No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSUE OSVALDO SOLIS, PETITIONER

V.

UNITED STATES OF AMERICA

_____

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, consistent with the Due Process Clause, a defendant can knowingly waive the right to appeal his sentence when his purported waiver occurs before he can appraise and understand the right he is waiving.

2. Whether, under the rules governing the construction of plea agreements and in light of due process fairness considerations, plea agreements containing provisions purporting to waiver a defendant's sentence-appeal rights must be strictly construed against the government and against the purported waiver.

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Josue Osvaldo Solis asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 9, 2019.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unreported opinion of the court of appeals is attached to this opinion as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on August 9, 2019. This petition is filed within 90 days after entry of judgment. See SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent 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 11 provides in pertinent part that:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

. . .

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence[.]

STATEMENT

Pursuant to a plea agreement, Petitioner Josue Solis pleaded guilty to one count of conspiring to transport undocumented immigrants, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii), (v)(I).[1] Fifth Circuit Electronic Record on Appeal (EROA).123-80; EROA.231-41. As part of the agreement, the government promised that, if the district court "determines that Defendant qualifies for an[acceptance-of-responsibility] adjustment under section 3E1.1(a)," it would move for the additional one-level reduction for acceptance of responsibility provided by §3E1.1(b). EROA.235.

After Solis entered his plea, a probation officer prepared a presentence report for the district court. The probation officer found that, under guidelines §2L1.1(a)(3), Solis's base offense level was 12. EROA.271. The officer made a series of increases to the offense level that raised it to 28. EROA.271-73. The last and largest increase was a 10-level adjustment under sentencing guidelines §2L1.1(b)(7)(D) because a woman crossing the Rio Grande to gain entry to the United States had drowned. The officer believed that Solis, who was not at the river, but who later picked up seven aliens, should have foreseen that a death might result from a smuggling venture. EROA.272-73. The probation officer refused

[1] The district court exercised jurisdiction under18 U.S.C. 3231

to recommend a downward acceptance-of-responsibility adjustment, citing the fact that Solis had been in a fight while in jail on the immigrant-smuggling charge. EROA.273

The probation officer determined that Solis had a minimal record and belonged in criminal history category I. EROA.274-75. A criminal history category of I, together with an offense level of 28, yielded an advisory guidelines sentence range of 78 to 97 months' imprisonment. EROA.289; U.S.S.G. Ch.5, Pt.A (sentencing table).

Solis objected to the death-resulted 10-level adjustment and to the probation officer's failure to recommend an acceptance-of-responsibility reduction. EROA.248-50. The government repeatedly advocated in favor of the denial of an acceptance-of-responsibility reduction. It filed a response to Solis's objection in which it argued that an acceptance-of-responsibility decrease should be denied on the facts of the case. EROA.255-56. Solis filed amended objections, again objecting to the §2L1.1(b)(7)(D) increase and again arguing that he deserved an acceptance reduction. The government filed a reply that set out facts that it insisted made an acceptance adjustment unwarranted. EROA.255. The government concluded that it "concurs with U.S. Probation and *recommends that the defendant not receive* credit for Acceptance of Responsibility in this case." EROA.255-56 (emphasis added). The government later filed an amended reply to Solis's objections in which it provided more details about the fight Solis had at the jail and reiterated its recommendation that Solis be denied an acceptance adjustment. EROA.260-61. At sentencing, the government again advocated against an acceptance reduction. EROA.227.

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The district court adopted the calculations in the presentence report. EROA.226. It found that the total offense level was 28. EROA.226. The sentenced Solis to 97 months' imprisonment, the top of the advisory guideline range. EROA.227; *see also* EROA.109.

Solis appealed. He argued that the district court has misapplied the death-resulted adjustment of guideline §2L1.1(b)(7)(D) because he was not shown to be a but-for cause of the drowning that had occurred. But-for causation requires proof that the harm would not have occurred in the absence of the defendant's conduct, and Solis argued that, as he was nowhere near the site of the drowning and had not been involved in urging anyone to cross the river, no conduct of his was involved in the events leading up to the drowning. Solis Br. 14-20 (citing, *inter alia*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-47 (2013); *see also Burrage v. United States*, 571 U.S. 204 (2014)).

