No. ____

IN THE

Supreme Court of the United States

DANIEL ANGEL RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
Counsel of Record
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

Counsel for Petitioner

December 14th, 2021

QUESTION PRESENTED

Whether an unconditional guilty plea waives a federal criminal defendant's right to appeal a district court's failure to recuse under 28 U.S.C. § 455(a).

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Rodriguez*, No. 19-12451 (11th Cir. Aug. 25, 2021) (opinion affirming convictions and sentences on direct appeal); and

- *United States v. Rodriguez*, No. 17-cr-20904 (S.D. Fla. June 24, 2019) (judgment of conviction imposing a 400-month prison sentence).

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *In re Rodriguez*, No. 19-11081 (11th Cir. Apr. 16, 2019 & May 2, 2019) (orders denying *pro se* petition for a writ of mandamus and reconsideration);

- *In re Rodriguez*, No. 19-11084 (11th Cir. Apr. 16, 2019) (order denying counseled petition for a writ of mandamus);

- *United States v. Rodriguez*, Nos. 20-10563, 20-11153, 20-11235 (11th Cir. Aug. 23, 2019) (opinion affirming the denial of various post-judgment *pro se* motions and order denying *pro se* motions for bond pending appeal);

- *United States v. Rodriguez*, No. 21-12132 (11th Cir.) (appeal from the denial of various *pro se* post-judgment motions).

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Petitioner respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 2021 WL 3745337 and reproduced as Appendix ("App.") A, 1a–21a. The district court's order denying Petitioner's motions to recuse is unreported and reproduced as App. E, 60a–65a.

JURISDICTION

The Eleventh Circuit issued its decision on August 25, 2021. It denied a timely petition for rehearing en banc on December 10, 2021. App. B, 22a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 455 of Title 28 of the U.S. Code provides, in pertinent part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

* * *

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

INTRODUCTION

Under 28 U.S.C. § 455(a), federal judges must recuse themselves in any case where their "impartiality might reasonably be questioned." The question presented here is straightforward: does an unconditional guilty plea waive a federal criminal defendant's right to appeal the district court's failure to recuse under § 455(a)?

The circuits have been openly divided on that question for over thirty years. The Fifth, Tenth, and Eleventh Circuits have held that an unconditional guilty plea does waive the right to raise a § 455(a) claim on appeal; the First and Second Circuits have held the exact opposite. Thus, the happenstance of geography now determines whether federal criminal defendants may raise a § 455(a) claim on appeal after entering an unconditional guilty plea. The Court should rectify that disparity.

Indeed, the question presented affects both the administration of justice and the integrity of the judiciary. More than 97% of federal defendants plead guilty, and more than 60,000 of them did so in 2020 alone. The consequences of such pleas should be clear and predictable. And that is especially true where there are doubts about the impartiality of the judge adjudicating guilt and imposing sentence. After all, any appearance of partiality harms not only the parties but the rule of law itself.

This case neatly tees up the question presented. Petitioner appealed the denial of a compelling § 455(a) recusal motion. But, applying its precedent, the Eleventh Circuit held that his unconditional guilty plea waived his right to appeal that denial. That is not the law in either New England or the Big Apple. And it is also wrong: an unconditional guilty plea—without more—does not waive a § 455(a) claim on appeal.

STATEMENT

A. Legal Background

1. "In 1974 Congress amended the Judicial Code 'to broaden and clarify the grounds for judicial disqualification.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 849 (1988) (quoting Pub. L. No. 93-512, 88 Stat. 1609 (1974)). In addition to enumerating five circumstances requiring recusal, *see* 28 U.S.C. § 455(b)(1)–(5), Congress more generally required a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C § 455(a). Section 455(a) "was an entirely new 'catchall' recusal provision" requiring judicial disqualification based not on "the reality of bias or prejudice but its appearance," as "evaluated on an objective basis." *Liteky v. United States*, 510 U.S. 540, 548 (1994) (emphasis omitted). Thus, "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865; *see id*. at 859–60 (repeating same).

In that 1974 legislation, Congress also specifically addressed whether, and how, judicial disqualification under § 455 may be waived by the parties. On the one hand, Congress made clear that no judge may "accept from the parties to the proceeding a waiver of any ground for disqualification in subsection (b)." 28 U.S.C. § 455(e). On the other hand, Congress provided that, "[w]here the ground for disqualification arises only under subsection (a), waiver may be accepted." *Id*. Critically, however, Congress further specified that any such waiver must be "preceded by a full disclosure on the record of the basis for disqualification." *Id*.

