**No. _____**

In the

Supreme Court of the United States

_____

**Tesa Keith**,

*Petitioner,*

v.

**United States of America**,

*Respondent.*

_____

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

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# PETITION FOR A WRIT OF CERTIORARI

_____

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## QUESTIONS PRESENTED

I. Whether facial challenges to a federal criminal statute may be waived by plea agreement?

## PARTIES TO THE PROCEEDING

Petitioner is Tesa Keith, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Tesa Keith seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The district court's judgement and sentence is attached as Appendix A. The unpublished order of the Court of Appeals dismissing is not electronically reported. It is reprinted in Appendix B to this Petition.

## JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 10, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides:

> **Section 1.**
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> **Section 2.**
> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the

number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

**Section 3.**
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.**
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.**
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Rule of Criminal Procedure 11 states:

**(a) Entering a Plea.**

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

**(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:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

**(c) Plea Agreement Procedure.**

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing

factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

**(d) Withdrawing a Guilty or Nolo Contendere Plea**. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

**(e) Finality of a Guilty or Nolo Contendere Plea**. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

**(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

**(h) Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

## STATEMENT OF THE CASE

### A. Trial Proceedings

Petitioner Tesa Keith worked for the San Angelo State Supported Living Center, which "serve[s] people with intellectual and developmental disabilities who are medicaly fragile or who have behavioral problems." She became involved in an altercation with a resident, and seriously assaulted her, which led to her charge and plea to18 U.S.C. §242, wilful deprivation of civil rights under color of law. She signed a plea agreement that waived her right to appeal, save certain express exceptions not applicable here. The district court imposed a sentence of 51 months.

### B. Court of Appeals

Petitioner appealed, contending on plain error review that 18 U.S.C. 242 was beyond Congress's power to enact. While 242 is grounded in Congressional power to enforce Section Five of the Fourteenth Amendment, it criminalizes large swaths of conduct that does not arguably violate the constitution. As such, she argued, the enactment is not "congruent and proportional" to the constitutional violations it ostensibly addresses. See *City of Boerne v. Flores*, 521 U.S. 507, 518–19(1997). She conceded that the argument did not establish plain error under current law, but sought to preserve the challenge for review.

The government moved to dismiss the appeal. It argued first that the challenge was barred by the waiver of appeal. Further, it maintained that it was waived by the plea of guilty because it required the defendant to contradict the indictment in order

to show that her particular conduct did not violate the constitution. The court of appeals dismissed the appeal without explanation. *See* [Appendix A].

## REASONS FOR GRANTING THE PETITION

**This Court should grant certiorari to clear up the pervasive confusion and inconsistent precedent in the federal courts of appeal regarding the scope of implied exceptions to appeal waivers.**

All federal courts of appeals hold that appeal waivers are enforceable in an appropriate case. *See United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003)((citing *United States v. Teeter,* 257 F.3d 14, 21–27 (1st Cir.2001); *United States v. Hernandez,* 242 F.3d 110, 113–14 (2d Cir.2001); *United States v. Khattak,* 273 F.3d 557, 559–63 (3d Cir.2001); *United States v. Brown,* 232 F.3d 399, 402–06 (4th Cir.2000); *United States v. Melancon,* 972 F.2d 566, 567 (5th Cir.1992); *United States v. Fleming,* 239 F.3d 761, 764 (6th Cir.2001); *United States v. Jemison,* 237 F.3d 911, 916–18 (7th Cir.2001); *United States v. Nguyen,* 235 F.3d 1179, 1182–84 (9th Cir.2000); *United States v. Rubio,* 231 F.3d 709, 711–13 (10th Cir.2000); *United States v. Howle,* 166 F.3d 1166, 1168–69 (11th Cir.1999)); *see also United States v. Brown*, 892 F.3d 385, 394 (D.C. Cir. 2018). But beyond this initial point of clarity, it becomes difficult to identify any guiding principles.

At least five circuits hold that a waiver of appeal cannot shield a miscarriage of justice. *See Teeter,* 257 F.3d at 25-26; *Khattak,* 273 F.3d at 563; *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013). The Seventh Circuit enumerates the following errors as "miscarriages of justice": "(1) a sentence based on "constitutionally impermissible criteria, such as race"; (2) a sentence that exceeds the statutory maximum for the defendant's particular crime; (3) deprivation of "some minimum of civilized

procedure" (such as if the parties stipulated to trial by twelve orangutans); and (4) ineffective assistance of counsel in negotiating the plea agreement." *Adkins*, 743 F.3d at 192–93 (quoting *United States v. Bownes,* 405 F.3d 634, 637 (7th Cir.2005)); *Teeter,* 257 F.3d at 25 n. 9 & 10 ("constitutionally impermissible factors"). The First and Third Circuits use imprecise multi-factor balancing tests to identify "miscarriages" justifying an exception to an appeal waiver. *See Khattak*, 273 F.3d at 563 (quoting *Teeter*, 257 F.3d at 25-26). The Seventh Circuit has also held that a vague term of supervised release constitutes a miscarriage of justice, *see Adkins*, 743 F.3d at 192–93, while the First Circuit has used the exception to invalidate an intrusive condition of supervised release, *United States v. Velez-Luciano*, 814 F.3d 553 (1st Cir. 2016). Notably, the Third Circuit has held that insufficient evidence for conviction constitutes a miscarriage. *See United States v. Castro*, 724 F.3d 125, 138 (3rd Cir. 2016).

