No. _____

IN THE
# Supreme Court of the United States

JACK BENSON FLANDERS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITION FOR WRIT OF CERTIORARI

William F. Nettles, IV
FEDERAL PUBLIC DEFENDER
DISTRICT OF SOUTH CAROLINA

Jeremy A. Thompson
ASSISTANT FEDERAL PUBLIC DEFENDER
DISTRICT OF SOUTH CAROLINA
1901 Assembly Street
Suite 200
Columbia, South Carolina 29201
803.765.5079
Jeremy_Thompson@fd.org
***Counsel of Record for Petitioner***

## QUESTIONS PRESENTED

**(1)**

Whether a prosecutor's improper closing argument is less prejudicial because it occurred during a rebuttal argument or because a district court gave a general instruction that arguments of the parties are not evidence?

**(2)**

Whether errors in calculating the Sentencing Guidelines are rendered categorically harmless by the district court's statement that the Guidelines would make no difference to the choice of sentence.

## PARTIES TO THE PROCEEDINGS

The parties to the petition are:

Jack Benson Flanders, Petitioner; and

United States of America, Respondent.

## RELATED PROCEEDINGS

*United States v. Flanders*, No. 4:22-cr-217-JD, United States District Court for the District of South Carolina. Judgment entered February 22, 2024.

*United States v. Flanders,* No. 24-4120, United States Court of Appeals for the Fourth Circuit. Judgment entered August 4, 2026.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS ..... ii

RELATED PROCEEDINGS ..... iii

PETITION FOR WRIT OF CERTIORARI ..... vi

OPINION BELOW ..... 1

JURISDICTION ..... 1

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED ..... 1

INTRODUCTION ..... 2

STATEMENT OF THE CASE ..... 6

REASONS FOR GRANTING THE PETITION ..... 8

I. This Court Should Grant Certiorari to Determine the Degree of Prejudicial Impact from a Prosecutor's Improper Closing Argument. ..... 8

II. This Court Should Grant Certiorari to Resolve a Deep and Entrenched Circuit Split over Review of a District Court's Misapplication of the Guidelines when the District Court also Pronounced an Alternative Sentence. ..... 11

A. This Court's Precedents Do Not Answer the Question Presented. ..... 14

B. The Circuits Have Taken Markedly Different Approaches to Alternative Sentence Cases. ..... 15

1. The Majority of Circuits Require More than Just an Alternative Sentence. ..... 15

2. The Minority Views Find Guidelines Errors Harmless When the District Judge Issues an Alternative Sentence. ..... 17

C. The Majority View Is the Better Approach. ..... 20

CONCLUSION ..... 22

APPENDIX:

Unpublished Opinion of the United States Court of Appeals
for the Fourth Circuit entered August 4, 2026 ..... 1A

Judgment of the United States Court of Appeals
for the Fourth Circuit entered August 4, 2026 ..... 6A

Judgment of the United States District Court
for the District of South Carolina entered February 22, 2024 ..... 9A