2. Because federal judges preside over criminal cases, § 455 applies in that context. When a defendant is convicted, he has a statutory right to appeal his conviction and sentence. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742(a). Nonetheless, when a defendant enters an unconditional guilty plea—*i.e.*, one that does not expressly reserve in writing the ability raise certain claims on appeal, *see* Fed. R. Crim. P. 11(a)(2)—the plea itself waives the right to raise certain claims on appeal.

In *Class v. United States*, 138 S. Ct. 798 (2018), the Court summarized its precedent on the type of claims that are waived on appeal by an unconditional guilty plea. First, "a valid guilty plea foregoes not only a fair trial, but also other accompanying constitutional guarantees," including "the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers." *Id*. at 805 (quotation omitted). Second, "[a] valid guilty plea also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered." *Id*. "Finally, a valid guilty plea relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty." *Id*. (quotation omitted).

The question presented here is whether, in addition to those claims, an unconditional guilty plea also waives the defendant's right to appeal a district court's failure to recuse under § 455(a). As explained below, the circuits have divided on that question for three decades. That question is an important one for the administration of criminal justice and the integrity of the judiciary. And this case affords the Court an ideal and rare opportunity to resolve that longstanding circuit conflict.

B. Proceedings Below

1. In 1994, Petitioner was charged in the Southern District of Florida with firearms offenses and with assaulting Hon. Shelby Highsmith, a federal judge in that District. (Case No. 94-cr-402). Because Judge Highsmith was the alleged victim, the Acting Chief Judge of the District entered an order under § 455(a) recusing all of the District Judges from that case. Dist. Ct. ECF No. 10. The Chief Judge of the Eleventh Circuit then designated Hon. Robert B. Propst of the Northern District of Alabama to preside until the case concluded. Dist. Ct. ECF No. 13. A jury ultimately acquitted Petitioner of assaulting Judge Highsmith, but it convicted him of being a felon in possession of a firearm. Judge Propst sentenced him to 272 months in prison.

In 2010, Petitioner sought credit on his federal sentence for three years that he had spent in state custody. The Bureau of Prisons requested Judge Propst's position but mistakenly sent its letter to the courthouse in Miami instead of Alabama. Rather than transmitting the letter to Judge Propst, Hon. Federico A. Moreno—then the Chief Judge of the Southern District, who had served alongside Judge Highsmith since 1991—responded to it. Although Chief Judge Moreno had been recused from the case, and although Petitioner had been acquitted of the assault, Judge Moreno "strongly oppose[d]" Petitioner's request for credit because Judge Highsmith "was the victim in the case." Chief Judge Moreno elaborated that "[f]ederal judges have been the recipients of many threats in today's society," and "[w]hen a threat results in an actual attack, the offenders should be severely punished. To now allow Mr. Rodriguez to be released" three years early "is not only dangerous to the public but an insult to

the victim in the federal case, Judge Shelby Highsmith." Chief Judge Moreno copied "[a]ll Southern District and Magistrate Judges" on his letter. Relying on that letter, the BOP denied Petitioner the sentencing credit that he had requested.

After obtaining a copy of Chief Judge Moreno's letter through a FOIA request, Petitioner challenged the BOP's denial in a habeas corpus petition brought in California, where he was then incarcerated. Although the district court dismissed his petition, the Ninth Circuit reversed and remanded, holding that the BOP "doubly erred" by relying on the Chief Judge Moreno's letter. *Rodriguez v. Copenhaver*, 823 F.3d 1238, 1243 (9th Cir. 2016). The court explained that, not only was Judge Moreno not the sentencing judge, but he "had been recused from the case and should not have participated in any way." *Id*. In addition, Judge Moreno was "a colleague of an alleged victim of Rodriguez's crimes," and he "presented his recommendation under the guise of a neutral adjudicator by sending his letter in place of the sentencing judge's recommendation." *Id*. The Ninth Circuit concluded that "[s]uch actions do not satisfy the appearance of justice," and they violated due process and § 455(a). *Id*.