Other circuits exempt some of these challenges from an appellate waiver, but without using the "miscarriage" language. *See United States v. Johnson,* 347 F.3d 412 (2d Cir 2003)(appeal waiver cannot bar appeal of sentence that unconstitutionally considers defendant's "status," including financial status); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir.2000)(challenges to sentence based on race or sentence exceeding maximum cannot be waived); *United States v. General*, 278 F.3d 389, 399 n. 4 (4th Cir.2002) (*Apprendi* errors and lack of competence cannot be waived); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir.1995)(ineffective assistance of counsel in the negotiation of the waiver); *United States v. Baramdyka*, 95 F.3d 840, 843 (9th

Cir.1996) ("the waiver of a right to appeal may be subject to certain exceptions such as claims involving a breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence imposed in excess of a maximum statutory penalty"); *United States v. Cudjoe*, 634 F.3d 1163, 1165–66 (10th Cir. 2011)(illegal sentence cannot be protected by a waiver). Other issues may escape a waiver, including the breach of a plea agreement, *see United States v. Chavful*, 781 F.3d 751 (5th Cir. 2015), and the failure of a factual basis to state an offense, *see United States v. Adams*, 448 F.3d 492, 497 (2d Cir. 2006)(inadequacy of factual basis); *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002)(same).

The contours of any implied exceptions are not clear, and certainly not uniform among the circuits. As noted, the circuits use very different formulations to describe exempted errors. And even within a given circuit, it is not at all clear which errors will be exempted. The term "miscarriage of justice," for example, does not refer to a sharply defined category of errors. It is doubtful that all circuits would find a vague term of supervised release to constitute a clear miscarriage, as the Seventh Circuit did. *See Adkins*, 743 F.3d at 192–93. To the extent that the term's settled meaning can be ascertained from its history, it refers to actual innocence. *See Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897, 1906 (2018). That history would well explain the Third Circuit's conclusion that insufficient evidence for conviction constitutes a miscarriage. *See Castro*, 724 F.3d 125, 138. But it would not explain the Seventh Circuit's conclusion that facial challenges to the constitutionality of a criminal statute do not assert a "miscarriage." *See Oliver v. United States*, 951 F.3d

841, 846 (7th Cir. 2020). After all, the absence of a valid criminal offense would seem to render the defendant "innocent" of the charged offense. And the term's historical meaning would also not explain why the Seventh Circuit exempts from a waiver errors that have nothing to do with actual innocence, such as racial discrimination in sentencing and ineffective assistance in plea negotiations. *See Adkins*, 743 F.3d at 192–93.

Circuits operating outside the "miscarriage" formulation also disagree about the scope of implied exceptions. For example, they disagree about whether there is an implied exception for an illegal sentence. ***Compare*** *Cudjoe*, 634 F.3d at 1165–66 ("illegal sentence" is implied exception to waiver) ***with*** *United States v. Martinez*, 395 Fed. Appx. 131, 133 (5th Cir. 2010)(unpublished)(district court's statement that defendant possessed right to appeal "illegal sentence" in spite of waiver described as "erroneous").

The confused standards for implied waivers manifest clearly in facial constitutional challenges to federal criminal statutes. At least three circuits have recently concluded that there is no implied exception for such challenges, including the court below as it disposed of the instant appeal. *See United States v. Lloyd,* 901 F.3d 111, 124 (2d Cir. 2018); *Oliver*, 951 F.3d at 846; Appendix B. It is difficult to see how that decision could be predicted from the standards employed by those courts. A defendant raising such a claim simply could not have predicted the denial of review before the precedents addressing the issue.

The Seventh Circuit, for example, exempts "miscarriages of justice" from appeal waivers. But as noted, the term's has any core historical meaning refers to claims of actual innocence. And the absence of a prosecutable offense would seem at least arguably to render the defendant actually innocent. At the very least, such claims hew closer to the original meaning of the term "miscarriage of justice" than the kinds of claims adjudicated under that standard in the Seventh Circuit, such as racial discrimination in sentencing. The Seventh Circuit's decision to deny review to facial challenges to a criminal statute is especially baffling in light of its holding, in the *coram nobis* context, that a conviction for an act the law does not make criminal constitutes "a paradigm miscarriage of justice." *United States v. Keane*, 852 F.2d 199 (7th Cir.1988); *accord United States v. Bonansinga,* 855 F.2d 476, 478 (7th Cir. 1988). Accordingly, it may well be that a Seventh Circuit could raise a facial challenge to the statute of conviction in *coram nobis* proceedings to avoid its collateral consequences, but not to get out of prison.

