No. _____

IN THE

Supreme Court of the United States

DAVID A. BRIDGEWATER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the rule of *United States v. Mezzanatto*, 513 U.S. 196 (1995), that a statutory right is waivable in a plea agreement absent an affirmative indication by Congress, preclude application of the contractual principle expressed in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), "that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy"?

2. If the contractual principle from *Brooklyn Savings Bank* is applicable to plea agreements, is a compassionate-release waiver in a plea agreement drafted by the Department of Justice contrary to the statutory policy of the First Step Act, which removed the sole compassionate release gatekeeping powers from the Department of Justice due to its poor administration of the compassionate release program in the Bureau of Prisons?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David A. Bridgewater respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is available at 995 F.3d 591 and is reprinted in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 28, 2021. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3582(c)(1)(A) provides in relevant part:

> The court may not modify a term of imprisonment once it has been imposed except that – in any case – the court, upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling

> reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

STATEMENT OF THE CASE

Mr. Bridgewater was charged with one count of attempted enticement of a minor in violation of 18 U.S.C. § 2422(b) ("Count 1") and one count of soliciting an obscene visual depiction of a minor in violation of 18 U.S.C. § 2522A(a)(3)(B) ("Count 2"). *United States v. Bridgewater*, Case No. 4:19-cr-40012-SMY-1, ECF No. 22 (S.D. Ill. Mar. 5, 2019). He entered a guilty plea on Count 2 of the Indictment, pursuant to a plea agreement. *Id.*, ECF No. 29. The plea agreement provides, in relevant part:

> 4. Defendant is aware that Title 18, Title 28, and other provisions of the United States Code afford every defendant limited rights to contest a conviction and/or sentence through appeal or collateral attack. However, in exchange for the recommendations and concessions made by the United States in this Plea Agreement, *Defendant knowingly and voluntarily waives the right to seek modification of or contest any aspect of the conviction or sentence in any type of proceeding*, including the manner in which the sentence was determined or imposed, that could be contested under Title 18 or Title 28, or under any other provision of federal law, except that if the sentence imposed is in excess of the Sentencing Guidelines as determined by the Court (or any applicable statutory minimum, whichever is greater). Defendant reserves the right to appeal the substantive reasonableness of the term of imprisonment. Defendant acknowledges that in the event such an appeal is taken, the United States reserves the right to fully and completely defend the sentence imposed, including any and all factual and legal findings supporting the sentence, even if the sentence imposed is more severe than that recommended by the United States.

Id., ECF No. 32, p. 7-8 (emphasis added). The district court accepted the guilty plea. *Id.*, ECF No. 29. During the plea colloquy, however, the district court failed to verify that Mr. Bridgewater understood that his plea agreement waived his right to seek modification of his sentence. *Id.*, ECF No. 53, p. 10; *see United States v. Brown*, No. 21-1754, 2021 WL 3356946 (3d Cir. 2021) (defendant did not waive the right to appeal denial of motion for compassionate release where district court did not discuss plea agreement's waiver of right to collaterally attack or otherwise challenge sentence). The district court imposed a sentence of 78 months' incarceration, seven years of supervised release, a $150 fine, and a $100 special assessment. *Id.*, ECF No. 55, p. 22-23.

Mr. Bridgewater filed a direct appeal, arguing that his sentence was substantively unreasonable and that the district court's reliance on dismissed conduct violated his rights to due process and a jury trial. *See United States v. Bridgewater*, 950 F.3d 928, 929 (7th Cir. 2020). The United States Court of Appeals for the Seventh Circuit affirmed the sentence. *Id.* at 939. Mr. Bridgewater is still serving his term of imprisonment and is currently incarcerated at FCI Forrest City.

On April 3, 2020, Mr. Bridgewater filed an Emergency Motion for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A)(i). *Bridgewater*, Case No. 4:19-cr-40012-SMY-1, ECF No. 57 (S.D. Ill. Apr. 3, 2020). The district court denied the motion, finding that Mr. Bridgewater had not exhausted his administrative remedies. *Id.*, ECF No. 65, p. 3.