Solis also argued in his opening brief that the purported appeal-waiver provision in his plea agreement was not enforceable because the government had breached the plea agreement. In the plea agreement, Solis had agreed to plead guilty, to waive appeal of his sentence, admitted a factual basis for the plea and had made other admissions and concessions. In return for Solis's concessions, the government made two promises to him. The government's first promise was that it would dismiss Counts Two and Three of the indictment. EROA.235. The government's second promise was that "[if] the Court determines that Defendant qualifies for an adjustment under section 3E1.1(a) of the United

States Sentencing Guidelines, and the offense level prior to the operation of section 3E1.1(a) is 16 or greater, the United States will move under section 3E1.1(b) for an additional one level reduction[.]" EROA.235.

Solis contended that, by affirmatively opposing an acceptance-of-responsibility adjustment, the government broke its second promise to him. Rather than leaving it to the district court to determine whether Solis qualified for an acceptance-of-responsibility adjustment under §3E1.1(a), the government actively advocated against a §3E1.1(a) adjustment. *See* EROA.255-56; EROA.260-61; EROA.227. That advocacy, Solis argued, breached the plea agreement and invalidated the purported sentence-appeal waiver in the plea agreement.

The plea agreement also reserved the government's right to bring forth factors related to the sentence. EROA.236. Solis argued that this provision did not change the result, because of the well-settled rules that all terms are meant to be given effect and that specific terms control over general terms in a contract. *See, e.g., Baton Rouge Oil and Chemicals Workers Union,* 289 F.3d 373, 377 (5th Cir. 2002). The government's specific promise to leave the acceptance determination to the district court controlled over its general reservation of a right to bring sentencing factors to the court's attention. Solis contended that, reasonably understood and construed against the government as plea agreement terms must be, *Santobello v. New York*, 404 U.S. 257 (1971), the government's promise to recommend the third-level acceptance adjustment after the district court made its determination on the first two levels of acceptance was a promise that the government would leave the initial two-level acceptance determination under §3E1.1(a) to the district

court. That is, Solis reasonably understood the promise to be that the government would not advocate about the §3E1.1(a) issue. If the district court, on the record, found in Solis's favor, then the government would inform the court that Solis had saved it time and resources and merited the third level. Solis argued that no other understanding accorded any value to the government's promise to him.

This was so because acceptance is always a potentially contestable issue between the parties, and the determination is always for the court. *Cf. United States v. Anderson,* 174 F.3d 515, 525 (5th Cir. 1999) (district court's acceptance determination is a factual finding accorded great deference). Thus, the government would not have had to have put in any language about §3E1.1(a) concerning the determination by the district court if it meant for ordinary procedures to apply. Yet the government included the language. *Cf. Nicolson Pavement Co. v. Jenkins,* 81 U.S. 452, 456-57 (1871) (meaning should be given to each contract term).

In response to Solis's arguments, the government moved to dismiss the appeal. Solis opposed that motion, reiterating and explicating further the arguments made in his opening brief. The court of appeals carried the motion with the case.

After briefing was complete, the court granted the motion and dismissed Solis's appeal. Appendix. The court of appeals decided that "we are not persuaded by Solis's argument that he reasonably understood it to include an additional promise that the Government would refrain from advocating against his qualification for the two-level § 3E1.1(a) reduction." App. at 2. The court found the government's advocacy against the

acceptance reduction "was consistent with a reasonable understanding of the plea agreement and, therefore, not a breach, let alone a clear or obvious one." App. at 2.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO PROVIDE GUIDANCE AS TO WHETHER ANTICIPATORY SENTENCE-APPEAL WAIVER PROVISIONS ARE CONSISTENT WITH DUE PROCESS.

The Court has recognized that plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992)); *Lafler v. Cooper,* 566 U.S. 156, 170 (2012). Over 95% of federal criminal cases are resolved through guilty pleas, and the figure is only slightly lower for state criminal cases. *Frye*, 566 U.S. at 143.

