NO. 19-1060

In the

Supreme Court of the United States

VICTOR THOMAS,

PETITIONER,

v.

NEW YORK,

RESPONDENT.

On Petition for Writ of Certiorari to the New York Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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March 20, 2020

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2(b), the Cato Institute ("Cato") respectfully requests leave to submit a brief as *amicus curiae* in support of the petition for writ of certiorari filed by petitioner Victor Thomas. As required under Rule 37.2(a), Cato timely provided notice to all parties' counsel of its intent to file this brief more than 10 days before its due date. Petitioners consented to the filing of this brief. Respondent did not.

Cato often participates in cases before this Court on issues of national importance, consistent with its mission of advancing the principles of individual liberty, free markets, and limited government. Cato seeks to assist the Court by highlighting some of the important constitutional principles at stake in this case, while also explaining the practical consequences of prosecutors' growing use of plea agreements that require defendants to waive any right to file a notice of appeal. One of Cato's scholars and counsel has written extensively on this subject, addressing the serious problems presented by coercive plea bargaining. *See* Clark M. Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 Fed. Sent'g Rep. 284, 285 (2019).

Cato urges the Court to grant review because the decision below raises an exceptionally important question concerning prosecutors' frequent use of waiver provisions designed to strip defendants of their rights to file a notice of appeal even with regard to claims of constitutional error that are not supposed to

be subject to waiver. Because no-notice-of-appeal waivers are designed to prevent further judicial review, there are compelling reasons for the Court to grant the petition and clarify this important area of federal law.

For these reasons, and because Cato is well-equipped to help the Court evaluate the petition for certiorari, the Court should grant this motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[*]

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal-justice system, and accountability for law-enforcement officers. This case implicates several of those important issues.

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[*] Counsel for all parties received notice of Cato's intent to file this brief 10 days before its due date. Because respondent did not consent, Cato has submitted a motion for leave to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prosecutors have a strong institutional interest in ensuring that when a defendant pleads guilty, the case ends, further review is precluded, and the prosecutors' work is shielded from scrutiny. As a result, prosecutors increasingly require that defendants include a no-notice-of-appeal waiver in their plea agreements. These provisions require defendants to agree not only that they will not appeal but also that they will not cause their attorney to undertake the ministerial task of filing a notice of appeal necessary to preserve any rights they might have.

There is an urgent need for this Court to address the legality of these provisions and to clarify when, if ever, a no-notice-of-appeal waiver is appropriate. Precisely because no-notice-of-appeal waivers are designed to cut off a defendant's appellate rights, the important issues raised in the petition often evade meaningful review. Moreover, and especially in light of this Court's recent decision in *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019), this case presents a good vehicle for the Court to provide further clarity in this important area of federal law.

As set forth in more detail below, the Court's intervention is justified for at least three reasons.

First, courts have long held that there are certain types of challenges on appeal that cannot be waived, including claims that address the power of the state to prosecute and claims that serve to protect certain important structural constitutional interests. Including no-notice-of-appeal waivers in plea

agreements appears to be a backdoor attempt to prevent these types of non-waivable claims from being considered on appeal.

Second, with the growth of plea agreements, scholars have recognized that prosecutors possess extraordinary leverage to pressure a defendant into pleading guilty and giving up the right to trial. Given that marked imbalance, it is important that defendants not be precluded from seeking appellate review when a non-waivable error has infected the prosecution's case and, inevitably, any ensuing guilty plea.

Third, clarifying when, if ever, a no-notice-of-appeal provision may be included in a plea agreement should relieve pressure from overburdened collateral-review processes. This Court is in the best position to protect the federal judiciary by ensuring that non-waivable claims that survive a guilty plea are promptly and efficiently resolved on direct review. Facilitating direct review is preferable to having claims channeled into collateral habeas review in the form of complaints that counsel was ineffective during the plea-bargaining process.

ARGUMENT

I. The Court Should Grant Review to Address the Significant Constitutional Concerns Raised by the Use of No-Notice-of-Appeal Waivers.

Despite any purported waiver of appellate rights in a defendant's plea agreement, this Court has recognized that parties cannot waive their rights to raise certain issues on appeal. *See Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) ("[N]o appeal waiver serves as an absolute bar to all appellate claims"). Defendants are entitled to challenge their pleas, including any purported waiver, as unknowing or involuntary, and "all jurisdictions appear to treat at least some claims as unwaiveable." *Id.* at 745; *see also Class v. United States*, 138 S. Ct. 798 (2018) (holding that an unconditional guilty plea does not waive certain types of constitutional claims).