On April 30, 2020, Mr. Bridgewater filed a Second Emergency Motion for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A)(i), asking that the district court order his immediate release in light of the COVID-19 pandemic, the severe outbreak at FCI Forrest City, and his medical conditions that make him susceptible to serious illness, including death, from COVID-19. *Id.*, ECF No. 66. On July 17, 2020, the district court denied the motion, finding that he waived his right to file a motion under 18 U.S.C. § 3582(c) in his plea agreement and that the 18 U.S.C. § 3553(a) factors weighed against his release. *Id.*, ECF No. 81; App. at 23a.

The United States Court of Appeals for the Seventh Circuit affirmed. *United States v. Bridgewater*, 995 F.3d 591 (7th Cir. 2021); App. at 1a. It concluded that "the 'express and unambiguous' text of Bridgewater's waiver confirms that it extends to compassionate release." *Id.* at 595. In particular, "Bridgewater waived 'the right to seek modification of . . . any aspect of the . . . sentence." *Id.*

The Seventh Circuit further concluded that a waiver of the right to compassionate release "is not unenforceable on public policy or unconscionability grounds." *Id.* at 596. "First," the court reasoned, "statutory rights are presumed to be waivable in plea agreements," *Id.* (citing *United States v. Mezzanatto*, 513 U.S. 196 (1995)), and "[s]econd, compassionate release waivers are more defensible against public policy and unconscionability challenges than § 1983 release-dismissal agreements, which the Supreme Court has held are generally enforceable." *Id.* (citing *Town of Newton v. Rumery*, 480 U.S. 386 (1987)).

The district court had jurisdiction to consider a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Jurisdiction is conferred on the United States Court of Appeals for the Seventh Circuit pursuant to 18 U.S.C. § 3742, 28 U.S.C. § 1291, and Fed. R. App. P. 4(b)(1)(A)(i). The District Court for the Southern District of Illinois is located within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. 28 U.S.C. § 41.

REASONS FOR GRANTING THE WRIT

I. Lower courts are split over whether a defendant may waive a statutory right that is contrary to public policy in a plea agreement.

A defendant may waive many constitutional protections in a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). In *United States v. Mezzanatto*, this Court concluded that statutory protections are presumptively waivable in plea agreements, "absent some affirmative indication of Congress' intent to preclude waiver." 513 U.S. at 201.

Plea agreements "are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009). Pursuant to contractual principles, all jurisdictions, "treat at least some claims as unwaivable." *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019). For instance, consistent with contract law, a plea agreement does not preclude claims outside the scope of the waiver. *See id.*

In *Brooklyn Savings Bank v. O'Neil*, this Court recognized "that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." 324 U.S. 697, 704 (1945); *see also Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)

("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"). Courts have applied this principle to plea agreements. *See, e.g.*, *United States v. Cabrera-Rivera*, 893 F.3d 14 (1st Cir. 2018) ("if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion may refuse to honor the waiver"); *Price v. U.S. Dep't of Justice Att'y Office*, 865 F.3d 676, 683 (D.C. Cir. 2017) (quoting *Rumery*, 480 U.S. at 392); ("a plea agreement that attempts to waive a right conferred by a federal statute is, like any other contract, 'unenforceable if the interest in its enforcement is outweighed [under] the circumstances by a public policy harmed by enforcement.'"); *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).

The principles in *Mezzanatto* and *Brooklyn Savings Bank* are at odds. As a result, lower courts are split over whether Congress must *explicitly* foreclose waiver of a statutory right in order for a statutory right to be deemed unwaivable. Here, relying on *Mezzanatto*, the Seventh Circuit found that "[u]ntil Congress says otherwise, the better course is to allow defendants to waive this new right for something they value more in return." *Bridgewater*, 995 F.3d at 600.