Transcript Excerpt from Trial held July 26, 2023 ..... 15A

Transcript Excerpt from Sentencing Hearing held February 21, 2024 ..... 20A

## TABLE OF AUTHORITIES

**Cases**

*Caldwell v. Mississippi*, 472 U.S. 320 (1985) ..... 8

*Chavez-Meza v. United States*, 585 U.S. 109 (2018) ..... 20

*Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) ..... 11

*Gall v. United States*, 552 U.S. 38 (2007) ..... 3, 4, 11, 12, 14, 20, 21

*Greer v. United States*, 593 U.S. 503 (2021) ..... 21

*Kisor v. Wilkie*, 588 U.S. 558 (2019) ..... 6, 21

*Molina-Martinez v. United States*, 578 U.S. 189 (2016) ..... 11, 12, 14

*Neder v. United States*, 527 U.S. 1 (1999) ..... 13

*Peguero v. United States*, 526 U.S. 23 (1999) ..... 13

*Peugh v. United States*, 569 U.S. 530 (2013) ..... 11

*Rita v. United States*, 551 U.S. 338 (2007) ..... 12

*Rosales-Mirales v. United States*, 585 U.S. 129 (2018) ..... 15

*Sinisterra v. United States*, 600 F.3d 900 (8th Cir. 2010) ..... 8

*Stinson v. United States*, 508 U.S. 36 (1993) ..... 21

*United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009) ..... 16

*United States v. Acevedo-Hernandez*, 898 F.3d 150 (1st Cir. 2018) ..... 4

*United States v. Aguilar*, 645 F.3d 319 (5th Cir. 2011) ..... 9

*United States v. Asbury*, 27 F.4th 576 (7th Cir. 2022) ..... 4, 16

*United States v. Bah*, 439 F.3d 423 (8th Cir. 2006) ..... 3, 18

*United States v. Collins*, 800 F. App'x 361 (6th Cir. 2020) ..... 18

*United States v. Cruz*, 592 F. App'x 623 (9th Cir. 2015) ..... 2, 3, 10

*United States v. Davila*, 569 U.S. 597 (2013) ..... 13, 21

*United States v. Davis*, 863 F.3d 894 (D.C. Cir. 2017) ..... 9

*United States v. Fitzpatrick*, 126 F.4th 348 (4th Cir. 2025) ..... 20

*United States v. Franklin*, 187 F.4th 168 (4th Cir. 2026) ..... 4

*United States v. Gieswein*, 887 F.3d 1054 (10th Cir. 2018) ..... 4, 16

*United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012) ..... 19

*United States v. Gomez-Jimenez*, 750 F.3d 370 (4th Cir. 2014) ..... 4, 19

*United States v. Grady*, 18 F.4th 1275 (11th Cir. 2021) ..... 18

*United States v. Hall*, 979 F.3d 1107 (6th Cir. 2020) ..... 2, 9

*United States v. Henry*, 1 F.4th 1315 (11th Cir. 2021) ..... 5, 17

*United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005) ..... 9

*United States v. Howard*, 773 F.3d 519 (4th Cir. 2014) ..... 20

*United States v. Icaza*, 492 F.3d 967 (8th Cir. 2007) ..... 15, 18

*United States v. Kamper*, 748 F.3d 728 (6th Cir. 2014) ..... 4

*United States v. Kasenge*, 660 F.3d 537 (1st Cir. 2011) ..... 10

*United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992) ..... 10

*United States v. Langford*, 516 F.3d 205 (3d Cir. 2008) ..... 15, 21

*United States v. Mills*, 917 F.3d 324 (4th Cir. 2019) ..... 19

*United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011) ..... 10

*United States v. Morrison*, 852 F.3d 488 (6th Cir. 2017) ..... 18

*United States v. Nixon*, 130 F.4th 420 (4th Cir. 2025) ..... 20

*United States v. Ouellette*, 985 F.3d 107 (1st Cir. 2021) ..... 18

*United States v. Raia*, 993 F.3d 185 (3d Cir. 2021) ..... 4, 21

*United States v. Sanchez*, 659 F.3d 1252 (9th Cir. 2011) ..... 2

*United States v. Seabrook*, 968 F.3d 224 (2d Cir. 2020) ..... 3, 4, 15, 17

*United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) ..... 9

*United States v. Still*, 6 F.4th 812 (8th Cir. 2021) ..... 5, 17

*United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017) ..... 4, 16

*United States v. Vonn*, 535 U.S. 55 (2002) ..... 15

*United States v. Williams*, 5 F.4th 973 (9th Cir. 2021) ..... 4, 16

*United States v. Wright*, 642 F.3d 148 (3d Cir. 2011) ..... 15

*United States v. Young*, 470 U.S. 1 (1985) ..... 2, 8

*United States v. Zuk*, 874 F.3d 398 (4th Cir. 2017) ..... 20

*Williams v. United States*, 503 U.S. 193 (1992) ..... 3, 13, 14

**Statutes**

18 U.S.C. § 2423(c) and (e) ..... 6

18 U.S.C. § 3553 ..... 16

18 U.S.C. § 3553(a) ..... 6, 15

18 U.S.C. § 3553(a)(4)(A) ..... 20

28 U.S.C. § 1254(1) ..... 1

**Rules**

Fed. R. Crim. P. 52 ..... 1

Fed. R. Crim. P. 52(a) ..... 3, 13

Fed. R. Crim. P. 52(b), ..... 14

U.S.S.G. § 2G1.3(b)(2)(B) ..... 6

## PETITION FOR WRIT OF CERTIORARI

Petitioner Jack Benson Flanders respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit can be found at *United States v. Flanders*, No. 24-4120 (4th Cir. Aug. 4, 2026), ECF No. 44, and is set forth at App. 1A.