2. After Petitioner's release from prison, he was charged in 2017 in the Southern District of Florida with drug and money-laundering offenses. (Case No. 17-cr-20904). The case was assigned to Judge Ursula Ungaro. After entering a guilty plea without a written plea agreement, App. C, Petitioner learned that Judge Ungaro had been a sitting judge on the Southern District of Florida at the time of his alleged assault on Judge Highsmith. During a status conference, Petitioner alerted Judge Ungaro to the earlier recusal order and advised of his intention to seek her recusal.

In response, she revealed that she was already familiar with the "Judge Highsmith case" and the "Judge Highsmith assault." App. 47a, 54a. She added: "What a gift this would be" for Petitioner if she was required to recuse from his case. App. 48a.

Petitioner then formally moved to recuse Judge Ungaro on two grounds: (1) the 1994 district-wide recusal order remained in effect; and (2) § 455(a) independently required Judge Ungaro's recusal because she was a colleague of Judge Highsmith when the alleged assault occurred in 1994; and she remained a colleague of Judge Moreno, who expressed actual bias against Petitioner in his letter to the BOP, on which Judge Ungaro had been copied. *See* Dist. Ct. ECF Nos. 277, 280, 281.

Judge Ungaro denied the recusal motions. App. E, 60a–65a. As to Petitioner's first argument, she determined that the district-wide recusal order applied only to the original 1994 case. App. 63a. As to his second argument, she determined that recusal was not required under § 455(a) merely because she served alongside Judge Highsmith and received a copy of then-Chief Judge Moreno's letter, as those issues were temporally and substantively distinct from the current case. App. 63a–65a.

Proceeding both *pro se* and through counsel, Petitioner sought two writs of mandamus from the Eleventh Circuit, reiterating his recusal arguments. The court of appeals summarily denied both petitions. (11th Cir. Nos. 19-11081, 19-11084).

Judge Ungaro thus presided at sentencing. She overruled all of Petitioner's objections to the pre-sentence investigation report. She denied him a reduction for acceptance of responsibility, which the probation officer had recommended. And she denied his request for a downward variance from the guideline range, ultimately

imposing a sentence of 400 months (*i.e.*, over 33 years). When imposing that sentence, she again referred to "the Judge Highsmith robbery." Dist. Ct. ECF No. 633 at 27.

3. On appeal, Petitioner reiterated his recusal arguments. *See* Pet. C.A. Br. 23–28. Instead of addressing the merits, the government responded that, under *United States v. Patti*, 337 F.3d 1317 (11th Cir. 2003), Petitioner had waived the issue by entering an unconditional guilty plea. U.S. C.A. Br. 37–38. Petitioner replied that *Patti* was both distinguishable and wrongly decided. Pet. C.A. Reply Br. 12 & n.8.

The Eleventh Circuit affirmed. As to the § 455(a) issue, the court of appeals held that the 1994 recusal order applied only to the original criminal case, not to the 2017 criminal case. App. 7a–8a. But, critically, the court did not address the merits of Petitioner's "alternative[ ]" argument that § 455(a) independently required Judge Ungaro's recusal. App. 7a. Instead, it simply held that, under its precedent in *Patti*, Petitioner had "waived any argument concerning his § 455(a) motion when he entered a voluntary and unconditional guilty plea in the district court." App. 7a–8a.

Petitioner sought rehearing en banc. He argued that "an unconditional guilty plea does not waive a criminal defendant's ability to challenge on appeal a judge's 455(a) violation." Pet. C.A. Reh. Pet. 3. He observed that the First and Second Circuits had so held. *Id.* (citing *United States v. Brinkworth*, 68 F.3d 633, 637–38 (2d Cir. 1995) and *United States v. Chantal*, 902 F.2d 1018, 1020–21 (1st Cir. 1990)). And because "[t]hose other circuits [decisions] are more persuasive," he urged the Eleventh Circuit to "grant rehearing en banc, overrule *Patti*, and follow the approach adopted in *Chantal* and *Brinkworth*." *Id.* The court denied rehearing. App. B, 22a.

REASONS FOR GRANTING THE PETITION

Since 1990, the circuits have been openly divided on whether an unconditional guilty plea waives the right to appeal a district court's failure to recuse under § 455(a). That question is important to the administration of justice. And this case presents an excellent opportunity to resolve the conflict. The Court should seize it.