In *Price v. United States Department of Justice Attorney Office*, on the other hand, the District of Columbia Circuit concluded that "a plea agreement that attempts to waive a right conferred by a federal statute is, like any other contract, 'unenforceable if the interest in its enforcement is outweighed [under] the circumstances by a public policy harmed by enforcement.'" 865 F.3d 676, 683 (D.C.

Cir. 2017) (quoting *Rumery*, 480 U.S. at 392). There, the court found that the defendant's waiver of FOIA rights in his plea agreement was not enforceable because the waiver offended public policy. *Id.* Similarly, in *United States v. Ready*, the Second Circuit acknowledged that "courts may apply general fairness principles to invalidate particular terms of a plea agreement." 82 F.3d at 559, superseded on other grounds by *United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013).

II. Compassionate release waivers are contrary to Congress's clear intent to remove the Department of Justice as the sole compassionate release gatekeeper

In its alternative reasoning, the Seventh Circuit reasoned that "there are legitimate prosecutorial interests in efficiency and finality that weigh against the interest in allowing defendants to petition directly for modification." *Bridgewater*, 995 F.3d at 601. The court reasoned that "compassionate release waivers are more defensible against public policy and unconscionability challenges than § 1983 release-dismissal agreements waivers, which the Supreme Court has held are generally enforceable." *Id.* at 597. It also reasoned that compassionate release waivers are more defensible than the FOIA waiver invalidated in *Price*, because "FOIA waivers can prevent defendants from uncovering files that reveal ineffective assistance of counsel or prosecutorial misconduct in their cases." *Id.* at 602. The court, however, never addressed Mr. Bridgewater's argument that compassionate release waivers were contrary to the public policy embodied in the First Step Act itself—to remove the compassionate release gatekeeping powers from the Department of Justice.

Until Congress passed the First Step Act, the Department of Justice through the Bureau of Prisons was the sole compassionate release gatekeeper. *See United States v. Brooker*, 976 F.3d 228, 233 (2d Cir. 2020). The BOP, however, "sparingly" granted compassionate release. *Id.* at 231. According to a report from the Office of the Inspector General, an average of "only 24 incarcerated people per year were released on BOP Motion." *Id.* (citing U.S. Dep't of Just. Office of the Inspector Gen., *The Federal Bureau of* Prisons' *Compassionate Release Program* 1 (2013), https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf. The report found that the "BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and terminally ill inmates dying before their requests were decided." U.S. Dep't of Just. Office of the Inspector Gen., *The Federal Bureau of Prisons' Compassionate Release Program* 1 (2013), https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf. The report explained that the improperly managed program was "inconsistent and result[ed] in ad hoc decision making, with "no timeliness standards for reviewing . . . requests." *Id.* at 11. As a result, 13% of the people whose compassionate release requests had been approved by a warden and a Regional Director died while waiting for the BOP Director's final decision. *Id.* Thereafter, the BOP expanded its compassionate release pool to include people over 65 who had served a significant portion of their sentence. *Brooker*, 976 F.3d at 232 (citing *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector

Gen., Dep't of Justice, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf)). Although the number of compassionate-release grants increased, the BOP released only 83 individuals in the first 13 months after it enacted those changes. *Brooker*, 976 F.3d at 232.

With these and other shortcomings in mind, Congress amended the First Step Act by removing the Department of Justice, through the BOP, as the sole compassionate-release gatekeeper and by permitting individuals to file compassionate-release motions directly in the district court. Congress's intent in amending the compassionate- release statute through the First Step Act is apparent from the title: "Increasing the Use and Transparency of Compassionate Release." See P.L. 115-391 § 603(b), 132 Stat. 5194, 5239. "One co-sponsor of the bill described this provision as both 'expand[ing]' and 'expedit[ing]' compassionate release." *Brooker*, 976 F.3d at 233 (quoting 164 S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin)). "Another representative stated that the First Step Act was 'improving application of compassionate release ....'" *Brooker*, 976 F.3d at 232 (quoting 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler)).