## JURISDICTION

The judgment of the court of appeals was entered on August 4, 2026. Mr. Flanders did not seek rehearing or rehearing en banc.

Jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in relevant part: "No person shall … be deprived of life, liberty, or property, without due process of law."

## FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 52 provides:

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

(b) **Plain error**. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

## INTRODUCTION

1. Over forty years ago, this Court held it was plain "error" for a prosecutor "to try to exhort the jury to 'do its job'" because "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice." *United States v. Young*, 470 U.S. 1, 18 (1985). There, this Court found the error was not prejudicial due to the overwhelming evidence of the defendant's guilt and "the context of the prosecutor's remarks and defense counsel's broadside attack." *Id.* at 18-20.

In the wake of *Young*, courts have identified numerous, often conflicting, factors for evaluating prejudice from an improper closing argument. The Ninth Circuit has held arguments made during rebuttal "increase[] the risk that the inflammatory statement would improperly influence the jurors." *United States v. Sanchez*, 659 F.3d 1252, 1261 (9th Cir. 2011); *see also United States v. Cruz*, 592 F. App'x 623, 624 (9th Cir. 2015) ("[T]he prosecutor's rebuttal argument was the last thing the jury heard before beginning deliberation; this timing increased the risk that the prosecutor's improper statement influenced the jurors."). The Fourth Circuit below, however, concluded the argument's presence "at the end of a lengthy summary of the evidence … was unlikely to mislead or distract the jury." App. 3A. Additionally, the Sixth Circuit has "found that general curative instructions given after closings, and not right after the prejudicial statements, might not cure their prejudicial impact." *United States v. Hall*, 979 F.3d 1107, 1120 (6th Cir. 2020). The Fourth Circuit below, however, concluded Flanders was not prejudiced in part because "while the district court did not address the specific comment Flanders

challenges, it did instruct the jury not to consider attorneys' statements, including those in closing argument, as evidence." App. 3A.

This Court's review is warranted to resolve these tensions and determine what weight these factors should be given. A "do the right thing" closing argument made at the end of a prosecutor's rebuttal should not be plain error in one circuit, *see Cruz*, and harmless error in another, *see* App. 2A-3A.

2. District courts must properly calculate the Guidelines and explain a defendant's sentence, with a more detailed explanation required when the district court departs from the applicable Guidelines range. *Gall v. United States*, 552 U.S. 38, 49-50 (2007). If preserved, a misapplication of the Guidelines is subject to harmless error analysis on appellate review pursuant to Fed. R. Crim. P. 52(a). *See Williams v. United States*, 503 U.S. 193, 204 (1992).

This case presents a recurring issue where a district court attempts to "insulate its sentence from [appellate] review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did." *United States v. Seabrook*, 968 F.3d 224, 233-234 (2d Cir. 2020). Such a statement by a district court during sentencing is commonly referred to as an "alternative sentence." *United States v. Bah*, 439 F.3d 423, 430 (8th Cir. 2006). The circuit courts have fractured multiple ways when evaluating Guidelines calculation errors under harmless error when confronted with an alternative sentence and the need for a district court to explain its sentence.

The first, and majority, view is that "it is not enough for the district court to say the same sentence would have been imposed but for the error." *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017). Instead, the district court must comply with *Gall* and "state its justifications with enough specificity" to provide enough context for effective appellate review. *Seabrook*, 968 F.3d at 235. The Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits are in accord.[1]

In contrast, the second view finds procedural errors harmless when "the district court has expressly stated in a separate and particular explanation that it would have reached the same result" had it not erred. *United States v. Gomez-Jimenez*, 750 F.3d 370, 383 (4th Cir. 2014). Consequently, if the district court issues an alternative sentence, these circuits will affirm the sentence unless it is substantively unreasonable. *Id.* at 382. In varying degrees, the First, Fourth, and Sixth, are in accord.[2] The Fourth Circuit applied this approach to affirm Flanders' sentence. *See* App. 4A-5A.

The third view takes the most deferential approach. The Eighth and Eleventh Circuits require little more than a simple statement that the district court

---

[1] *See United States v. Seabrook*, 968 F.3d 224, 233-234 (2d Cir. 2020); *United States v. Raia*, 993 F.3d 185, 196 (3d Cir. 2021); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017); *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021); *United States v. Gieswein*, 887 F.3d 1054, 1062-1063 (10th Cir. 2018).

