentence" because it did not explain *why* the Missouri Constitution, which rendered Mr. Phillips's prior convictions void *ab initio*, did not affect his Guidelines-range calculation, or *why* state convictions subject to retroactive expungement should be counted in contravention of the Guidelines.

The district court's three-page order overruled Mr. Phillips's objection by citing precedents that were relevant only to prior controlled-substance and armed-career-criminal objections from an earlier appeal. App.10a–13a. These precedents had nothing to do with the Missouri Constitution. There is no mention of the Missouri Constitution in the district court's resentencing order, statement of reasons, or resentencing-hearing transcript. All the district court said was that Mr. "Phillips objected on grounds unrelated to the Armed-Career-Criminal enhancement, and the Court overruled this objection." App.11a. There is no indication that the court duly considered the substance of the objection based upon the Missouri Constitutional Amendment.

Mr. Phillips's sentence is approximately 2.4 to three times greater than his properly calculated Guidelines range. The district court failed to take into account "the extent of [the] variance from the

Guidelines range." *Gall*, 552 U.S. at 51. The "court's generic disclaimer" that it "would have reached the same sentence" based on the § 3553 factors "sheds no light on" its thinking regarding the impact of the Constitutional Amendment on the sentence, and "[i]t is thus not specific enough to permit a finding of harmless error." *Asbury*, 27 F.4th at 583.

Furthermore, the district court failed to adequately explain how its sentence would avoid disparities under § 3553(a). As noted in the Petition, other defendants in the Eastern District of Missouri have been sentenced without counting prior state-marijuana convictions pursuant to the Missouri Constitutional Amendment. *See, e.g.*, *United States v. Roberts*, No. 1:22CR00112-1 (terminated Jan. 11, 2023) (sentencing defendant approximately one month before Mr. Phillips).

The Government does not dispute that the district court failed to properly perform Step 1 and offered no basis for overruling Mr. Phillips's objection. Its only response is that this Court has denied petitions that raised similar claims. But the cases the Government cites did not present a timely raised Guidelines-error claim pursuant to a state Constitutional Amendment. *See* Opp.13. Nor did those cases raise the federalism concerns at issue here.

Lastly, contrary to the Government's assertion, because Mr. Phillips lodged a timely objection, it is "the Government who bears the burden of persuasion with respect to prejudice." *Molina-Martinez*, 578 U.S. at 203. The Government has not shown that the district court's error regarding the Constitutional

Amendment "does not warrant correction because it was harmless." *Id*.

## CONCLUSION

The Court should grant the Petition for writ of certiorari.

Respectfully submitted,

Paul Enríquez
*Counsel of Record*
2 Massachusetts Ave. NE #1147
Washington, DC 20013
(202) 662-6000
paul.enriquez.law@gmail.com

Robert A. Long, Jr.
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000

*Counsel for Petitioner*

December 3, 2025