No.

In the Supreme Court of the United States

ELIEZER ALBERTO JIMENEZ, PETITIONER,

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a recurring constitutional question of exceptional importance. The Court has said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-605 (2013). Those cases "reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* Among the most important rights secured by the Constitution is "[t]he Privilege of the Writ of Habeas Corpus," U.S. Const., Art. I, § 9, cl. 2, a right guaranteed "even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights," *Boumediene v. Bush*, 553 U.S. 723, 785 (2008). Notwithstanding the significance of an accused's decision to waive the right to habeas corpus (or its adequate substitute)—often the only available means of challenging the legality of a guilty plea, conviction, or sentence—this Court has never addressed whether conditioning a guilty plea on the waiver of the right to seek such postconviction relief violates the unconstitutional conditions doctrine.

The questions presented are:

1. Whether requiring a criminal defendant to waive the right to seek habeas corpus or its substitute as a condition of a guilty plea violates the unconstitutional conditions doctrine.

2. Whether a waiver of the right to seek habeas corpus or its substitute is unenforceable where, as here, its enforcement works a miscarriage of justice.[1]

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[1] The second question is similar to the question presented by *Harper v. United States*, No. 22-5111.

RELATED PROCEEDINGS

United States District Court (E.D. Ky.):

Jimenez v. United States,
No. 5:18-cr-00074 (Jan. 5, 2021)

United States Court of Appeals (6th Cir.):

Jimenez v. United States,
No. 21-5201 (July 8, 2022)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is unpublished but available at 2022 WL 2610337. The order of the court of appeals denying rehearing (App. 55a) is unreported. The opinions of the district court denying petitioner's postconviction motion and granting a certificate of appealability (App. 13a-33a) is unreported but available at 2021 WL 37484. The report and recommendation of the magistrate judge recommending the denial of petitioner's postconviction motion but the granting of a certificate of appealability (App. 34a-54a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2022. App. 1a. The court of appeals denied a timely petition for rehearing en banc on September 9, 2022. App. 55a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution provides in relevant part:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. Const., Art. I, § 9, cl. 2.

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

U.S. Const., amend. V.

STATEMENT OF THE CASE

This case presents a fundamental and recurring question that has vexed the lower federal courts and affects the rights of tens of thousands of criminal

defendants each year: the question whether, and if so under what circumstances, a defendant can be required to waive the right to seek habeas corpus or its substitute as a condition of a guilty plea.

Every day, in courtrooms across the United States, federal prosecutors demand that criminal defendants waive their right to collaterally attack their conviction and sentence as a condition of receiving the benefit of a negotiated guilty plea. This Court has never approved this practice—and it violates the unconstitutional conditions doctrine. It conditions the benefit of a guilty plea on a defendant's waiver of one of his most fundamental constitutional rights. These waivers are extraordinarily significant, frequently barring prisoners from obtaining release from unlawful detention, often on the basis of grounds for relief that were wholly unknown at the time of the bargain and that are unrelated to the subject matter of the guilty plea.

Rather than declare these waivers categorically unconstitutional, the lower federal courts have instead crafted numerous exceptions to their enforcement to ameliorate their harsh effects. The most important of the judicial exceptions is the widely-recognized "miscarriage of justice" exception: In nine circuits—every circuit with criminal jurisdiction outside the Fifth, Sixth, and Seventh—a collateral attack waiver cannot be enforced where its enforcement would work a "miscarriage of justice."

By upholding the enforcement of petitioner's collateral attack waiver in the teeth of a clear miscarriage of justice, the decision below compounds an intolerable circuit conflict over the appropriate standard for holding collateral attack waivers unenforceable. These waiver cases have vexed the lower courts and resulted in the kind of unequal and inconsistent treatment that only this Court

can resolve. In truth, the lower courts' efforts to define the permissible limits on the enforcement of collateral attack waivers can never fully remedy this problem because the practice is unconstitutional. Nonetheless, at minimum the conflict between the lower courts on the existence and scope of the "miscarriage of justice" exception cries out for this Court's guidance. The Court should grant review to set the outer parameters of the enforcement of collateral attack waivers so that cases like this one, in which petitioner was denied any opportunity at any point ever to receive a lawful sentencing, do not arise.

This case satisfies the criteria for granting review. The questions presented are exceptionally important. The first question seeks review of a nationwide practice now common in the criminal justice system which this Court has never examined or approved. A defendant's waiver of any future ability to collaterally attack a guilty plea, conviction, or sentence—no matter what later factual or legal developments arise—is among the most significant waivers a criminal defendant could possibly make. Yet this Court has never addressed the question whether conditioning a guilty plea on the waiver of collateral attack rights comports with the unconstitutional conditions doctrine.