Similarly, the Second and Fifth Circuits hold that waivers of appeal cannot bar challenges to the adequacy of a factual basis for the plea. *See Adams*, 448 F.3d at 497; *Spruill*, 292 F.3d at 215. Yet it is difficult to see how a defendant's factual admissions could ever adequately support his or her liability if the statute of conviction were unconstitutional in all cases. With no effort to reconcile these precedents, the Second and Fifth Circuit have nonetheless recently held that waivers of appeal bar facial challenges to the constitutionality of the charged statute. *See Lloyd,* 901 F.3d at 124; Appendix B. This is not merely unpredictable and possibly unfair to criminal

defendants. It also establishes an irrational distinction between the absence of statutory elements in the factual basis, and the absence of facts necessary to establish a constitutional offense.

In short, the standards governing implied exceptions to appeal waivers are a mess. They differ materially between circuits, both in formulation and application. And even knowing the standards applied within a circuit, results are unpredictable. This absence of predictability is of special concern given the contractual nature of appeal waivers. Parties execute contracts to allocate risk. If they don't know the scope of their agreements, they are less likely to enter mutually beneficial bargain, and more likely to be unfairly surprised.

This Court has expressly reserved the question of implied exceptions to a waiver. *See Garza v. Idaho*, 139 S. Ct. 738, 745, n. 6 (2019)("We make no statement today on what particular exceptions may be required.") It has thus recognized that the issue remains open, even as it declined to offer guidance.[1] The lack of guidance

[1] Nor did the Court's recent decision in *Class v. United States*, 138 S.Ct. 798 (2018), help to address any confusion regarding the defendant's capacity to waive facial challenges to the statute of conviction. In *Class*, this Court held that a guilty plea does not "bar a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution." *Class*, 138 S.Ct. at 802. This decision "flow[ed] directly from [its] prior decisions," *id*. namely *Haynes v. United States*, 390 U.S. 85, 87, n. 2, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968), *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), and *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam). These cases all reflected a particular understanding of a guilty plea: that it confessed all factual elements of guilt, and waived procedural defenses, but could not waive a defendant's right to appeal his conviction if could not be "constitutionally prosecute[d]." *See id*. at 803-805. A defendant's plea, therefore, does not waive his right not to be convicted for conduct that does not amount to a constitutional offense. *See id.*

But *Class* did not decide whether a defendant could expressly waive such challenges in a plea agreement. To the contrary, the opinion points in two directions on this question. It notes that the defendant's written plea agreement did not waive this claim, which would seem to limit the opinion's scope. *See id.* at 802, 807. On the other hand, the sentencing court in *Class* told the defendant that he "was 'giving up [his] right to appeal [his] conviction.'" *Id.* Further, the rationale of the *Class* opinion strongly suggests that such claims are simply unwaivable. Citing a 19th century Massachusetts case, the *Class* opinion suggested that facial challenges to the statute of conviction survive a guilty plea

has resulted in significant confusion and inconsistency in an area where clarity is paramount both to fairness and efficiency.

The present case is a good vehicle to address the issue. It presents the question of whether an appeal waiver bars a defendant's facial challenge to the statute of conviction, namely Petitioner's claim that 18 U.S.C. §202 exceeds Congressional power under Section Five of the Fourteenth Amendment. That particular kind of claim arguably invokes at least three implied exceptions recognized by the courts of appeals. As discussed above, the absence of a constitutionally valid charging statute at least arguably renders the defendant actually innocent, and accordingly constitutes a "miscarriage of justice." Also as discussed above, it arguably shows a deficient factual basis for the plea. Finally, any sentence for an unconstitutional offense is at least arguably an "illegal sentence," and/or one "exceeding the statutory maximum," which is zero. A grant of certiorari here would thus permit the Court to address the validity and scope of at least three commonly recognized implied exceptions to a waiver of appeal. The opinion could thus offer significant guidance in this area.

Below, the government argued that Petitioner's guilty plea waived her constitutional challenge. Specifically, it argued that the factual premise for Petitioner's challenge could not be established without contradicting the indictment.[2]

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because if the defendant's conduct does not state a prosecutable offense, "the defendant is entitled to be discharged." *Id.* at 804 (quoting *Commonwealth v. Hinds*, 101 Mass. 209, 210 (Mass. 1869)). But if it is simply improper to imprison a defendant for conduct the government lacks a constitutional right to prosecute, that is true whether the defendant has waived any appellate challenge to that state of affairs implicitly, by plea, or explicitly, plea agreement.

[2] Importantly, this argument was not likely the basis for the Fifth Circuit's decision to dismiss the appeal. While the court below uses dismissal to enforce waivers of appeal, *see United States v.*

The government may raise this claim on the merits on remand to the Fifth Circuit. This Court can and should grant certiorari in order to determine whether the waiver of appeal supports the dismissal of the appeal.

*Melancon*, 972 F.2d 566, 568 (5th Cir. 1992), the proper disposition of a challenge to the conviction barred by guilty plea is an affirmance, *see United States v. Davila*, 53 F.3d 1280 (5th Cir. 1995)(unpublished).

## CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 5th day of June, 2020.

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