No. 20-1095

In the Supreme Court of the United States

DARIUS WAYNE HAWS, PETITIONER,

v.

STATE OF IDAHO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

REPLY BRIEF FOR THE PETITIONER

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
322 E. Front St., Suite 570
Boise, ID 83702
(208) 334-2712

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

JEREMY C. MARWELL
Counsel of Record
JOSHUA S. JOHNSON
JAMES T. DAWSON
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Rules:

REPLY BRIEF FOR THE PETITIONERS

The brief in opposition offers a welter of arguments fairly characterized as a strategy of defense by distraction. But on closer examination, respondent's position ultimately boils down to one mistaken premise—that the question presented here is somehow "not controlled by the due process guarantees of the Constitution." Br. in Opp. 5 ("BIO"). That is manifestly wrong—as even respondent is eventually forced to concede. Respondent *agrees* that "constitutional constraints" of federal due process apply where, as in Idaho, states have "create[d] appellate review." *Id.* at 7 (quoting *Smith* v. *Robbins*, 528 U.S. 259, 270 (2000)). Respondent also does not, and could not, plausibly contest the key premise of Haws' petition—that the Due Process Clauses of the Fifth and Fourteenth Amendments require that any waiver of the right to appeal in a plea agreement be knowing, intelligent, and voluntary. See Pet. I, 8, 16-17. Petitioner is thus on firm due process ground in arguing that "[w]hen a district court has advised a defendant that, contrary to the plea agreement, he is entitled to appeal his sentence, the defendant can hardly be said to have knowingly waived his right of appeal." *United States* v. *Manigan*, 592 F.3d 621, 628 (4th Cir. 2010). Respondent spills much ink arguing that a lower due process standard applies, under which Haws' appeal waiver was valid. BIO 6-8, 17-21. But those are merits arguments, not a basis to dispute the existence of a federal question.

On the other certworthiness factors, respondent fares no better. Contrary to respondent's strained and atextual recasting of precedent, at least ten

jurisdictions have applied the due process "knowing, intelligent, and voluntary" standard in refusing to enforce appeal waivers in circumstances materially indistinguishable from Haws' case. See Pet. 8-14. As the "legion" of cases discussed in the petition and amicus brief demonstrate, Amicus Br. 9, the federal question presented here is important and demands this Court's review.

A. This Case Presents An Important Federal Question That The Court Below Decided Incorrectly

1. Respondent's central argument against certiorari—that this case somehow lacks a federal question—is meritless.

Respondent itself concedes that "this Court has 'imposed constitutional constraints on States'"—including the requirements of due process—"when they choose to create appellate review." BIO 7 (quoting *Smith*, 528 U.S. at 270); see also *ibid.* ("[I]f a State has created appellate courts [for criminal cases], the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." (quoting *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985))). Idaho law entitles defendants to "appeal as a matter of right" from criminal judgments. Idaho App. R. 11(c); see also Idaho Code § 19-2801 (2021). The State's denial of Haws' appeal right is thus subject to federal "constitutional constraints." *Smith*, 528 U.S. at 270.

Respondent protests vaguely that the applicable constraints must be "based on explicit constitutional or fundamental rights." BIO 7-8 (citation omitted).

But here, Haws' argument rests on an "explicit constitutional * * * right[]"—his Fourteenth Amendment right to due process.

In *Evitts*, this Court expressly held that federal due process governs restrictions on state-created appellate rights. 469 U.S. at 402-405. *Evitts* explained that "due process" prohibits states from establishing "a system of appeals as of right" but "refus[ing] to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Id.* at 405; see also *id.* at 404 (due process precludes deprivations of appellate rights that are "arbitrary with respect to the issues involved"). Applying those principles, *Evitts* held that "the Due Process Clause of the Fourteenth Amendment guarantees [a] criminal defendant the effective assistance of counsel" on appeal. *Id.* at 388-389, 396. Similarly, Haws seeks to vindicate due process constraints on a state's enforcement of appeal waivers. Here, as in *Evitts*, the "right to appeal" cannot "be withdrawn without consideration of applicable due process norms." *Id.* at 400-401.

Respondent protests that the constraints of due process in the context of Haws' case are minimal and that the State complied with them. But that is a *merits* argument respondent may press after this Court grants plenary review—not a basis to dispute that the petition presents a federal question.