I. The Circuits Are Divided on the Question Presented

The Fifth, Tenth, and Eleventh Circuits have held that an unconditional guilty plea waives a defendant's right to appeal the district court's failure to recuse under § 455(a). The First and Second Circuits have held that it does not. Several courts and commentators have acknowledged this longstanding split among the circuits.

1. In *United States v. Gipson*, 835 F.2d 1323 (10th Cir. 1988), the Tenth Circuit "h[e]ld that when the defendant entered his plea of guilty without seeking to preserve the issue raised by his § 455(a) motion, he waived his right to appeal the denial of recusal based upon the judge's appearance of impartiality." *Id* at 1325. The court emphasized that, while § 455(e) prohibited parties "from waiving the *fact* of partiality" under § 455(b), it authorized parties "to waive the *appearance* of judicial partiality" under § 455(a). *Id*. And because "a party can waive recusal" under 455(a), it "follow[ed] that denial of recusal is a pretrial defect which is sublimated within a guilty plea and thereafter unavailable as an issue for appeal." *Id*.

The First Circuit soon disagreed with the Tenth Circuit. In *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990), it emphasized that, given the "laudable congressional aim that § 455(a) would assure not only an impartial court but the

appearance of one, the idea that a plea of guilty would wipe out the attainment of adjudication by that kind of court is simply contrary to fundamental fairness." *Id.* at 1021 (quotation omitted). In that court's view, it was "plain that Congress would never have thought its purpose to assure actions by judges who are not only impartial but appear to be, could be so unintelligibly eradicated by a plea engendered by the immediate prospect of a trial/decision by a biased judge." *Id.* By holding that "disqualification of judges can be so easily waived," "the Tenth Circuit is, in our view, in error." *Id.* The court rejected the government's argument that a conditional plea was needed to preserve the issue, explaining that "[i]t would be incongruous to hold that for one seeking the benefit of such protection the consent would have to obtained from the very judge whose qualifications are under attack." *Id. Accord United States v. Voccola*, 99 F.3d 37, 42 (1st Cir. 1996) ("a guilty plea does not bar a recusal motion").

The Second Circuit thereafter agreed with the First Circuit and disagreed with the Tenth Circuit. In *United States v. Brinkworth*, 68 F.3d 633 (2d Cir. 1995), the Second Circuit "h[e]ld . . . that a defendant who pleads guilty unconditionally may nevertheless appeal denial of a § 455(a) motion." *Id.* at 638. The court found that "*Chantal*'s approach, which permits a defendant who has pleaded guilty unconditionally to appeal a § 455(a) denial, correctly resolves the waiver issue." *Id.* Meanwhile, it believed that the "*Gipson* approach is formalistic, and relies upon the notion that an improper § 455(a) is a pretrial defect which is sublimated within a guilty plea rather than an error that affects the integrity of the whole judicial process." *Id.* (internal citation and quotation omitted). In light of § 455(a)'s purpose

to safeguard the "integrity of the judiciary" as a "protection for the citizenry," the Second Circuit believed that "Congress did not intend for the section's provisions to be circumvented so easily." *Id*.

Deepening and evening the split, the Fifth Circuit in *United States v. Hoctel*, 154 F.3d 506 (5th Cir. 1998) subsequently agreed with the Tenth Circuit and disagreed with the First and Second Circuits. After recognizing that "other circuits have split on the issue," the Fifth Circuit sided with the Tenth Circuit's approach in *Gipson*. *Id*. at 507–08. Based on "the statutory scheme that clearly contemplates the possibility of waiver in § 455(a), [it] conclude[d] that Hoctel was not precluded from waiving his right to appeal the district court's denial of his recusal motion." *Id*. at 508. Thus, the court held that "Hoctel's appeal is foreclosed by . . . the general waiver resulting from his unconditional guilty plea." *Id*.