[2] *See United States v. Acevedo-Hernandez*, 898 F.3d 150, 172 (1st Cir. 2018); *United States v. Kamper*, 748 F.3d 728, 743-744 (6th Cir. 2014). Unique amongst all the circuits, the Fourth Circuit applies the majority view to unpreserved Guidelines errors and the second approach to preserved Guidelines errors. *See United States v. Franklin*, 187 F.4th 168 (4th Cir. 2026).

would have imposed the same sentence regardless of any error, rendering harmless error analysis a paper tiger.[3]

This Court's review is warranted due to the differing approaches adopted by the circuits and because of the frequency and importance of this issue. This Court should grant certiorari to promote uniformity in sentencing, the very purpose of the federal Sentencing Guidelines. This Court should conclude, like the majority of circuits to consider the issue, that a Guidelines error is not harmless simply because a district judge issues an alternative sentence.

[3] *United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2021); *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021).

## STATEMENT OF THE CASE

In 2023, Flanders proceeded to trial on one count of engaging in illicit sexual conduct with a minor—his granddaughter—while living in a foreign country in violation of 18 U.S.C. § 2423(c) and (e). At the conclusion of the government's rebuttal closing argument, government's counsel implored the jury to "[d]o the right thing" and "[f]ind him guilty." App. 19A. The jury acquiesced in that request.

At sentencing, Flanders raised several arguments regarding the application of enhancements under the United States Sentencing Guidelines. The district court overruled these objections. After the district court pronounced its sentence of 198 months' imprisonment, the district court stated it "would have imposed the same sentence as an alternate variance sentence in light of all of the 18 U.S.C. Section 3553(a) factors and in light of the totality of the circumstances present in this case." App. 20A.

Flanders filed a timely notice of appeal, challenging the proprietary of the prosecution's closing argument as well as the correctness of the district court's undue influence Guidelines enhancement, *see* U.S.S.G. § 2G1.3(b)(2)(B), in light of this Court's decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019). On August 4, 2026, the Fourth Circuit issued an unpublished per curiam decision affirming Flanders' conviction and sentence. The Fourth Circuit concluded the government's closing argument was improper; however, the Fourth Circuit found the argument was not prejudicial because the argument "was … confined to a single, brief statement at the end of a lengthy summary of the evidence that was unlikely to mislead or distract the jury." App. 3A. The Fourth Circuit also declined to review Flanders'

Guidelines challenge because the Fourth Circuit determined any error was harmless based on the district court's statement that, in the alternative, it would have imposed the same sentence. *See* App. 4A-5A.

## REASONS FOR GRANTING THE PETITION

### I. This Court Should Grant Certiorari to Determine the Degree of Prejudicial Impact from a Prosecutor's Improper Closing Argument.

While not "every improper and unfair argument of a … prosecutor" is a "due process violation," *Caldwell v. Mississippi*, 472 U.S. 320, 338 (1985), those which are "quite focused, unambiguous, and strong … might so affect the fundamental fairness of the … proceeding," *id.* at 340. One such argument is to implore the jury to "do its job," which "has no place in the administration of criminal justice." *Young*, 470 U.S. at 18. A variant on that argument—to "do the right thing"— asks the jury "to send a message with its verdict" by, in part, "[having] the courage to do the right thing" and convict the defendant. *Sinisterra v. United States*, 600 F.3d 900, 910 (8th Cir. 2010).

The government ended its rebuttal closing argument by exhorting the jury to "[d]o the right thing. Find him guilty." App. 19A. The Fourth Circuit concluded the "statement was improper." App. 3A. The Fourth Circuit, however, found Flanders was not prejudiced by the argument because it was "confined to a single, brief statement at the end of a lengthy summary of the evidence that was unlikely to mislead or distract the jury." App. 3A. The Fourth Circuit also noted the government's trial evidence "included the extensive and detailed testimony of the victim, as well as testimony from other witnesses that corroborated and supported the victim's testimony." App. 3A. Finally, the Fourth Circuit concluded that "while the district court did not address the specific comment Flanders challenges, it did

instruct the jury not to consider attorneys' statements, including those in closing argument as evidence." App. 3A.