Many factors brought plea bargaining to its predominant place. An accused person may benefit from a plea bargain by reducing the number of charges he faces, or the potential sentence he faces, or simply the time he spends in jail awaiting disposition of the case. *Frye,* 566 U.S. at 144. Prosecutors and the courts do benefit from plea bargaining because neither have been allotted the resources to handle, without plea bargaining, the number of cases that must be heard. Trial of all cases brought has been logistically impossible for decades. *See, e.g, Santobello v. New York,* 404 U.S. 257, 260-61 (1971). Society can benefit from the plea bargaining because quick resolutions of criminal cases may "enhance[e]" the "rehabilitative prospects of the guilty," and because plea bargaining encourages "finality of judgments." *Santobello,* 404 U.S. at 260-61.

Santobello settled that voluntary and intelligent plea agreements between the government and an accused are valid. 404 U.S. at 260-61. *Santobello* also taught that,

because of the broadly dispersed benefits of a plea-bargaining system and the contractual nature of plea-bargain agreements, the government must strictly adhere to the terms and conditions of any plea agreement that is reached. *Id.* at 262; *see also United States v. Roberts,* 624 F.3d 241, 245-46 (5th Cir. 2010). Holding the government strictly to its agreements furthers "the trust between defendants and prosecutors that is necessary to sustain plea bargaining" as an "essential" and "highly desirable" part of the criminal justice system. *Puckett v. United States,* 556 U.S. 129, 141 (2009) (quoting *Santobello,* 404 U.S. at 261-62). The presupposition that underlies our criminal justice system of plea bargains is one of "fairness in securing agreement between an accused and a prosecutor." *Santobello,* 404 U.S. at 261.

In the past two decades that underlying fairness has been challenged in the federal system by the increasing prevalence in plea agreements of a provision purporting to waive the right of the defendant to appeal the sentence imposed upon him. Prosecutors in many federal districts treat the sentence-appeal waiver provision as a routine and required part of reaching a plea agreement. Defendants agree–or accede–to these government-mandated waiver provisions because doing so helps them avoid even harsher potential punishment that may be invoked. *Cf. Frye,* 566 U.S. at 144 (acknowledging that harsh punishments may "exist on the books largely for bargaining purposes"); *see also Branzburg v. Hayes,* 408 U.S. 665, 707-08 (1972) (recognizing significant power grand jury process affords prosecutor); *United States v. Looney,* 532 F.3d 392, 398 (5th Cir. 2008) (recognizing shadow cast over plea bargaining by possibility of prosecutor-added charges and required

sentences). The courts of appeals routinely enforce these sentence-appeal waivers. *See, e.g., United States v. Bond*, 414 F.3d 542 (5th Cir. 2005).

This Court has never explicitly addressed the validity of these anticipatory sentence-appeal waivers. This case presents an opportunity for it to do so, as well as an opportunity to redefine and reinforce *Santobello* for a federal criminal justice system comprised overwhelmingly of guilty pleas and government-written plea agreements containing waiver provisions.

A. Sentence-Appeal Waiver Provisions Appear to Conflict With the Due Process Requirement That the Right Waived Be Known.

A waiver is the intentional "relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also United States v. Olano*, 507 U.S. 725, 732 (1993). Due process requires that waivers be made knowingly. Stated conversely, no valid waiver can be made without knowledge of the right to be waived. *Cf. Newton v. Rumery*, 480 U.S. 386, 390–91 (1987) (approving waiver of right to bring civil suit for false arrest and imprisonment when right to sue had accrued). Sentence-appeal waivers lack the essence of a valid waiver—an accrued and known right.

A federal defendant's right to appeal his criminal sentence is created and guaranteed by a statute, 18 U.S.C. § 3742(a), and includes the right to appeal incorrect applications of the sentencing guidelines and sentences imposed in violation of law. When a defendant signs a plea agreement waiving his sentence-appeal rights ahead of his sentencing, he cannot know whether his counsel will misunderstand or misargue the applicable law, whether the prosecutor will overreach in asserting the applicability of an upward

adjustment, or whether the court will err, factually or legally, in applying the guidelines, let alone the particulars of how any of these errors may occur. The right has not accrued because no error, actual or arguable, has occurred, and no reasonable method of assessing the possibilities of error exists. The Court's precedent that a waiver be the knowing relinquishment of a right suggests that anticipatory sentence-appeal waivers cannot therefore be justified.