Permitting the waiver of compassionate-release motions in plea agreements would contravene Congress's intent by placing the compassionate-release gatekeeping power back with the Department of Justice in a large portion of cases. Were this Court to agree that defendants can validly waive motions for compassionate release, a large portion of inmates would once again be at the mercy

of the BOP to file motions for compassionate release on their behalf. The executive branch would place these defendants in the exact situation that Congress sought to remedy in the First Step Act. *See Patchak v. Zinke*, 138 S. Ct. 897, 904-05 (2018) (no branch can encroach upon the powers confided to the others (internal quotation marks omitted)). As waiver of compassionate release would thwart congressional intent in passing the First Step Act, a defendant cannot waive it in a plea agreement. *See Brooklyn Sav. Bank*, 324 U.S. at 704-05 ("With respect to private rights cr[e]ated by a federal statute . . . the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute.").

Several lower courts agree that compassionate-release waivers are contrary to public policy. In rejecting a compassionate release waiver, one court explained:

> Congress knew of the BOP's rare granting of compassionate release petitions. Until 2013, on average, "only [twenty-four] inmates were released each year" through the BOP program. *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice). That number increased to eighty-three inmates between August 2013 and September 2014 following complaints to the BOP from the Inspector General's office. *Id.* Since Congress still amended the program following this increase, one can infer Congress thought eighty-three was still insufficient. Because rather than "effectively ratif[ying]" the BOP's position, Congress sought to overturn it by statute. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000). It did so in three ways: First, § 3582 now mandates the BOP notify terminally ill defendants of their ability to petition the BOP for early release. § 603(b), 132 Stat. at 5239. Second, § 3582 requires the BOP now report to Congress

> the frequency and reasoning of its compassionate release decisions. *Id.* Third, and critically here, § 3582 now allows defendants to motion district courts directly for compassionate release even after the BOP Director denies their petition. *Id.* The Act listed these changes under the title of "Increasing the Use and Transparency of Compassionate Release." *Id.* That title is "especially valuable" here. *Yates v. United States*, [574 U.S. 528, 552] (2015).

United States v. Brown, 411 F. Supp. 3d 446, 450-51 (S.D. Iowa 2019).

Another court rejected a plea agreement waiver that required a defendant to waive compassionate release, explaining:

> This Plea Agreement neatly undoes Congress's work. It closes the escape hatch and replaces it with an alternative likely to be just as if not more time consuming than exhaustion. It restores the very obstacles the First Step Act removed and undermines the purpose of that law's amendments. Of course, a federal prosecutor is not required to draft plea agreements that reflect Congress's wishes. But since it is the Court's duty to effectuate congressional intent, the Court considers Congress's wishes an appropriate consideration in evaluating the Plea Agreement. The First Step Act received eighty seven votes in the Senate, 358 votes in the House, and was signed into law by President Donald J. Trump. . . . It enjoyed broad bipartisan support from its inception. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 Yale L.J. 791, 798–99 (2019). The Court cannot endorse this attempt by unelected federal prosecutors to unmake the work of elected representatives.

United States v. Osorto, 445 F. Supp. 3d 103, 108-09 (N.D. Cal. 2020). Another district court noted that "Congress did not intend for federal prosecutors to have the final say on a defendant's request for compassionate release." *United States v. Glasper*, 11-cr-30053-NJR, 2020 WL 6363703, at *3 (S.D. Ill Oct. 29, 2020).

III. This case is a good vehicle for resolving the conflict.

Mr. Bridgewater preserved the legal issues by pressing it to the Seventh Circuit. There, Mr. Bridgewater cited to *Rumery* and argued that the compassionate-release waiver in his plea agreement was unenforceable because it was "contrary to the public interest expressed in the First Step Act." App. Br., p. 13-16.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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