The Fourth Circuit's determination Flanders was not prejudiced is the latest in a series of decisions which cannot agree on the prejudicial weight to assign these aspects of a prosecutor's closing argument. Numerous circuits have concluded that "remarks" that are "among the final arguments presented to the jurors prior to their deliberations" are more harmful than arguments made during a closing presentation. *United States v. Solivan*, 937 F.2d 1146, 1156 (6th Cir. 1991). Since such arguments are "the last words to the jury, the potential for prejudice from an impermissible closing statement is heightened." *United States v. Davis*, 863 F.3d 894, 907 (D.C. Cir. 2017). Arguments made at the end of a rebuttal presentation are particularly damaging because "[d]efense counsel [is] left with no opportunity to rebut the allegations." *United States v. Holmes*, 413 F.3d 770, 776 (8th Cir. 2005). The Fourth Circuit in this case, however, found it a mitigating factor instead of a prejudicial factor that the government's impermissible argument was "a single, brief statement at the end of a lengthy summary." App. 3A.

Additionally, circuits have "found that general curative instructions given after closings, and not right after the prejudicial statements, might not cure their prejudicial impact." *Hall*, 979 F.3d at 1120. "[S]uch generic instructions only moderately reduce any prejudice." *United States v. Aguilar*, 645 F.3d 319, 326 (5th Cir. 2011). This is because generic instructions do "not mention the specific statements of the prosecutor and [are] not given immediately after the damage was

done." *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992). The Fourth Circuit below, however, concluded Flanders was not prejudiced because the district court "instruct[ed] the jury not to consider attorneys' statements, including those in closing argument, as evidence." App. 3A. Other circuits have addressed similar claims in that fashion. *See*, *e.g.*, *United States v. Moore*, 651 F.3d 30, 53-54 (D.C. Cir. 2011) ("[T]he district court gave general limiting instructions on the arguments of counsel to the jury at the beginning of the trial, after the prosecutor's opening argument, and during the final instructions to the jury before it began deliberating."); *United States v. Kasenge*, 660 F.3d 537, 543 (1st Cir. 2011) (concluding "any potential harmful effect from the prosecutor's closing statement was safeguarded by the district court's final jury instructions" that "[a]rugments and statements by the lawyers are not evidence").

The differing approaches are borne out by comparison to the Ninth Circuit's decision in *Cruz*. There, the government implored the jury to "[f]ind him guilty and do the right thing and make him finally take responsibility for what he did." *Cruz*, 592 F. App'x at 624. The Ninth Circuit reversed and remanded for a new trial on plain error review, concluding "the court did not give a curative instruction" and "the prosecutor's rebuttal argument was the last thing the jury heard before beginning deliberation; this timing increased the risk that the prosecutor's improper statement influenced the jurors." *Id.* The argument, timing, and circumstances are the same, yet *Cruz* found plain error and ordered a new trial and

the Fourth Circuit found the same circumstances mitigated the prejudice Flanders suffered from the government's closing argument.

Consequently, this Court's review is warranted. The circuits cannot agree on which factors are relevant for consideration and cannot agree on whether those factors support a finding of prejudice or militate against such a finding. While "the process of constitutional line drawing in this regard is necessarily imprecise," it should not be this imprecise. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). A "do the right thing" argument should not be held to be a due process violation in the Ninth Circuit but not in the Fourth Circuit. This Court should grant certiorari.

## II. This Court Should Grant Certiorari to Resolve a Deep and Entrenched Circuit Split over Review of a District Court's Misapplication of the Guidelines when the District Court also Pronounced an Alternative Sentence.

The Guidelines play a "central role in sentencing" and frequently are determinative of the actual sentence. *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). This is because "[t]he post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh v. United States,* 569 U.S. 530, 541 (2013).

Because of the centrality of the Guidelines, "district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," and "improperly calculating[] the Guidelines range" constitutes "significant procedural error." *Gall*, 552 U.S. at 50 n.6, 51. Even if the sentencing court "decides that an outside-Guidelines sentence is warranted," it "must give

serious consideration" to "the extent of the deviation" and variances from the Guidelines range must be accompanied by a "justification … sufficiently compelling to support the degree of the variance." *Id.* at 50. When "the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." *Molina-Martinez*, 578 U.S. at 201.

"[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall,* 552 U.S. at 49. In imposing sentence, a sentencing judge "should set forth enough to satisfy the appellate court that [s]he has considered the parties' arguments and has a reasoned basis for exercising [her] own legal decision making authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). The "appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances." *Id.* Finally, when reviewing a sentence on appeal, "the appellate court … must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range … or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51.