The key premise of Haws' petition is that the Due Process Clauses of the Fifth and Fourteenth Amendments require that any waiver of the right to appeal in a plea agreement must be knowing, intelligent, and voluntary. See Pet. I, 8, 16-17. Respondent does not, and could not, plausibly contest that point. This Court

has recognized the widespread consensus among federal and state courts nationwide that an appeal waiver is not "valid and enforceable" if "it was unknowing or involuntary." *Garza* v. *Idaho*, 139 S. Ct. 738, 745 (2019); see also *Cooper* v. *Oklahoma*, 517 U.S. 348, 362 (1996) ("near-uniform application of a standard * * * supports [the] conclusion" that the standard is required by due process). Under this Court's cases, the core requirement that a waiver of rights as part of a guilty plea be knowing, intelligent, and voluntary applies both to constitutional and statutory rights. See *Libretti* v. *United States*, 516 U.S. 29, 41-42, 48-51 (1995) (applying "knowing and voluntary" standard in determining constitutional adequacy of waiver of statutory right to jury determination of forfeitability). Contra BIO 10, 18-19 (proposing to distinguish between "constitutional" and "non-constitutional" rights). Indeed, consistent with the widespread recognition that this due process framework governs the validity of appeal waivers, the Idaho Supreme Court applied the due process knowing, intelligent, and voluntary standard in this case. Pet. App. 14a. Contra BIO 8 (arguing that "the Idaho Supreme Court did not cite to any federal or constitutional right"); *id.* at 10 (similar).[1]

---

[1] The Idaho Supreme Court cited *State* v. *Cope*, 129 P.3d 1241 (Idaho 2006), and *State* v. *Lee*, 443 P.3d 268 (Idaho Ct. App. 2019), which are founded in pertinent part on this Court's due process case law. See Pet. App. 14a; see also *Cope*, 129 P.3d at 1245 (citing *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973)); Pet. 6 n.3 (discussing due process foundation of Haws' argument below, and citing *Lee*). Further demonstrating that the decision below rested on federal law, the court emphasized its (mistaken) understanding that its decision accorded with the approach to the question

In this case, Haws argues for a straightforward application of the knowing, intelligent, and voluntary standard: When the trial court mistakenly assures a defendant during the plea colloquy that he has reserved the right to appeal, the defendant's purported appeal waiver is unknowing and involuntary, and thus is unenforceable.[2] See, *e.g.*, *Manigan*, 592 F.3d at 628 ("When a district court has advised a defendant that, contrary to the plea agreement, he is entitled to appeal his sentence, the defendant can hardly be said to have knowingly waived his right of appeal.").

Respondent's only answer is that the "rule Haws seeks" is not based on a "principle of justice so * * * fundamental" as to be compelled by the Due Process Clause. BIO 8 (quoting *Medina* v. *California*, 505 U.S. 437, 445 (1992)). But that simply reframes the question presented—i.e., whether enforcing appeal waivers despite a trial judge's misrepresentation violates federal due process. Respondent cannot assume away the existence of an important federal question by arguing that it should prevail on the merits of that question.

2. The Idaho Supreme Court's decision below is wrong. Given the trial judge's representation that

---

presented taken by a "majority of federal courts." Pet. App. 17a-18a; cf. Pet. 8-16.

[2] In opposing this Court's review, respondent distorts Haws' argument and attacks the resulting straw man. Haws is not arguing that the federal Constitution requires states to adopt any particular set of detailed procedural protections. Contra BIO 8-11. Haws merely argues that trial judges cannot misrepresent to defendants with written appeal waivers that the defendants have nonetheless "reserv[ed] [the] right to appeal," Pet. App. 12a, and that if such misrepresentations occur during a plea colloquy and are left uncorrected, the appeal waivers are unenforceable.

Haws was "reserving [his] right to appeal [his] sentences," Pet. App. 12a, enforcing the appeal waivers in Haws' plea agreements violates due process.

Under *Evitts*, due process precludes a state from arbitrarily denying a defendant "a fair opportunity to obtain an adjudication on the merits" of a state-created appeal as of right. 469 U.S. at 405. A state violates that principle by enforcing an appeal waiver that is unknowing or involuntary. *See* pp. 3-4, *supra*. And as the vast majority of jurisdictions that have addressed the question have held, a trial judge's representation that a defendant reserves the right to appeal renders a purported appeal waiver unknowing and involuntary. See Pet. 8-16.