The courts of appeals began approving and enforcing sentence-appeal waivers in the early 1990s without fully accounting for this Court's waiver precedent. The Fifth Circuit, for example, first approved sentence-appeal waivers in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992). The *Melancon* court reasoned that, because defendants can waive constitutional rights by pleading guilty, they may also waive statutory rights, including the right to appeal a sentence. This reasoning imbues the decisions of other courts of appeals. *See, e.g.*, *United States v. Khattack*, 273 F.3d 557, 560 (3d Cir. 2001); *United States v. Wiggins*, 905 F.2d 51, 52–54 (4th Cir. 1990); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).

The flaw in the analogy the courts of appeals have drawn between a sentence-appeal waiver and the waiver of constitutional rights that occurs when a defendant pleads guilty is that the defendant does not know what he is waiving in the sentence-appeal context. The rights and the meaning of giving up those rights are known at the guilty plea hearing where they are relinquished: "[O]ne waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In

these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty." *Melancon*, 972 F.2d at 571 (Parker, J., concurring). Due process is satisfied in these circumstances because the defendant knows what he has and thus knows what he is relinquishing. *Cf. Johnson,* 304 U.S. at 464; *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

Because sentence-appeal waivers are made at the time of the guilty plea, rather than after sentencing, the defendant does not and cannot know what he is relinquishing. At the time the "waiver" occurs, no clear, knowable right exists to be waived. Although the courts of appeals have acknowledged that "[t]he basic argument against presentence waivers of appellate rights is that such waivers are anticipatory," *United States v. Teeter,* 257 F.3d 14, 21 (1st Cir. 2001), they have nonetheless routinely upheld them, *see, e.g. United States v. Guillen,* 561 F.3d 527, 529-30 (D.C. Cir. 2009). They have done so by asserting that a waiver of sentence-appeal rights is like a waiver of trial rights in that one does not know for certain what might happen at trial, and have therefore approved anticipatory sentence-appeal waiver if "the record [shows] that [the defendant] knows what he is doing and his choice is made with eyes open[.]" *Guillen,* 561 F.3d at 530 (quoting *United States v. Cunningham,* 145 F.3d 1385, 1391 (D.C. Cir. 1998).

The question remains, however, whether a defendant can ever make an eyes-open choice to waive a right that has not accrued and whose contours are not known. A sentencing error could appear in many guises, in the light of the many potential permutations that arise through application of the federal sentencing guidelines and the 18 U.S.C. § 3553 sentencing factors. *Cf. Molina-Martinez v. United States,* 136 S. Ct. 1338,

1342-43 (2016) (recognizing complexity of guidelines means that errors often go unnoticed by even experienced defense lawyers, prosecutors, and sentencing judges). The right to appeal a sentence arises only when a specific error occurs during or in connection with the imposition of sentence. *See* 18 U.S.C. § 3742 (setting forth sentences that may be appealed). But the "waiver" of sentence-appeal rights made in a plea bargain agreement of the type Solis signed purports to occur long before guidelines are applied and argued about, mitigating factors may be known, and sentence is imposed. What is being "waived" is the right to appeal an unknown, but eventually very specific, error in the application of complex sentencing provisions in what will be particular future circumstances then unknowable to any person. *Cf. Molina-Martinez*, 136 S. Ct. at 1342-43; *see also Melancon*, 972 F.2d at 572 (right waived is not simply a general, abstract appellate right) (Parker, J., concurring).[2]

Over the years, the Fifth Circuit has read sentence-appeal waivers more and more expansively, in a way that has vastly increased the scope of the anticipatory waiver the defendant is found to have agreed to. The Fifth Circuit has gone so far as to hold that

[2] The analogy of appeal waivers to the waiver of constitutional rights when pleading guilty is faulty for another reason. Guilty pleas can offer substantial benefits to both the government and the defendant. The value of a sentence-appeal appeal waiver to a defendant is often difficult to discern. The prevalence of sentence-appeal waivers seems more a product of unequal bargaining power between the government and an accused than a real contractual "choice" by the individual defendant. The government, which holds the power to seek further charges and to invoke mandatory-minimum sentences that bind the courts can wield that power to reduce its own future appellate workload by having the accused agree not to challenge his loss of liberty.