Despite this Court's unequivocal directive regarding calculation of the correct Guidelines range and that district courts are to remain cognizant of the Guidelines during sentencing, a circuit split exists about whether "improperly calculating[]"

that range is rendered categorically harmless if the district court simply announces an "alternative sentence": that the district court would have imposed the same sentence regardless of any Guidelines errors it may have committed. In effect an alternative sentence demonstrates that the district court considers the Guidelines unimportant for its sentence.

The majority of circuits have concluded that the requirement of a fulsome sentencing explanation informs the harmless error inquiry when a district judge imposes an alternative sentence. However, a minority of circuits hold the opposite: an alternative sentence renders any Guidelines error harmless regardless of the lack of explanation justifying the alternative sentence.

This Court often grants certiorari to resolve circuit conflicts to ensure harmless error review is properly conducted under Rule 52(a). *See*, *e.g.*, *Williams*, 503 U.S. at 203 (whether incorrect application of the mandatory Guidelines is harmless error); *United States v. Davila*, 569 U.S. 597, 605 (2013) (whether violations of Rule 11(c)(1) are harmless); *Neder v. United States*, 527 U.S. 1, 7 (1999) (whether an erroneous jury instruction harmless error); *Peguero v. United States*, 526 U.S. 23, 24 (1999) (whether failure to advise defendant of right to appeal harmless error). The harmlessness of a Guidelines calculation error is no less important, and this Court should grant certiorari to review this important question. This Court should adopt the majority view because it properly applies this Court's sentencing jurisprudence and is the better interpretation of Rule 52(a), Fed. R. Crim. P.

### A. This Court's Precedents Do Not Answer the Question Presented.

"[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49. If a district court "decides that an outside-Guidelines sentence is warranted, [s]he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50. "[A] major departure should be supported by a more significant justification than a minor one." *Id.*

When a district court errs in calculating the Guidelines, an appellate court does not have to "remand every time a sentencing court might misapply a provision of the Guidelines." *Williams*, 503 U.S. at 202. Instead, "remand is required only if the sentence was 'imposed as a result of an incorrect application' of the Guidelines." *Id.* at 202-203 (emphasis in original). Thus, "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless." *Id.* at 203.

This Court has not refined this harmless error analysis in the context of Guidelines errors. Under plain error review, *see* Rule 52(b), Fed. R. Crim. P., "[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist." *Molina-Martinez*, 578 U.S. at 201. Such a procedural error may be harmless when the "record may show … that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." *Id.* However, "[w]hen a defendant is sentenced under an incorrect Guidelines range … the error itself can, and most often will, be sufficient

to show a reasonable probability of a different outcome absent the error." *Id.* at 198. "In the ordinary case, proof of a plain Guidelines error that affects a defendant's substantial rights is sufficient to meet" a defendant's burden "'to persuade the court that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Rosales-Mirales v. United States*, 585 U.S. 129, 142 n.4 (2018) (quoting *United States v. Vonn*, 535 U.S. 55, 63 (2002)).

Therefore, despite having found that an erroneous Guidelines range calculation is almost always plain error, this Court has not addressed the impact an alternative sentence will have on the harmless error calculus and has only mentioned in passing such alternative sentences in plain error cases.

### B. The Circuits Have Taken Markedly Different Approaches to Alternative Sentence Cases.

#### 1. The Majority of Circuits Require More than Just an Alternative Sentence.

The circuit courts have diverged in the treatment of alternative sentences. A majority of circuits require more than the issuance of an alternative sentence to find harmless error. The Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits find that a Guidelines calculation error is not harmless merely because the district court states it would have sentenced the defendant to the same sentence regardless of any Guidelines errors. These circuits require that a district judge "determine a Guidelines range without the miscalculation error and explain any variance from it based on [18 U.S.C. §] 3553(a) factors." *United States v. Langford*, 516 F.3d 205, 218 (3d Cir. 2008) (citing *United States v. Icaza*, 492 F.3d 967, 971 (8th Cir. 2007)). *See also Seabrook*, 968 F.3d at 233-234; *United States v. Wright*, 642 F.3d 148, 154 n.6