The Eleventh Circuit joined that camp in *United States v. Patti*, 337 F.3d 1317 (11th Cir. 2003), the precedent applied in the decision below. The court acknowledged that its "sister circuits . . . have come to opposite conclusions, thus creating a circuit split." *Id*. at 1320. But it "agree[d] with the Fifth and Tenth Circuits and h[e]ld that a defendant waives his right to appeal the denial of a § 455(a) motion by entering an unconditional guilty plea." *Id*. at 1320–21. Like those circuits, the Eleventh Circuit emphasized that "a party can waive recusal under § 455(e) when the motion is brought pursuant to § 455(a), but cannot waive recusal when the motion is brought pursuant to § 455(b)." *Id*. at 1322. In light of that distinction, the court "conclude[d] that the 'denial of recusal is a pretrial defect which is sublimated within a guilty plea

and thereafter unavailable as an issue on appeal.'" *Id*. (quoting *Gipson*, 835 F.2d at 1325). While "[t]he First and Second Circuits base[d] their holdings upon the belief that the appearance of impropriety goes to the heart of the judicial proceedings and fundamental fairness," the Eleventh Circuit rejected their holdings because "Congress expressly provided for waiver in § 455(a) cases." *Id*. at 1322 n.7.

2. In light of the foregoing cases, there can be little doubt that a circuit conflict exists. Indeed, every precedential decision above (except the first) expressly acknowledged the conflict and chose a side. Other courts have long recognized the conflict too. *See, e.g.*, *United States v. Swallers*, 897 F.3d 875, 877 n.2 (7th Cir. 2018) (noting the conflict between *Patti* and *Brinkworth*); *United States v. Jones*, 718 F. App'x 181, 184 (4th Cir. 2018) (observing that *Patti* "summarize[ed] [the] circuit split on [this] issue"); *United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1006 (9th Cir. 2000) ("other circuits are currently split"); *United States v. Ross*, 116 F.3d 487, 1997 WL 345646, at *1 (9th Cir. 1997) (stating that the circuits "disagree as to whether a defendant may appeal the denial of a motion to recuse after pleading guilty"); *Wiles v. United States*, 2020 WL 5055627, at *7 (D.N.J. Aug. 27, 2020) ("The Circuit Courts of Appeal are split on the issue of whether, through a guilty plea, a defendant waives his right to challenge the denial of a motion to recuse under § 455(a)").

Numerous commentators have also noted the circuit split. *See, e.g.*, Wright & Miller, et al., Federal Practice & Procedure § 173 (Apr. 2021) ("courts have reached different conclusions on whether a guilty plea prevents a defendant from claiming on appeal that the trial judge improperly refused to disqualify herself, with some saying

that a guilty plea is a bar to appeal and others concluding that it is not") (footnotes omitted); *id*. § 3552 ("There is authority for concluding that a criminal defendant's plea of guilty waives the defendant's right to appeal the denial of recusal based on § 455(a). There is, however, case law that rejects this proposition, and allows the defendant to raise recusal on appeal, even after the guilty plea.") (footnotes omitted); LaFave, et al., 5 Criminal Procedure § 21.6(a) & n.60 (4th ed. Dec. 2020) (citing *Patti*, which "not[ed] [a] split in [the] circuits"); Lisa B. Eisen & Ian R. Rooney, Guilty Pleas, 90 Geo. L.J. 1477, 1493–94 & n.1262 (2002) ("The circuit courts are split over whether a guilty plea waives the right to appeal based on alleged partiality by the sentencing judge."); Nancy B. Pridgen, Note, Avoiding the Appearance of Judicial Bias: Allowing a Federal Criminal Defendant to Appeal the Denial of a Recusal Motion Even After Entering an Unconditional Guilty Plea, 53 Vand. L. Rev. 983, 1006 (2000) ("The circuit courts are currently split as to whether an unconditional guilty plea constitutes a waiver of the appeal of a denied recusal motion under § 455(a).").

II. The Circuit Split Should Be Resolved

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Indeed, only 2% of federal defendants exercise their right to trial; the remainder plead guilty. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012). More than 60,000 federal defendants pleaded guilty in 2020 alone. U.S. Sentencing Comm'n, 2020 Annual Report and Sourcebook of Federal Sentencing Statistics 56–58, tbl. 11. Yet despite the ubiquity of guilty pleas, confusion endures about what claims survive on appeal after an unconditional plea.

Clarity on that issue would benefit all of the actors in the system. As a general matter, "informed consideration" of the consequences of a plea "can only benefit both the State and [criminal] defendants during the plea-bargaining process," for it will permit them to "reach agreements that better satisfy the interests of both." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Without clarity on what claims of error will survive a guilty plea, the government will be surprised when a defendant appeals a claim it thought had been extinguished. And defendants will be surprised when a court of appeals refuses to consider a claim they thought had been preserved.