language waiving appeal and post-sentencing review bars appeal of a much-later-filed, (post-sentence-served) motion to modify conditions of supervised release. *United States v. Scallon*, 683 F.3d 680, 683 (5th Cir. 2012). The Fifth Circuit's broad construction of sentence-appeal waivers highlights the serious questions about whether the defendant can knowingly give up rights that have not yet accrued and that he cannot appraise accurately or intelligently. For example, the waiver in *Scallon* made no mention of motions to modify, which Congress has specifically provided for by statute as part of its policy decisions about how best to assist defendants in rejoining society. *See* 18 U.S.C. § 3583(e). Construing sentence-appeal waivers made in presentence plea agreements as broadly as the Fifth Circuit does appears to be contrary to notions of fundamental fairness. A loss of fundamental fairness and a loss of the ability to know what one is giving up calls into question the integrity of the plea bargaining system, and thus the federal criminal justice system. *Cf. Frye*, 566 U.S. at 143-44.

Because it appears that a defendant cannot have sufficient knowledge of what he is ceding when sentence-appeal rights are waived anticipatorily, sentence-appeal waivers fail to meet the waiver requirements imposed by the due process clause. *Cf. Johnson*, 304 U.S. at 464.[3] The Court should now decide whether anticipatory waivers of sentence-appeal rights are permitted.

[3] Rule 11(b)(1)(N) requires district courts to advise defendants of the existence and the terms of appeal waivers during the plea colloquy. The rule does not state that compliance with the advice requirement renders a defendant's acquiescence a knowing and voluntary waiver. To the contrary, the Advisory Committee explicitly reserved opinion on whether

B. The Prevalence of Appeal-Waivers Provisions Counsels Unflagging Adherence to *Santobello*'s Rule That Plea Agreements Be Construed Against the Government.

If sentence-appeal waivers are permitted, the Court should provide guidance as to how the courts of appeals are to determine when such waivers are valid and how waiver provisions are to be evaluated in light of the entire plea agreement.

The courts of appeal have divided over how to approach sentence-appeal waivers. Most courts uphold and enforce a plea agreement's waiver language unless that language violates some basic principle of fairness. Thus, courts have said that a waiver would be invalid if the sentence imposed exceeded the authorized statutory-maximum sentence or was based on constitutionally impermissible factor, such as race *See, e.g., United States v. Brown,* 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Black,* 201 F.3d 1296, 1302 (10th Cir. 2000). And, they have held out the possibility that a waiver might be invalid if enforcing it would result in miscarriage of justice. *United States v. Andis,* 333 F.3d 886, 891 (8th Cir. 2003). But, underneath these potential, conceivable, theoretical problems with waivers is a reality of a day-to-day routine, near unfailing inclusion and enforcement of sentence-appeal waivers.

Two circuits have shown more interest than the others in the rights of the defendant, and have recognized that the government holds greater bargaining power than the individual defendant. The Third Circuit reviews sentence-appeal waivers as a whole. In so

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appeal waivers are constitutional: "[T]he Committee takes no position on the underlying validity of [appeal] waivers." *Id.,* Advisory Committee Notes (1999).

doing, the court considers a number of factors, including the gravity and character of the sentencing error, the impact of the error, the impact of correcting the error, and extent to which defendant acquiesced in the proceedings. *Khattak*, 273 F.3d at 563.

The Second Circuit has given sentence-appeal waiver provisions the narrowest endorsement. That court has indicated a preference for plea agreements that set out a guideline-sentence range beyond which the defendant cannot be imprisoned. *See United States v. Goodman*, 165 F.3d 169, 174 (2d Cir. 1999) (refusing to enforce sentence-appeal waiver in agreement that did not contain stipulated sentence range); *United States v. Martinez-Rios*, 143 F.3d 662, 668–69 (2d Cir. 1998) (same). The Second Circuit has observed that, without a stipulated sentence range, it is doubtful whether a defendant can knowingly waive his right to appeal his sentence. *United States v. Rosa*, 123 F.3d 94, 101 (2d Cir. 1997). The stipulated range protects a defendant from being left "entirely to the mercy of the sentencing court" or without recourse from a sentence he could not have anticipated. *Rosa*, 123 F.3d at 98–99; *see also United States v. Coston*, 737 F.3d 235, 237 (2d Cir. 2013) (in deciding whether to enforce waiver, court will consider "whether the sentence was reached in a manner plea agreement did not anticipate.")