The second question presented is also important to the fates of tens of thousands of criminal defendants. Enforcing collateral attack waivers often results in flagrant miscarriages of justice. These waivers can operate to bar prisoners from ever receiving a lawful sentencing (as in this case); from taking advantage of resentencing opportunities expressly conferred on them by Congress in new statutes authorizing retroactive postconviction relief; and even from challenging convictions on the basis of newly discovered evidence of

actual innocence. There must be *some* limit on the enforceability of these waivers. Yet in the Fifth, Sixth, and Seventh Circuits, no safety valve presently exists, even for cases in which enforcement works a miscarriage of justice.

This Court's review of the questions presented would provide much needed clarity to federal and state courts nationwide. These questions arise frequently, raise issues of surpassing importance, and their correct disposition is central to the consistent lawful operation of the criminal justice system. Because this case presents an optimal vehicle for resolving these important questions of federal law, the petition should be granted.

1. Petitioner Eliezer Jimenez pleaded guilty to conspiracy to launder money, 18 U.S.C. § 1956(h). His plea agreement included a stock collateral attack waiver that waived his right to collaterally attack his "guilty plea, conviction, and sentence." App. 2a.

2. At the time of sentencing, petitioner's sentencing guidelines range was substantially enhanced by an unconstitutionally procured 2015 Minnesota state court conviction. App. 3a.

Petitioner was prohibited from contesting the district court's reliance on that conviction at sentencing because this Court's cases prohibit a criminal defendant from collaterally attacking the validity of a state criminal conviction at a federal sentencing. *Daniels v. United States*, 532 U.S. 374, 382 (2001) (citing *Custis*, 511 U.S. at 497); *see also Lewis v. United States*, 445 U.S. 55, 62 (1980). Rather than permit a criminal defendant to challenge the validity of a state court conviction at sentencing—which implicates significant federalism concerns—the Court's cases instruct that the defendant should assent to the unlawful sentencing, have the state court vacate the unlawful state court conviction, and then

file a postconviction motion in the sentencing court to obtain a lawful sentencing. *Daniels*, 532 U.S. at 382. In such circumstances, postconviction motions must be granted because the criminal defendant has in fact *never* had a fair sentencing, and denying resentencing following vacatur of a state court conviction would thus result in a manifest miscarriage of justice. *See infra* I.B.

Notwithstanding the rule, petitioner, concerned with preserving his rights, filed *pro se* objections to his presentence report, arguing that the district court should not consider his Minnesota conviction at sentencing because it was invalid and likely to be vacated. App. 3a. Petitioner eventually withdrew his objections on the advice of counsel. App. 16a-17a. Petitioner was then sentenced to 87 months, the very top of his guidelines range—a range incorrectly enhanced by the 2015 conviction. App. 3a.

3. Eight months later, the Minnesota state court vacated petitioner's 2015 conviction as obtained "in violation of . . . the laws and constitution of the United States and the State of Minnesota." *Id.* Petitioner then filed a *pro se* petition for postconviction relief pursuant to 28 U.S.C. § 2255, seeking resentencing wherein his unconstitutional Minnesota conviction would not taint the guidelines calculation or the sentencing factors under 18 U.S.C. § 3553(a). *Id.*

4. Petitioner argued that enforcing his collateral attack waiver in this situation would amount to a miscarriage of justice warranting nonenforcement of the collateral attack waiver in his plea agreement. The magistrate judge who reviewed the petition recognized that if the miscarriage of justice exception exists, it likely would apply in this case and petitioner would be entitled to resentencing. App. 51a. But the magistrate judge acknowledged that the Sixth Circuit had not yet

recognized the existence of the exception. App. 45a. The magistrate judge therefore recommended that the district court deny the petition but grant a certificate of appealability to permit petitioner to seek clarification from the Sixth Circuit on this important question. App. 47a. The magistrate judge further appointed counsel for petitioner to pursue the remainder of the case. App. 54a.

5. The district court accepted the magistrate judge's report and recommendation. App. 33a. Undertaking its own independent review of the facts and law, the district court agreed with the magistrate judge that petitioner's case would be a good candidate for the application of the miscarriage of justice exception, were it a valid basis for overcoming a collateral attack waiver. App. 31a. The district judge also recognized, as the magistrate judge did, that the Sixth Circuit had not yet recognized any such exception. App. 31a. Consequently, the district judge denied the petition and granted petitioner a certificate of appealability to seek recognition of the miscarriage of justice exception from the court of appeals. App. 32a.