Courts also suffer under this cloud of confusion. Under Rule 11(b) of the Federal Rules of Criminal Procedure, district courts are obligated to advise criminal defendants of the rights they are relinquishing when they plead guilty, ensuring that their pleas are voluntary. But their ability to perform that crucial role is frustrated by uncertainty about the consequences of the pleas that are being entered. The courts of appeals would benefit from clarity too. In light of the current confusion, some courts of appeals may be dismissing claims that they should be resolving, while other courts of appeals may be resolving claims that they should not be considering.

All of those considerations take on added weight in the context of § 455(a), which transcends the interests of the parties. After all, the main purpose of § 455(a) is not to protect individual litigants but "to promote public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 859–60. Yet despite the grand purpose, the happenstance of geography now determines whether a § 455(a) claim can be raised on appeal after an unconditional guilty plea. In that regard, roughly half of

all federal defendants who plead guilty do so in the Fifth, Tenth, and Eleventh Circuits, *see* U.S. Sentencing Comm'n, 2020 Sourcebook, *supra*, where a guilty plea waives a § 455(a) claim. Finally, the mere existence of that conflict frustrates the purpose of § 455(a), as the disparate treatment of identical claims undermines rather than promotes public confidence in the legal system. In that context most of all, then, there should be a uniform national rule about the consequences of a guilty plea.

III. This Case Is an Excellent Vehicle

1. This case squarely presents the question long dividing the circuits.

Petitioner moved to recuse Judge Ungaro under § 455(a). Dist. Ct. ECF Nos. 277, 280, 281. She denied his recusal motions on the merits. App. E, 60a–65a. Undeterred, Petitioner then sought two writs of mandamus from the Eleventh Circuit, both of which were summarily denied. (11th Cir. Nos. 19-11081, 19-11084).

On appeal, Petitioner reiterated his recusal arguments. Pet. C.A. Br. 23–28. Perhaps recognizing the strength of his § 455(a) argument, the government did not address it on the merits. Instead, the government exclusively argued that, under the Eleventh Circuit's precedent in *Patti*, Petitioner's unconditional guilty plea had waived his right to appeal the recusal issue. U.S. C.A. Br. 37–38. Petitioner replied by attempting to distinguish *Patti* on the facts, and by stating *Patti* was wrongly decided and should be overruled en banc. Pet. C.A. Reply Br. 12 & n.8.

The Eleventh Circuit affirmed. Although it rejected Petitioner's argument that the 1994 recusal order applied to Petitioner's 2017 criminal case, it declined to address his "alternative[ ]" argument that § 455(a) independently required Judge

Ungaro's recusal. App. 7a–8a. Instead, and accepting the government's argument, the Eleventh Circuit expressly held that Petitioner "waived any argument concerning his § 455(a) motion when he entered a voluntary and unconditional guilty plea in the district court." App. 8a (citing *Patti*, 337 F.3d at 1320). Because the court of appeals did not address Petitioner's § 455(a) argument on the merits, the court's waiver holding was dispositive below. Thus, that issue is squarely presented for review here.

Finally, and although unnecessary to preserve that issue for further review, Petitioner then sought rehearing en banc. He expressly argued, *inter alia*, that "an unconditional guilty plea does not waive a criminal defendant's ability to challenge on appeal a judge's 455(a)." Pet. C.A. Reh. Pet. 3. Although *Patti* held that it did, Petitioner argued that the First and Second Circuits "had reached the opposite conclusion." *Id*. He argued that those circuits' decisions were "more persuasive," and he urged the Eleventh Circuit to "grant rehearing en banc, overturn *Patti*, and follow the approach adopted in *Chantal* and *Brinkworth*." *Id*. The Eleventh Circuit declined to do so, App. B, 22a, further entrenching *Patti* as settled law in that circuit.

2. This case is a particularly attractive vehicle because, not only is the question squarely presented, but Petitioner has a compelling § 455(a) claim. That may explain why neither the government nor the Eleventh Circuit addressed the merits of his argument that § 455(a) required Judge Ungaro's recusal independent of the 1994 recusal order. Although that § 455(a) claim is not presented for review here, its strength indicates that Petitioner—who is serving a 33-year prison sentence—may obtain significant relief on remand were he to prevail on the question presented here.