The scrutiny and narrower enforcement given sentence-appeal waiver provisions by the Second and Third Circuits accords better with this Court's precedent explaining waiver. Nonetheless, other courts have disagreed that such careful review is warranted. *See, e.g.*, *Black*, 201 F.3d at 1301 n.3 (Tenth Circuit expressed disagreement with Second Circuit and noted its intention to give more deference to waiver provisions).

The Fifth Circuit precedent since *Melancon* not only defers to sentence-appeal waiver provisions, it tilts toward reading the provisions in favor of the government, the drafting party. *See, e.g.*, *Scallon*, 683 F.3d at 683 (agreeing with prosecutor that sentence-appeal waiver gave up right to ask later for modification of supervised release conditions). This deference to appeal-waiver provisions appears contrary to the letter and spirit of Rule 11, which tries to keep the defendant apprised of what he might be waiving, of due process, which requires that the defendant know what he is waiving, and of *Santobello*, which places the burden of promise-keeping on the government. Petitioner Solis's case illustrates the problem.

The agreement that Solis reached with the government provided that the government would recommend that he receive the third level of acceptance of responsibility available under guidelines §3E1.1(b) if the district court determined that Solis was entitled to a two-level reduction under §3E1.1(a). EROA.235. That is, the government made a specific promise to let the district court make the decision on the two-level adjustment. That specific agreement could be reasonably understood only as meaning that the government would not advocate against a two-level acceptance adjustment. Without that understanding, the provision meant nothing−the court is always the one who determines the two-level adjustment. The government could not have made an empty promise to induce a plea, and, of course if it had, then the sentence would be "reached in a manner plea agreement did not anticipate," *Coston*, 737 F.3d at 237, and thus outside the proper construction of the agreement, *Santobello*, 404 U.S. at 261-62.

Nonetheless, when Solis pointed this out, the Fifth Circuit ruled that the government's interpretation of the plea agreement was "consistent with a reasonable understanding of the plea agreement." App. at 2. But so was Solis's. And precedent makes clear that in that situation a plea agreement must be construed against the government. *Santobello,* 404 U.S. at 261-62. This is because the government must strictly adhere to the terms and conditions of its plea deals. *Id.*

Plea bargain agreements are treated as contractual in nature, *Santobello v. New York*, 404 U. S. 257, 262–63 (1971), but they are "unique contracts" because "they implicate the deprivation of human freedom[.]" *United States v. Mankiewicz,* 122 F.3d 399, 403 n.1 (7th Cir. 1997). Thus, while plea agreements are interpreted "in accordance with principles of contract law." *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002); *see also United States v. Elashyi,* 554 F.3d 480, 501 (5th Cir. 2008) (same); *United States v. Frownfelter,* 626 F.3d 549, 554 (10th Cir. 2010) (same), that interpretation must be "temper[ed]" "with special due process concerns for fairness and the adequacy of procedural safeguards." *United States v. Granik,* 386 F.3d 404, 413 (2d Cir. 2004). The rule has to be that "[t]he government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant's guilty plea." *United States v. Ingram,* 979 F.2d 1179, 1184 (7th Cir. 1992). The prevalence and routinization of sentence-appeal waivers has eroded these protections. Routine and broad enforcement discourages development of the law. Routine and broad enforcement lets the government cut off potential issues, such as supervised release motions, far from those understood to be ordinary sentencing matters. *See, e.g., Scallon,* 683 F.3d at 683. Routine and broad enforcement, as in Solis's case where the government

appeared to promise to lay out of the acceptance decision and then advocated vigorously against Solis on the matter, erodes the fairness of plea bargaining and the trust that is necessary for our justice system of pleas to function. *Puckett,* 556 U.S. at 141 (citing *Santobello,* 404 U.S. at 261-62).

Petitioner Solis lost the benefit of his bargain in this case, and the Fifth Circuit's deviation from the command of *Santobello* threatens to deprive other defendants of the bargains they thought they had reached. At a time when plea bargaining "*is* the criminal justice system." *Frye*, 566 U.S. at 143-44, the Court should grant certiorari in this case to reinforce the teachings of *Santobello* and to ensure the fundamental fairness that due process requires of our plea-bargaining system and to delineate the necessary standards that apply to determine whether and how to enforce sentence-appeal waiver provisions.

CONCLUSION

FOR THESE REASONS, Solis asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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