No. 25-5067

IN THE

Supreme Court of the United States

KIRA KRISTINA ZIELINSKI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

TOBIAS S. LOSS-EATON
JILLIAN S. STONECIPHER
KATHLEEN M. MUELLER
AVERY D. GERDES
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8427
tlosseaton@sidley.com

KNUT S. JOHNSON
Counsel of Record
BRENDAN MCDONALD
SINGLETON SCHREIBER, LLP
591 Camino de la Reina,
Suite 1025
San Diego, CA 92108
(619) 535-2929
kjohnson@singletonschreiber.com

JEFFREY T. GREEN
DANIELLE HAMILTON
THE CARTER G. PHILLIPS/
SIDLEY AUSTIN LLP
SUPREME COURT CLINIC
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

Counsel for Petitioner

December 3, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF

The sole, dispositive question decided below was whether § 1204(c)(2)'s affirmative defense "encompasses those situations where a third party alone suffers domestic violence and the defendant aids the third party in escaping that violence." App. 2a. The Eighth Circuit's answer was no. On that basis alone, the court of appeals affirmed Ms. Zielinski's conviction.

The government now admits that the legal rule it urged below is wrong: "The court of appeals erred in concluding that 'domestic violence' in 18 U.S.C. 1204(c)(2) includes only violence against the defendant herself." Opp. 7. Rather, the "affirmative defense is best understood to at least encompass violence against either the defendant or the kidnapped child." *Id.*

Even so, the government urges the court to deny the petition because the error was supposedly harmless. But even if harmless-error analysis applied to the denial of the right to present a complete defense, this Court is not in the business of deciding harmlessness questions in the first instance. Indeed, of the four possible resolutions here, denying the petition outright makes the *least* sense.

Given the government's confession of error and the lack of any alternative grounds in the decision below, the Court could issue a GVR, as the government acknowledges; the Court could summarily reverse, since the sole issue addressed below was wrongly decided, and remand for further proceedings; or, if the Court harbors any doubts about the merits question, it could grant plenary review and appoint an *amicus* to defend the decision below. Any of those options is far superior to an outright denial, which would (i) ratify a

criminal conviction that rests solely on an admitted legal error and (ii) leave standing an obviously incorrect precedent that will influence future proceedings for many other defendants.

The government's harmlessness argument also fails on its own terms. The Government theorizes that some of Ms. Zielinski's evidence would have been excluded as inadmissible, some might have been excluded because it was "not obviously admissible," and other evidence might have been introduced by the government to undermine the affirmative defense. Opp. 10–12. But none of that happened. No court has ruled that the evidence Ms. Zielinski sought to introduce to support her affirmative defense is insufficient or inadmissible, no evidence supporting or undermining the defense was introduced at trial, and no jury has weighed the evidence. Only further proceedings in the district court can determine whether Ms. Zielinski can prevail on her affirmative defense. The Constitution guarantees her that chance. The erroneous decision below should not be left standing.

I. The decision below cannot stand because it rests solely on an admitted legal error.

The parties now agree that the Eighth Circuit was wrong about the sole question it addressed: The court of appeals misread the statute, and thus deprived Ms. Zielinski of her sole defense to the crime charged. Yet the government says "simply denying certiorari is the preferable course." Opp. 14.

That makes little sense. The decision below is now published, binding precedent in the Eighth Circuit. Indeed, it is the only court of appeals decision in the country that has squarely addressed this question. See Opp. 12. So even setting aside the drastic consequences for Ms. Zielinski herself, the decision below is

sure to have an outsized effect if left undisturbed. And while the government notes that, "if the issue arises again in the Eighth Circuit, that court will have the opportunity to correct its reasoning," *id.* at 13, there is no reason to force a future defendant and the court of appeals to go through rehearing *en banc* to upend the decision below when this Court can simply erase it now.

And there are ample avenues to do so. For one, as the government acknowledges, the Court could GVR "for further consideration in light of the government's position." Opp. 7, 13. Indeed, the Court "has a well-established practice of issuing GVR orders in analogous circumstances." *Id.* at 14. Though some members of the Court have questioned the propriety of that practice where "the court of appeals' judgment is correct," *id.* at 13, the judgment below is not correct. Again, the Eighth Circuit's decision rests entirely on an admitted legal error. That future proceedings in this case could eventually lead to the same ultimate result does not mean the *existing judgment* is correct.

Put differently, a vacatur and remand is entirely appropriate—even according to a GVR hawk—when this Court "identif[ies] a controlling error of law," but "the finding of error does not automatically entitle the appellant or petitioner to judgment, and the appellate court cannot conduct (or chooses not to conduct) the further inquiry necessary to resolve the questions remaining in the litigation." See *Lawrence* v. *Chater*, 516 U.S. 163, 177–79 (1996) (Scalia, J., dissenting) (per curiam). That is the case here. The Eighth Circuit's statutory misinterpretation is a controlling error of law because it is the sole basis for the judgment below. And the remaining question in the litigation is whether Ms. Zielinski could prevail on the defense that she was barred from presenting, based on a record that

she couldn't fully develop. This Court is not situated to resolve that question when neither of the lower courts did so. On any view of the GVR power, that remedy is proper here.