The facts underlying his claim are undisputed. Judge Ungaro was a colleague of Judge Highsmith at the time Petitioner was charged with assaulting him. That incident was well publicized at the time and gave rise to a district-wide recusal order. *See, e.g.*, Man Tries to Rob Judge, Sun-Sentinel (Jan. 13, 1995). Fifteen years later—and in an action that, according to the Ninth Circuit, violated both due process and § 455(a)—Chief Judge Moreno urged the BOP to deny Petitioner sentencing credit. *Rodriguez*, 823 F.3d at 1243. Although Chief Judge Moreno had been recused from the case, and although Petitioner had been acquitted of the assault, Judge Moreno opposed credit because Petitioner had "actually attack[ed]" his long-time colleague. Judge Ungaro was a colleague of Chief Judge Moreno's and was copied on his letter.

Judge Ungaro's conduct in Petitioner's case only made matters worse. She revealed that she was aware of the "Judge Highsmith assault" before anyone informed her. App. 47a, 54a. And when Petitioner first raised the recusal issue, she responded by saying: "[w]hat a gift this would be" to Petitioner if she had to recuse. App. 58a. With sentencing still to come, that statement revealed a potential bias against Petitioner. Why else would it have been a "gift" for her to recuse? Then, at sentencing, Judge Ungaro ruled against Petitioner at every turn: she overruled all of his objections to the pre-sentencing investigation report; she declined to award him a reduction for acceptance of responsibility, even though the probation officer had recommended it; and she denied Petitioner's request for a downward variance, ultimately imposing a whopping 400-month sentence. And, in doing so, she again referenced the "Judge Highsmith robbery." Dist. Ct. ECF No. 633 at 27. Finally, and

despite having sentenced Petitioner, Judge Ungaro (along with every other Judge in the District) later recused herself from a civil action that Petitioner brought against Judge Moreno. Case No. 20-cv-24729, Dist. Ct. ECF No. 20 (S.D. Fla. Dec. 23, 2020).

Those circumstances would, at the very least, give a reasonable person grounds to question Judge Ungaro's impartiality. And that appearance is what § 455(a) sought to eliminate. Petitioner has a substantial § 455(a) claim to raise on appeal.

3. This case is not only an excellent vehicle; it is a rare vehicle. As recounted above, the circuits first divided on the question presented in 1990 when the First Circuit in *Chantal* rejected the Tenth Circuit's decision in *Gipson*. With the Eleventh Circuit's 2003 decision in *Patti*, the circuit split became 3-to-2. Yet despite that longstanding and well-publicized split, this Court has not had occasion to resolve it. Although that question recurs with some frequency, it seldom generates suitable vehicles for review. But this case finally provides the Court with a clean opportunity to resolve the split. Because the Eleventh Circuit resolved Petitioner's § 455(a) claim on waiver grounds alone, this case squarely presents the question dividing the circuits. And it is unclear when another suitable vehicle will come along. The Court should not risk allowing yet another decade to pass without resolving the confusion.

IV. The Majority View Is Wrong

Bolstering the need for review, the majority view among the circuits is wrong. The Fifth, Tenth, and Eleventh Circuits have wrongly held that an unconditional guilty plea itself waives the right to appeal a court's failure to recuse under § 455(a). And, again, roughly half of all federal defendants plead guilty in those three circuits.

1. Like all litigants, federal defendants have the right to appear before a judge who appears impartial. 28 U.S.C. § 455(a). And they have the right to appeal their conviction and sentence. 28 U.S.C. § 1291; 18 U.S.C. § 3742(a). It follows that they have the right to appeal their conviction or sentence on the ground that the judge failed to recuse under § 455(a), provided that they did not waive their right to do so.

In holding that an unconditional guilty plea does not waive that right, the First and Second Circuits correctly emphasized the purpose of § 455(a)—"to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865. In light of that purpose, and because § 455(a) "is as much a protection for the citizenry as for the complaining defendant," they believed "that Congress did not intend for the section's provisions to be circumvented easily." *Brinkworth*, 68 F.3d at 637–38; *see Chantal*, 902 F.2d at 1021 ("Considering the laudable aim that § 455(a) would assure not only an impartial court but the appearance of one," the "disqualification of judges can [not] be so casually waived").