6. On appeal, the government did not dispute that courts, including this Court and the Sixth Circuit, have recognized that waiver enforcement would in certain situations amount to a miscarriage of justice. *See Johnson v. United States*, 544 U.S. 295, 303-304 (2005) (recognizing, in light of *Custis* and *Daniels*, that "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated"); *see also Bullard v. United States*, 937 F.3d 654, 658 (6th Cir. 2019); *Cuevas v. United States*, 778 F.3d 267, 274 (1st Cir. 2015). Nonetheless, the government argued that even in petitioner's circumstances, no exception to the collateral attack waiver would apply—even though petitioner never, at any

point, had an opportunity to challenge the Minnesota conviction's use as a factor in determining his federal sentence.

7. The Sixth Circuit panel issued an unpublished decision. App. 1a-8a. The panel first recited that, under controlling Sixth Circuit precedent, collateral attack waivers are generally enforceable as long as they are entered knowingly and voluntarily. App. 5a-6a (quoting *Portis v. United States*, 33 F.4th 331, 334-335 (6th Cir. 2022)). The court then held that petitioner "knowingly and voluntarily waived his collateral-attack rights." App. 6a.

The court of appeals explained that its finding "does not … end our inquiry" because the Sixth Circuit has "indicated that we will refuse to enforce knowing and voluntary waivers in at least three instances: (1) when a criminal defendant attacks his plea agreement as 'the product of ineffective assistance of counsel,' (2) when a district court sentences a criminal defendant above the statutory maximum, and (3) when a district court punishes a defendant because of the defendant's race." App. 6a (citation omitted). But, the court held, "[n]one of those exceptions applies here." App. 6a.

The court then addressed petitioner's main contention on appeal—that the Sixth Circuit should recognize the "miscarriage of justice" exception to collateral attack waivers—and rejected it. App. 7a-8a. Wrote the court: "[Petitioner] asks us to recognize a 'miscarriage of justice' exception to waiver enforceability … but we decline to do so in this case." App. 7a-8a (citation omitted). "[Petitioner] knowingly and voluntarily waived the right to collaterally attack his sentence, and this situation, *i.e.*, a vacated state-court conviction and a diminished guidelines range, was a foreseeable consequence of that waiver." App. 7a-8a. Thus, "[e]nforcing the waiver and applying the plea agreement

as written does not work a miscarriage of justice." App. 8a.

The court recognized that "other circuit courts decline to enforce valid appeal or collateral-attack waivers when doing so would result in a 'miscarriage of justice'" and that "they take varying approaches to identify the circumstances that meet this standard." App. 8a. But, wrote the court, "this circuit debate would not affect the outcome here" because "[n]o matter the standard, [petitioner] identifies no circuit court that has found a miscarriage of justice in his circumstances—when a court subsequently vacates a prior conviction used to enhance a defendant's advisory guidelines range." App. 8a.

8. Judge Bush concurred. App. 9a-12a. Judge Bush elaborated on his reasons for agreeing with the panel's decision to decline to recognize the miscarriage of justice exception, and with the panel's holding that petitioner could not meet the miscarriage exception under any circuit's standard. As Judge Bush explained, "[petitioner] waived his right, unambiguously and in open court, to bring *any* collateral attack other than for ineffective assistance." App. 12a. Petitioner "thus necessarily knew that the exact claim he now seeks to press—a mere sentence-reduction request—was subject to the waiver." App. 12a. "And as to that claim, the fact remains that [petitioner's] vacated conviction implicates *only* his advisory guidelines range—not the sentencing range set by statute, and thus not the lawfulness of his sentence." App. 12a. "Indeed, the district court today could lawfully reimpose the precise sentence Jimenez received." App. 12a. For that reason, Judge Bush explained that he "agree[d] that in these circumstances, no miscarriage-of-justice exception is available." App. 12a.

The Sixth Circuit denied a timely petition for rehearing en banc. App. 55a-56a.

REASONS FOR GRANTING THE PETITION

This Court should grant review to squarely address the question whether requiring individuals to waive their right to petition for habeas corpus or its substitute as a condition of receiving the benefit of a guilty plea violates the unconstitutional conditions doctrine. Only this Court can bring clarity to this fundamentally important area of federal law. Even if the Court declines to hold that collateral attack waivers in plea agreements are categorically unconstitutional, this case presents an ideal opportunity to provide guidance concerning the scope and application of the "miscarriage of justice" exception to such waivers. The courts of appeals are split and the question is exceptionally important and frequently recurring. This Court should grant certiorari and reverse the Sixth Circuit.