Respondent notes that Haws' plea colloquy occurred the day after Haws signed the plea agreements containing the appeal waivers. See BIO 17-18, 20-21. But "obligations under a plea agreement ripen only 'upon the entering of a plea.'" *State* v. *Pierce*, 249 P.3d 1180, 1183 (Idaho Ct. App. 2011); see also *Mabry* v. *Johnson*, 467 U.S. 504, 510-511 (1984) (allowing prosecution to withdraw proposed plea bargain after its acceptance by defendant), disapproved of on other grounds by *Puckett* v. *United States*, 556 U.S. 129 (2009). Therefore, the plea agreements here did not "actually bind[]" Haws until "the entry of [his guilty] plea," which occurred after the trial court's misrepresentation that Haws had reserved the right to appeal his sentences. *Pierce*, 249 P.3d at 1183; see also Pet. App. 65a-73a. Furthermore, the plea agreements here expressly provided that they could be "modified * * * on the record during Court proceedings." Pet. App. 28a, 35a. The in-court colloquy thus must be considered in

determining whether Haws knowingly, intelligently, and voluntarily waived his right to appeal.

Respondent posits that "appeal rights may be passively relinquished or forfeited by out-of-court actions," while "constitutional rights intrinsically intertwined with guilty pleas" purportedly cannot "be forfeited by inaction." BIO 17-18. But the premise of this argument is wrong. For example, "the right to confront witnesses"—a "constitutional right[] necessarily waived with every guilty plea," *id.* at 18—may be "forfeit[ed] by silence," *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 325-326 (2009).

Respondent's suggestion that the trial judge's misstatement does not implicate due process is especially insupportable given this Court's decision in *Libretti*, which features prominently in respondent's brief. See BIO 10, 16. While rejecting the notion that the district court had to affirmatively advise the defendant of the statutory right at issue, *Libretti* underscored that "[o]f course, a district judge must not mislead a defendant" or "permit a defendant's obvious confusion" regarding the right "to stand uncorrected." 516 U.S. at 51. Similarly here, depriving Haws of the ability to rely on the trial judge's representation that he was "reserving [his] right to appeal [his] sentences," Pet. App. 12a, violates fundamental principles of justice protected by the Due Process Clause. See, *e.g.*, *United States* v. *Wood*, 378 F.3d 342, 349 (4th Cir. 2004) (defendant may "naturally, and quite reasonably, rely on the [trial] court's characterization of the material terms disclosed during the [plea] hearing"). The Idaho Supreme Court's erroneous contrary conclusion warrants this Court's review.

B. Federal And State Courts Are Divided On The Question Presented, Even While Agreeing That The Validity Of Appeal Waivers Is Governed By The Federal Constitution

In disputing the existence of a split on the question presented, respondent's central contention is that "courts relied on procedural rules and underlying contract standards" rather than federal constitutional principles "when they held that an oral statement by a court at a plea hearing modifies or nullifies a plea waiver in a written plea agreement." BIO 11. Remarkably, respondent contends petitioner failed to show that "*any* of the other courts [cited in the petition] were employing constitutional due process standards." BIO 16 (emphasis added). On the contrary, each of the cases cited in the petition is premised on notions of constitutional due process, and answers the ultimate question of whether the appellate waiver was "knowing and voluntary." To the extent some of the cited cases refer to contract law or Rule 11, they did so in service of the underlying due process inquiry.

The BIO is also striking for what it does *not* say. Apart from a flawed effort to deny federal due process grounding, respondent does not dispute (nor could it) that the cases cited in the petition reach irreconcilable outcomes in circumstances materially indistinguishable from this case. In other words, unless this Court agrees that the cases in the split are not grounded in due process—a proposition readily disproved by the text of those decisions—respondent has effectively conceded the split.

According to respondent's strained taxonomy, the cases in the petition fall into one of two camps: (1)

cases grounded in contract law, that turn either on the notion that a misstatement modifies the contract (BIO 12-13) or that a misstatement creates ambiguity that must be resolved in the defendant's favor (BIO 13-14); or (2) cases grounded on the idea that compliance with Rule 11 "is a prerequisite to a valid waiver" (BIO 14-15).

Regarding the first camp, none of the cases support respondent's reading. Remarkably, many of the cases respondent says are grounded in "contract standards" (BIO 11) do not even use the word "contract"; instead, they employ a range of interpretative tools to answer a question which is couched not in contract terminology, but rather in the familiar language of due process: whether the waiver was "knowing and voluntary."