Some courts have held, for example, that a defendant "always retains the right to challenge the legality of the sentence or the voluntariness of the plea," *People v. Seaberg*, 541 N.E.2d 1022, 1026 (N.Y. 1989), and that a defendant can always assert "the constitutionally protected right to a speedy trial" or raise "questions as to the defendant's competency to stand trial." *People v. Callahan*, 604 N.E.2d 108, 112 (N.Y. 1992). Other courts have concluded that a defendant cannot waive "claims concerning constitutional violations that arise after the entry of the plea," "the right to effective assistance of counsel in a plea agreement," "the right to be sentenced free from constitutionally impermissible factors such as race," or "the right to challenge a sentence in a plea

agreement that exceeds the court's statutory authority." *In re Schorr*, 422 P.3d 451, 455–56 (Wash. 2018), *as amended* (Oct. 9, 2018). Courts have similarly concluded that a waiver of appellate rights does not extinguish challenges raising "competency to plead guilty, … subject matter jurisdiction[,] … [or] failure to charge a public offense." *Grigsby v. Commonwealth.*, 302 S.W.3d 52, 54 (Ky. 2010) (quoting *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008)).

Underlying these decisions is a recognition that certain rights not only protect the interests of the individual defendant but are also essential to safeguarding broader constitutional interests that are important to the criminal justice system as a whole. *See Class*, 138 S. Ct. at 803 (explaining that a guilty plea does not bar vindictive prosecution claims, which "implicate[] the 'very power of the State' to prosecute the defendant") (citing *Blackledge v. Perry,* 417 U.S. 21, 30 (1974)); *see also Bond v. United States*, 564 U.S. 211, 223 (2011) (recognizing that individual lawsuits are suitable for enforcing principles of "separation of powers and checks and balances"). Plea agreements that prohibit a defendant from filing a notice of appeal interfere with those interests by removing an essential check on the lower courts and the conduct of prosecutors.

Subject-matter jurisdiction, for example, goes to the inherent power of a court to hear a case, and a court lacking subject-matter jurisdiction lacks "the power to adjudicate the case before it." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 560 (2017). When a trial court lacks subject-matter jurisdiction

but nevertheless permits a plea agreement containing a no-notice-of-appeal waiver, that agreement prevents appellate review even if the trial court has exceeded the scope of its proper jurisdiction. In doing so, the no-notice-of-appeal waiver operates in effect as both a *grant* of subject-matter jurisdiction to the trial court and a *withdrawal* of the jurisdiction of the court of appeals to determine whether the trial court had jurisdiction in the first instance. Neither is permissible: "parties cannot confer subject matter jurisdiction on the courts by agreement." *Wilson v. Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 593 (10th Cir. 1996); *see also United States v. Griffin*, 303 U.S. 226, 229 (1938) (noting that "lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties").

Similarly, in situations where the prosecutor has failed to properly identify a violation of a statute defining a public offense or where the agreed-on sentence is outside the court's authority to impose, the plea-bargaining process can be wielded to redefine what constitutes a criminal act or what sentence is permissible. It is, of course, the province of the legislature to assign subject-matter jurisdiction to courts, to determine what class of actions constitute public offenses, and to assign ranges of permissible punishments for those offenses. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006) (noting Congress's "prerogative to restrict the subject-matter jurisdiction of federal district courts"); *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993) (explaining that "the primary responsibility for fixing criminal penalties lies with the legislature"); *Lambert v. California*, 355 U.S. 225, 228 (1957) (noting lawmakers' "wide latitude … to

declare an offense"). A plea agreement with a no-notice-of-appeal provision thus opens the possibility of prosecutors, with the acquiescence of the judiciary, encroaching on the powers of the legislative branch. *Cf. Papachristou v. City of Jacksonville,* 405 U.S. 156, 165–69 (1972).

A no-notice-of-appeal waiver also chills a defendant's ability to challenge any abrogation of the defendant's nonwaivable rights. The number and variety of nonwaivable rights, as well as jurisdiction-to-jurisdiction differences, make it difficult for any counsel—much less an unrepresented defendant—to ensure that nonwaivable rights are all properly excluded from the scope of a no-notice-of-appeal waiver. That is especially true in circumstances such as the one presented here, where the prosecutor ambushed the defendant (and the court) with the no-notice-of-appeal waiver after the defendant had already allocuted to the facts of the crime. Pet. 6 (citing CR92–94).