(3d Cir. 2011) ("[A] statement by a sentencing court that it would have imposed the same sentence even absent some procedural error does not render the error harmless" because "it must still begin by determining the correct alternative Guidelines range and properly justify the chosen sentence" in relation to it); *Tanksley*, 848 F.3d at 353 (remanding for new sentencing because "it is not enough for the district court to say the same sentence would have been imposed but for the error"); *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022) (while sentencing courts have discretion to fashion sentences under 18 U.S.C. § 3553, this discretion does not "permit the judge to nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence[,]" and "'a conclusory comment tossed in for good measure' is not enough to make a guidelines error harmless.") (quoting *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reversing Guidelines miscalculation notwithstanding district court's statements "that it would have imposed the same sentence" regardless of the Guidelines); *United States v. Gieswein*, 887 F.3d 1054, 1062-1063 (10th Cir. 2018) (Tenth Circuit "has rejected the notion that district courts can insulate sentencing decisions from review by making … statements" that "its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.'" (quoting statement by district court at sentencing)). These circuits require this additional step be taken before finding a procedural error harmless as "we cannot be certain that the court's calculus would not have been altered had it

appreciated the full extent of the … variance [from the proper Guidelines range] it was contemplating." *Seabrook*, 968 F.3d at 234.

### 2. The Minority Views Find Guidelines Errors Harmless When the District Judge Issues an Alternative Sentence.

In contrast to the majority of circuits, a minority of circuit courts have adopted several differing approaches. Some require little more than a simple statement of an alternative sentence to find a Guidelines error harmless. This effectively relieves the government of any burden to establish the error's harmlessness. Others take the extra step of determining whether the sentence was substantively reasonable. The Fourth Circuit, eschewing all these approaches, stands alone in having one rule for preserved Guidelines errors and a different rule for unpreserved Guidelines errors.

The Eighth and Eleventh Circuits affirm all Guidelines errors based solely on an assertion that the Guidelines made no difference to a district court's choice of sentence. In the Eighth Circuit, an incorrect application of the Guidelines is found to be harmless error "when the [district] court specifies the resolution of a particular issue did not affect the ultimate determination of a sentence, such as when the district court indicates it would have alternatively imposed the same sentence even if a lower [G]uideline range applied." *United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2021). A simple assertion that the Guidelines calculation would not affect the sentence is enough to insulate mistaken Guidelines calculations from appellate review.[4] The Eleventh Circuit takes a similar approach. *See United States v. Henry*,

[4] In two cases from several years ago, the Eighth Circuit conducted a more probing harmless error

1 F.4th 1315, 1327 (11th Cir. 2021) ("[B]ecause the district court stated on the record that it would have imposed the same sentence either way, that is all we need to know to hold that any potential error was harmless."); *accord United States v. Grady*, 18 F.4th 1275, 1291 (11th Cir. 2021) ("a [G]uidelines error is harmless if the district court unambiguously expressed that it would have imposed the same sentence … regardless of how the guidelines objections had come out").

The First and Sixth Circuits give some degree of deference to the district court's assertion that any errors in Guidelines calculations would be harmless yet still review to determine whether a sentence is substantively reasonable. The First Circuit finds a conclusory statement such as "I would impose precisely the same sentence even if the applicable sentencing [G]uidelines range would have been reduced by any or all of the objections made" enough to render error generally harmless, at least where the sentence is "outside of the Guidelines range." *United States v. Ouellette*, 985 F.3d 107, 110-111 (1st Cir. 2021). However, before affirming, the court must "still review the sentence for substantive reasonableness." *Id.* Similarly, the Sixth Circuit finds that "[i]f the record shows that the district court would have imposed its sentence regardless of the Guidelines range, then an error in calculating the Guidelines range is harmless." *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017). *See also United States v. Collins*, 800 F. App'x 361, 362 (6th Cir. 2020) (requiring there be "certainty that the error at sentencing did

analysis before affirming. *See United States v. Icaza*, 492 F.3d 967, 970-71 (2007); *United States v. Bah*, 439 F.3d 423, 432 (2006). However, in more recent cases, the Eighth Circuit follows the above-noted standard.

not cause the defendant to receive a more severe sentence[,]" and that "showing is not easy," requiring appellate court to assess whether "an upward variance from the correct [G]uidelines range would have been reasonable.").

In the Fourth Circuit, to find harmless error for a preserved Guidelines challenge, "we must be certain that '(1) … the district court would have reached the same result even if it had decided the [G]uidelines issue the other way, and (2) [make] a determination that the sentence would be reasonable even if the Guidelines issue had been decided in the defendant's favor.'" *United States v. Gomez*, 690 F.3d 194, 203 (4th Cir. 2012) (citation omitted). *See also United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019) (same). The Fourth Circuit has specifically rejected any requirement that the district court properly calculate the alternative sentence Guidelines range in cases where the defendant preserved a Guidelines challenge. An alternative sentence satisfies "the first element of the assumed error harmless inquiry … because the district court has expressly stated in a separate and particular explanation that it would have reached the same result." *Gomez-Jimenez*, 750 F.3d at 383. Accordingly, an alternative sentence will always render any Guidelines error harmless unless the sentence is substantively unreasonable.