Respondent points to *United States* v. *Wood*, 378 F.3d 342 (4th Cir. 2004), as supposedly emblematic of courts that have held that a "misstatement results in a contract modification." BIO 12. But *Wood* concluded that a defendant is entitled to "rely on the district court's characterization of the material terms" in a plea agreement precisely because the colloquy's purpose "is to establish that the defendant knowingly and voluntarily enters his plea." 378 F.3d at 349; accord *United States* v. *Ready*, 82 F.3d 551, 558 (2d Cir. 1996) (explaining that, while plea agreements are contracts, they are unique in that "special *due process concerns* for fairness and the adequacy of procedural safeguards obtain" (emphasis added) (citation omitted)).

In respondent's view, *United States* v. *Wilken*, 498 F.3d 1160 (10th Cir. 2007), is illustrative of cases where misstatements were purportedly found to "create ambiguity in the plea agreement." BIO 13. But

Wilken does not once use the word "contract." The court did discuss ambiguity, but only as a means of analyzing whether the appellate waiver "was knowing and voluntary." 498 F.3d at 1169. The court's holding was not that the misstatement created contractual "ambiguity," but rather that the misstatement "created ambiguity as to whether [the] waiver was knowing and voluntary." *Id.* at 1163.[3]

As for the second camp, respondent argues that authorities from Iowa and the Second, Third, Fourth, Eleventh, and D.C. Circuits all rest on the "foundation that compliance with [Rule 11 or a state analogue] is a prerequisite to a valid waiver," rather than on constitutional considerations. BIO 14. While these cases do discuss non-compliance with Rule 11, each uses that non-compliance as *one factor* suggesting that the plea was not "knowing, intelligent, and voluntary" for constitutional purposes. See *Manigan*, 592 F.3d at 627 (noting that compliance with Rule 11 was a "*factor*" which informed the ultimate question of whether the appellate waiver was knowing and voluntary (emphasis added)); see also *United States* v. *Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969), in holding that appeal waiver must be "knowing[] and voluntar[y]"). That approach makes sense, given that "[t]he whole point of the Rule

---

[3] Respondent makes the same error regarding decisions from Indiana and Washington. See *Ricci* v. *State*, 894 N.E.2d 1089, 1093 (Ind. Ct. App. 2008) (noting that the key question was "how a trial court's misstatements at the plea hearing impact the determination of whether a defendant's waiver was knowing, voluntary, and intelligent"); *State* v. *Smith*, 953 P.2d 810, 811 (Wash. 1998) (per curiam) (similar).

11 colloquy is to establish that the plea was knowingly and voluntarily made." *United States* v. *Standiford*, 148 F.3d 864, 868 (7th Cir. 1998).

C. This Case Is An Ideal Vehicle To Address The Important Question Presented

Respondent half-heartedly attempts to downplay this case's immense practical importance. It speculates without citation to authority that the number of cases where trial courts make misstatements about appellate waivers is "presumably quite low." BIO 21. The exact opposite is true. As the National and Idaho Associations of Criminal Defense Lawyers explain, "miscommunications of appellate waivers by trial judges are legion," and cases like this one are in fact "numerous and widespread." Amicus Br. 7-9 (collecting more than 20 examples). Respondent does not—and could not—dispute that numerous cases cited in the petition involved misstatements concerning appellate waivers. See, *e.g.*, *Manigan*, 592 F.3d at 628; *United States* v. *Godoy*, 706 F.3d 493, 495-496 (D.C. Cir. 2013); *Wilken*, 498 F.3d at 1168-1169.

Finally, Respondent suggests this case is a poor vehicle because Mr. Haws' answers during the plea colloquy "may have indicated his understanding that he was waiving his defenses" rather than his right to appeal. BIO 23. This strained argument takes flight from ordinary English usage and ignores the Idaho Supreme Court's express finding that the trial court made a "misstatement" that Haws was "reserving" the right to appeal his sentence and that this statement stood "in direct conflict with the written plea waiver." Pet. App. 13a-14a. The court below based its legal analysis on that factual understanding, as would this

Court. There is no support for respondent's contention that the colloquy was somehow "ambigu[ous]."[4] BIO 23.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
322 E. Front St., Suite 570
Boise, ID 83702
(208) 334-2712

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

JEREMY C. MARWELL
Counsel of Record
JOSHUA S. JOHNSON
JAMES T. DAWSON
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

APRIL 2021

---

[4] Respondent's remaining "vehicle" issues are not vehicle issues at all, but disguised merits arguments. Compare BIO 22 (contrasting appeal waivers and "constitutional rights necessarily waived when entering a guilty plea," and suggesting "[d]ue process principles" do not govern question presented), with pp. 2-7, *supra* (addressing those issues).