Petitioner offers a strong argument that the best way to resolve these significant concerns is to extend *Garza* and set forth a bright-line rule that no-notice-of-appeal waivers are never appropriate. But whether to adopt a bright-line rule or to take some other approach is at least a question worthy of this Court's consideration. And because no-notice-of-appeal provisions are designed to evade further review, this case presents a good opportunity for the Court to address this important issue.

II. The Court's Review Is Warranted Because the Important Issues Raised in This Case Are Increasingly Recurring.

The Court's intervention is also appropriate because the use of no-notice-of-appeal waivers has grown dramatically. With this growth, the potential for misuse has become a well-known feature of the criminal-justice system.

Plea bargaining is a relatively recent innovation in criminal law. It did not exist at the Founding and does not appear to have been contemplated by the Founders. *See* Clark M. Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 Fed. Sent'g Rep. 284, 285 (2019). Nonetheless, the plea-bargaining process has become the indispensable engine of our criminal-justice system. *See Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("[P]lea bargaining…. is not some adjunct to the criminal justice system; it *is* the criminal justice system.") (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)). Indeed, more than 95% of criminal convictions result from guilty pleas. *See Class*, 138 S. Ct. at 807 (Alito, J., dissenting) ("Roughly 95% of felony cases in the federal and state courts are resolved by guilty pleas."); William Ortman, *Second-Best Criminal Justice*, 96 Wash. U. L. Rev. 1061, 1070 (2019) (noting that felony trial rates in the three largest states—New York, Texas, and California—vary from 2.1% to 4.0%).

Felony defendants face enormous pressure to agree to plead guilty. Because crimes often have overlapping definitions, prosecutors can stack multiple charges for the same conduct into *non-*

overlapping counts. Neily, *supra*, at 287. They are also able to select from a menu of different severities of the same crime, threatening the defendant with the risk of a heavier punishment than the conduct warrants. *Id.* Moreover, depending on what charge the prosecutor decides to pursue, the defendant may face mandatory-minimum sentences or be subject to enhancements with their own mandatory minimums. *Id.* The result is that prosecutors often have a high degree of coercive flexibility, while defendants generally face a high cost if they insist on their constitutional right to trial: by threatening a harsh *potential* sentence at trial and offering a relatively lenient *bargained* sentence, a prosecutor can increase pressure to a point where no rational defendant would risk going to trial, regardless of the defendant's guilt or innocence. *See id.* at 291.

Prosecutors also have other tools that can be employed to pressure defendants into a guilty plea. For example, prosecutors can impose pretrial detention, which carries a host of consequences—from the accused's physical misery to his inability to assist in his defense to loss of employment. *Id.* at 286. Prosecutors may also use criminal forfeiture to seize assets that may have little or nothing to do with the actual crime, but that would otherwise allow the defendant to retain better qualified counsel and make it harder for the prosecutor to succeed at trial. *Id.*

The result is that prosecutors can often bring pressure to bear to force even an *actually innocent* defendant into capitulation by making the guilty plea the only rational choice in the face of the penalties the defendant risks at trial. That also allows prosecutors

to avoid the risk of addressing weakness in their own cases. *See* Ortman, *supra*, at 1078 ("With outsized prosecutorial leverage, plea bargaining makes uncertainty about whether a defendant is guilty less relevant—and sometimes irrelevant—to punishment."). As one scholar has concluded, "our criminal justice system's commitment is to minimizing trials, not errors." *Id.* at 1083.

To some extent, these risks are inherent in a system that requires prosecutors to advocate zealously for their *de jure* and *de facto* clients—the public and its elected government. *See* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies & Conflicts of Interest in Prosecutors' Offices*, 22 Cornell J.L. & Pub. Pol'y 53, 70 (2012) (the prosecutor serves as "advocate for the prosecution and administrator of justice," and in that dual role must "zealously represent[] the client (the prosecution) in a role closely akin to that of the defense attorney"). But the problems are exacerbated when prosecutors' one-sided power combines with similarly one-sided incentives to prioritize efficient outcomes over just ones. For example, prosecutors are often evaluated by "conviction rates and sentence lengths." *See* Leonetti, *supra,* at 77. The system rewards prosecutors willing to maximize their efficiency by employing the strongest strong-arm tactics: "punishment is not merely a matter of justice, but an adversarial tool to be used to increase conviction rates, particularly through the coercive practices of plea bargaining." *Id.* at 82.

The result is a justice system in which "innocent people regularly confess to crimes they did not

commit, and defendants who exercise their right to trial and lose receive sentences that are far more severe than they truly deserve." Neily, *supra*, at 284. The system trades "the transparency, accountability, and legitimacy of jury trials" for "the efficiency of coerced confessions." *Id.*

Enter the no-notice-of-appeal waiver. Much like the coercive plea bargain itself, the no-notice-of-appeal waiver serves to insulate the prosecutor's career-bolstering conviction rate from the inconvenient risk that a court will conclude that the prosecutor has taken improper or even unconstitutional shortcuts to secure the conviction.