The government's contrary argument rests on its assertion of harmless error. Opp. 10. But it cites no authority for the idea that this kind of error—the denial of an opportunity to present a complete defense—can ever be harmless. This Court has long held that a defendant must have an "opportunity to present a complete defense." *Holmes* v. *South Carolina*, 547 U.S. 319, 331 (2006) (cleaned up); see also *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense." (cleaned up)). The denial of this constitutional right is at least arguably harmful *per se*. See *United States* v. *Smith*, 30 F.4th 1334, 1338 (11th Cir. 2022) ("The complete denial of the opportunity to be heard on a material issue is a violation 'of due process which is never harmless error'" (cleaned up)); *United States* v. *Saenz*, 179 F.3d 686, 689 (9th Cir. 1999) ("Error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense."). The government's contention that harmless-error analysis applies to the "erroneous exclusion of testimony," Opp. 11 (citing *Crane* v. *Kentucky*, 476 U.S. 683, 690–91 (1986)), is not responsive.

In any event, "this Court often leaves harmless-error questions to the Court of Appeals when the issue was not addressed below," because such questions are generally "fact-intensive." *Erlinger* v. *United States*, 602 U.S. 821, 861 (2024) (Kavanaugh, J., dissenting); see also *McFadden* v. *United States*, 576 U.S. 186, 197 (2015) ("The Government contends that any error in the jury instructions was harmless . . . . Because the

Court of Appeals did not address that issue, we remand for that court to consider it in the first instance."). The government offers no reason for a different approach here. Thus, as the government's own authority recognizes, "respondent's harmless error argument should be directed in the first instance to the [lower] court." *Crane*, 476 U.S. at 691. A GVR is proper.

Alternatively, summary reversal would be appropriate. For all the reasons explained by Judge Kelly below, in the petition, and now in the government's own brief, the Eighth Circuit's decision is clearly wrong. This Court has summarily reversed lower-court decisions that rest on legal errors even when the availability and applicability of harmless error remains unresolved. Indeed, it did so quite recently. See *Pitts* v. *Mississippi*, No. 24-1159, 2025 WL 3260171, at *3 (U.S. Nov. 24, 2025) (per curiam) (summarily reversing and noting that "on remand the State remains free to argue . . . whether the error in this case warrants a new trial under the harmless-error standard").

Finally, if the Court is uncertain whether the Eighth Circuit's legal rule is wrong, it should grant plenary review and appoint an *amicus* to defend the decision below. For the reasons explained in the petition and the supporting amicus brief, this issue is vitally important, and leaving the decision below in place is dangerous. See generally Br. for *Amici* Battered Women's Justice Project et al. And Ms. Zielinski herself deserves an adjudication of her rights under the correct articulation of law.

Whichever path the Court takes, however, denying the petition is not the right outcome.

II. The government cannot show that the Eighth Circuit's admitted error was harmless beyond a reasonable doubt.

Even if the Court were inclined to entertain the government's harmless-error argument—and even if such errors can ever be harmless—it would provide no basis to deny the petition. To avoid reversal, a constitutional error must be "harmless beyond a reasonable doubt." *Neder* v. *United States*, 527 U.S. 1, 16 (1999). The government nowhere acknowledges this standard, much less tries to meet it. Rather, it relies on supposition. The Court should brush this guesswork aside.

No court has found that (or considered whether) Ms. Zielinski lacks "[]sufficient evidence to sustain her proposed affirmative defense." Opp. 10. The government moved to exclude her evidence that she fled the country to protect her child from sexual abuse, but the district court never ruled on that motion because it deemed the defense unavailable. App. 16a–17a. Deprived of her defense, Ms. Zielinski agreed to a bench trial on a stipulated record, at which she was convicted. As a result, Ms. Zielinski never had the chance to develop her evidence, and her defense was never tested.

What's more, the government took the position that following this procedure would permit Ms. Zielinski to appeal the court's adverse ruling on the affirmative defense. July 20, 2023 Hr'g Tr. 28:12–13. Now that she has done so and the government *concedes she is right*, it should not be heard to argue that her conviction should stand anyway.

Nor is there a basis to conclude that all of Ms. Zielinski's evidence would be inadmissible. *Contra* Opp. 10. Contrary to the government's claims, Ms. Zielinski's counsel did not admit that an audiotape of her

son talking about the abuse and testimony from teachers and others he told of the abuse would be "inadmissible hearsay." *Compare id.*, *with* July 20, 2023 Hr'g Tr. 10:21–24 (arguing statements from the child would be admissible if the affirmative defense applies). And while the district court expressed concern about whether the child was competent to testify, it did not hold the child's testimony (or any of Ms. Zielinski's other evidence) inadmissible. Rather, the district court said that some of her evidence might be admissible if she could raise the defense. *Id.* at 27:5–11. Indeed, it is well-established that, in criminal cases involving allegations of abuse, testimony from a child may be necessary. Cf. *Pitts*, 2025 WL 3260171, at *1.

CONCLUSION

For the reasons above and in the petition, the petition should be granted. The Court should GVR, summarily reverse, or grant plenary review.

Respectfully submitted,

TOBIAS S. LOSS-EATON
JILLIAN S. STONECIPHER
KATHLEEN M. MUELLER
AVERY D. GERDES
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8427
tlosseaton@sidley.com

KNUT S. JOHNSON
Counsel of Record
BRENDAN MCDONALD
SINGLETON SCHREIBER, LLP
591 Camino de la Reina,
Suite 1025
San Diego, CA 92108
(619) 535-2929
kjohnson@singletonschreiber.com

JEFFREY T. GREEN
DANIELLE HAMILTON
THE CARTER G. PHILLIPS/
SIDLEY AUSTIN LLP
SUPREME COURT CLINIC
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

Counsel for Petitioner

December 3, 2025