While the Fourth Circuit's approach ostensibly requires a second step, in reality, as in Flanders' case, the substantive reasonableness assessment in the Fourth Circuit is toothless. The Fourth Circuit has only "on rare occasion" concluded that a district court's sentence was substantively unreasonable. *United*

*States v. Howard*, 773 F.3d 519, 531 (4th Cir. 2014); *see also United States v. Zuk*, 874 F.3d 398 (4th Cir. 2017); *United States v. Nixon*, 130 F.4th 420 (4th Cir. 2025); *United States v. Fitzpatrick*, 126 F.4th 348 (4th Cir. 2025). Therefore, in almost all instances, the Fourth Circuit's harmless error inquiry simply devolves into one test: did the district judge issue an alternative sentence? If yes, then any procedural error made by the district judge will be found harmless.

### C. The Majority View Is the Better Approach.

The majority approach more properly implements this Court's sentencing jurisprudence. Trial courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh*, 569 U.S. at 541; *see also* 18 U.S.C. § 3553(a)(4)(A) (directing courts to consider the Guidelines when imposing sentences). If a sentencing determination is truly anchored by the Guidelines, it is not possible to assume the district court would reach the same result from a different Guidelines calculation absent a compelling justification for how the court would get from that calculation to the resulting sentence.

While "a judge [who] sentence[s] within the Guidelines range … often does not need to provide a lengthy explanation," *Chavez-Meza v. United States*, 585 U.S. 109, 113 (2018), this Court requires that "a major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50. The majority approach to harmless error review is faithful to *Gall*'s directives, as it requires that a district court justify its alternative sentence. Under the minority approach, alternative sentences need not comply with *Gall*.

Under the majority approach, an alternative sentence can render any procedural error harmless only if the district court's alternative sentence complies with *Gall*, thereby giving both lines of this Court's sentencing jurisprudence full effect. The minority view would discard *Gall* no matter the significance of the procedural error or degree of departure from the appropriate Guidelines range. This jettison of the Guidelines and *Gall* cannot be this Court's intent.

The question recurs frequently and is unquestionably important in light of the centrality of the Guidelines in sentencing. Moreover, it is counterintuitive that when the defendant has preserved the error and the claim is "governed by the more lenient harmless-error standard of Rule 52(a) rather than the more exacting plain-error standard of Rule 52(b)[,]" *Greer v. United States*, 593 U.S. 503, 511-512 (2021), he is less likely to win on appeal than in the plain error context. *See Davila*, 569 U.S. at 607 ("When Rule 52(a)'s 'harmless-error rule' governs, the prosecution bears the burden of showing harmlessness.").

"It is a *'rare case* where [courts] can be sure that an erroneous Guidelines calculation did not affect the sentencing process and the sentence ultimately imposed.'" *United States v. Raia*, 993 F.3d 185, 195 (3d Cir. 2021) (quoting *Langford*, 516 F.3d at 219) (emphasis in original). Since the Fourth Circuit applied the minority view to the district court's alternative sentence, its judgment should be vacated.[5]

[5] Flanders suggests this Court hold this petition for its decision in *Beaird v. United States*, No. 25-5343, as Flanders' underlying challenge to his Guidelines range rests on this Court's decision in *Kisor* modifying *Stinson v. United States*, 508 U.S. 36 (1993). If this Court concludes *Stinson* remains a correct statement of the law regarding the Guidelines commentary, then this issue is moot as

## CONCLUSION

For the reasons given above, Flanders' petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM F. NETTLES, IV
Federal Public Defender
for the District of South Carolina

s/ *Jeremy A. Thompson*
JEREMY A. THOMPSON
*Counsel of Record*
Assistant Federal Public Defender
Federal Public Defender's Office
District of South Carolina
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
803.765.5079
Jeremy_Thompson@fd.org
***Counsel for Petitioner***

October 30, 2026

Flanders' challenge is dependent on the text of the Guidelines controlling without regard to the commentary's interpretation of the Guidelines.