In advancing the absolute finality of a trial court plea, these waivers serve no higher purpose than unbridled efficiency and prosecutor protection. After all, absent truly egregious misconduct or a significant error, a criminal defendant is unlikely to escape the plea he has been forced to make. On direct appeal, the deck is already stacked against a defendant who has pleaded guilty. Appellate courts review trial courts' plea-related decisions with significant deference. In the federal system, for example, district courts' findings of fact are reviewed only for clear error, and their decisions regarding a motion to withdraw a guilty plea only for an abuse of discretion. *See, e.g.*, *United States v. Rose*, 891 F.3d 82, 85 (2d Cir. 2018). When an issue is raised for the first time on appeal, the standard is the even more demanding plain-error standard, requiring the defendant to show an error "that is 'plain'" and that "'affect[s] substantial rights.'" *United States v. Olano*, 507 U.S. 725, 732 (1993); *see also* Fed. R. Crim. P. 52(b). And even after finding

such an error, the court should exercise its discretion to correct the error only if it "seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

In light of the standards that apply, tacking a no-notice-of-appeal waiver onto a plea serves only to further insulate from appellate review potential abuses by prosecutors, prejudicial omissions by defense counsel, and errors of constitutional dimension by trial-court judges in assessing the fairness of the bargained plea. Moreover, the coercive nature of the "bargaining" process itself increases the likelihood that nonwaivable errors will escape review. Many of those errors would undoubtedly be revealed, corrected, or even rendered moot by further pretrial proceedings or at trial. But when the prosecutor presents a take-it-or-leave-it plea-bargain offer that incorporates a no-notice-of-appeal waiver, the structural deficiencies in the prosecutor's case become even more likely to escape review—compounding the initial error's prejudice to the defendant.

III. The Court Should Grant Review Because No-Notice-of-Appeal Waivers Channel Potentially Meritorious Challenges into Inefficient Collateral Proceedings.

Collateral challenges to criminal convictions are a constitutionally mandated safety valve when direct appeals fail to correct errors in a defendant's criminal proceedings. As this Court is well aware, collateral challenges to criminal convictions remain a resource-intensive part of the criminal-justice process. *See Harrington v. Richter*, 562 U.S. 86, 91–92 (2011)

(noting that the commitment to "reviewing petitions for the writ" of habeas corpus "entails substantial judicial resources"); *see also* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. Chi. L. Rev. 519, 520–21 (2014) (noncapital habeas petitions represent about one out of every fifteen federal district court cases filed, and between eight and twenty percent of this Court's docket).

When a convicted defendant has a meritorious claim that the courts could have dealt with on direct appeal, the prosecutor's decision to impose a no-notice-of-appeal waiver means that the plea-bargained conviction can only be channeled through this resource-intensive collateral system—as, for example, a habeas challenge on ineffective-assistance grounds—instead of being assessed on direct appeal. That imposes burdens on nearly all participants in the system. Courts and judges are faced with assessing a colder-than-usual record. They also must navigate a host of interlocking presumptions imposed by Congress in the Antiterrorism and Effective Death Penalty Act. Because of the law's relative complexity, and the fact-intensive nature of the review, courts often err in their assessment, requiring further appellate correction. *See Burt v. Titlow*, 571 U.S. 12, 15 (2013) (reversing Court of Appeals' decision for failure to use a "doubly deferential" standard of review giving both state court and defense attorney the benefit of the doubt); *id.* at 24–25 (Sotomayor, J., concurring) (reasoning that the case "turn[ed] on" a question of "enough evidence"). Habeas counsel must seek ever more creative means of framing claims of ineffective assistance, throwing colleagues of the defense bar under the bus. *See id.* at 15. And the

convicted defendant—more precisely, the potentially invalidly convicted defendant—is left watching this process unfold over a period of years with a view obstructed by prison bars.

The better option for all participants in the criminal process is generally the most direct—allow the defendant's appeal to proceed on whatever unwaived or nonwaivable grounds survive the bargained plea. That way, fewer errors remain in the record, and any eventual habeas challenges can be more narrowly focused and easier to assess. Accordingly, by explaining when, if ever, a no-notice-of-appeal waiver is permissible, this Court can reduce the burden on courts on collateral review.

CONCLUSION

The Court should grant the petition for review.

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