The statutory text confirms that view. The Fifth, Tenth, and Eleventh Circuits all emphasized that § 455(e) permits the parties to waive a § 455(a) claim. *Patti*, 337 F.3d at 1322; *Hoctel*, 154 F.3d at 507–08; *Gipson*, 835 F.2d at 1325. But they failed to appreciate that § 455(e) also requires that any such waiver be "preceded by a full disclosure on the record of the basis for disqualification." By expressly requiring such an on-the-record disclosure, Congress expressed its "belie[f] that confidence in the impartiality of federal judges [would be] enhanced by a more strict treatment of waiver." H.R. Rep. No. 93-1453, 1974 U.S.C.C.A.N. 6351, 6357; *see United States v.*

Kelly, 888 F.2d 732, 745 (11th Cir. 1989) (stating that § 455(a) waivers "should be limited to marginal cases and should be exercised with the utmost restraint"). Given § 455(e), an unconditional guilty plea does not, by itself, waive a § 455(a) claim.

2. Moreover, the requisite on-the-record disclosure will not occur during a typical plea colloquy. Although Rule 11(b) requires district courts to address a litany of issues with the defendant at the plea colloquy, the judge's qualification to preside is not one of them. This case confirms that district courts do not typically disclose the basis of any potential disqualification or ask defendants to waive it. Indeed, although Judge Ungaro later revealed that she had known about the "Judge Highsmith assault" all along, App. 47a, 54a, she did not mention it during the plea hearing, much less request a waiver of her potential disqualification. And when Petitioner first broached the recusal issue, he insisted that he had "never waived recusal." App. 56a. He then formally sought her recusal (as well as mandamus) in advance of sentencing.

Nor did the parties here agree, as they sometimes do, to waive the right to appeal certain issues as part of the plea negotiations. Such appeal waivers are memorialized in a written plea agreement, and, at the plea colloquy, the district court must ensure that the defendant understands the terms. Fed. R. Crim. P. 11(b)(1)(N). Such an on-the-record disclosure and waiver may satisfy § 455(e). But where, as here, there is no plea agreement at all, much less one with such an appeal waiver, there will seldom be the on-the-record disclosure required to satisfy § 455(e). In those mine-run cases, the guilty plea, standing alone, will not waive the defendant's statutory right to appeal the district court's failure to recuse under § 455(a).

3. To be sure, an unconditional guilty plea does inherently waive the right to appeal certain claims of error. But with respect to § 455(a) claims, § "455(e) requires waiver on the record, not waiver by implication." *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985) (Easterbrook, J.). Thus, in this particular context, Congress displaced the possibility of an implicit waiver via guilty plea. Instead, the judge must disclose the facts underlying any potential disqualification and ensure that the parties knowingly agree to waive it. Only then will the public's confidence in judicial integrity be protected, as the parties themselves will have agreed to allow the judge to preside despite knowing all of the facts giving rise to the appearance of partiality. But anything short of that explicit process will not suffice.

Even without § 455(e), an unconditional guilty plea still does not inherently waive the right to appeal a § 455(a) claim. By pleading guilty, a defendant waives his right to trial and the accompanying constitutional rights that he would have there. *Class*, 138 S. Ct. at 805; *see* Fed. R. Crim. P. 11(b)(1)(C)–(F). But the right to an impartial judge is not so limited; it permeates every phase of the proceeding—including sentencing, where the judge has broad discretion. *See Beckles v. United States*, 137 S. Ct. 886, 892–93 (2017) (summarizing the "long history of discretionary sentencing"). In that regard, this Court has held that even an express waiver of a trial right during the plea colloquy does not waive that right at the sentencing phase. *Mitchell v. United States*, 526 U.S. 314, 316, 321 (1999) (right against self-incrimination). Nor does challenging a judge's impartiality otherwise contradict any admissions made during the typical plea. *See Class*, 138 S. Ct. at 805–06.

* * *

In sum, and contrary to the holdings of the Fifth, Tenth, and Eleventh Circuits, a court's failure to recuse under § 455(a) is not "sublimated within a guilty plea." *Patti*, 337 F.3d at 1322 (quoting *Gipson*, 835 F.2d at 1325). Nothing about a guilty plea inherently waives the right to be adjudged and sentenced by a judge who appears to be impartial. And § 455(a) protects not only the litigants but the integrity of the federal judiciary as a whole. That is why Congress made crystal clear that any appearance of partiality can be waived only after the basis is fully disclosed on the record. 28 U.S.C. § 455(e). Put simply, judicial integrity cannot be tacitly waived.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
Counsel of Record
ANDREW L. ADLER
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org