I. THIS CASE RAISES TWO IMPORTANT QUESTIONS

A. Review is warranted to establish that conditioning a guilty plea on a collateral attack waiver violates the unconstitutional conditions doctrine

This Court has never considered the question whether conditioning guilty pleas on collateral attack waivers violates the unconstitutional conditions doctrine. The Court has addressed the constitutionality of appeal waivers, holding that such waivers are constitutionally permissible. *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019).[1] But collateral attack waivers—waivers that require a defendant to give up the ability to petition for writs of habeas corpus or substitutes like § 2255 motions—differ from appeal waivers in several critical respects that make

[1] Nonetheless, in *Garza*, the Court recognized that "no appeal waiver serves as an absolute bar to all appellate claims. . . . [A]ll jurisdictions appear to treat at least some claims as unwaiveable." 139 S. Ct. at 744-745.

conditioning the acceptance of guilty pleas on collateral attack waivers unconstitutional. The Court should grant certiorari to make clear that conditioning guilty pleas on such waivers violates the unconstitutional conditions doctrine.

1. The right to habeas corpus. The Constitution protects the right to petition for a writ of habeas corpus or its adequate substitute even after a conviction. The Framers understood the writ of habeas corpus as both a structural safeguard to our government's separation-of-powers design, as well as a "right of first importance" in the project to "secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742, 798 (2008). Thus, since 1789, the Constitution has protected the right of individuals—including individuals imprisoned as a result of criminal process—to seek writs of habeas corpus or adequate substitutes to challenge the legality of their detention.[2] Mindful of this "fundamental precept of liberty," the Framers saw "the necessity for specific language in the Constitution to secure the writ [of habeas corpus] and ensure its place in our legal system." *Id.* at 739-740. The Framers codified this right in the Suspension Clause, Art. I, § 9, cl. 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.* at 743 (quoting Art. I, § 9, cl. 2). At a time before amendments to the Constitution would enshrine a constellation of additional rights and freedoms, "[t]he word 'privilege' was used, perhaps, to avoid mentioning some rights to the exclusion of others." *Id.*

"The Clause, at a minimum, 'protects the writ as it existed in 1789,' when the Constitution was adopted."

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[2] In contrast, there is no constitutional right to an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal.").

Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). And "[t]he writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials." *Id.* at 1981. That included permitting challenges to confinement following criminal trials. As this Court wrote in *Boumediene*: "Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant." 553 U.S. at 785. "This is so . . . even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights." *Id.*

Thus, since the founding, federal prisoners have had a constitutional right to seek postconviction habeas relief or to seek relief through an adequate substitute. As the Court explained in *Boumediene*, the Court's "two leading cases addressing habeas substitutes," *Swain v. Pressley,* 430 U.S. 372 (1977), and *United States v. Hayman*, 342 U.S. 205 (1952), conclusively show that there is a right to habeas corpus after a criminal trial. *Boumediene*, 553 U.S. at 774, 785. As the Court wrote, those two cases would never have needed to be decided if there were no constitutional right to habeas corpus. "That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*." *Id.* at 785.

2. Unconstitutional conditions. The Court's cases "reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Under that doctrine, "the government may not deny a benefit to a person because he exercises a

constitutional right." *Id.* (quoting *Regan v. Taxation With Representation of Wash.,* 461 U.S. 540, 545 (1983)).

To be sure, this Court has "recognized that '[t]he most basic rights of criminal defendants are . . . subject to waiver.'" *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *Peretz v. United States*, 501 U.S. 923, 936 (1991)). But the extent of the government's power to extract a waiver of a constitutional right is tempered by the bar on unconstitutional conditions. For almost half a century, this Court has confirmed that when it comes to constitutional rights, the government cannot attach strings to a benefit to "produce a result which [it] could not command directly." *Speiser v. Randall,* 357 U.S. 513, 526 (1958); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972). In short, the government may not exact a "price" for refusing to surrender one's constitutional rights.

The Court weighs two considerations in particular in determining whether conditioning a government benefit on the waiver of a constitutional right violates the unconstitutional conditions doctrine. *See Koontz*, 570 U.S. at 604-606. The first is the level of coercion in the bargain. The unconstitutional conditions doctrine is most important where the bargain involves individuals who "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits" because the value of the benefit is of disproportionately greater value than the value of the constitutional right. *Id.* at 604-605. The second consideration is the public interest in permitting individuals to waive the particular constitutional right under the circumstances of the particular bargain. *See id.* at 605-606. Some waivers can result in benefits sufficiently weighty to justify permitting them even if there is some degree of coercion in the bargain. *See id.*

Applying the doctrine in the context of "the Fifth Amendment right to just compensation," the Court has "accommodate[d]" both considerations "by allowing the government to condition approval of a [land-use] permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Id.* at 604-606 (citations omitted). The Court's "precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out . . . extortion' that would thwart the Fifth Amendment right to just compensation." *Id.* at 606.

Applying a similar analysis in the context of guilty pleas, the Court has struck a balance more favorable to waiver, at least as to the waiver of those rights—like the jury trial right—essential to the "bargain" in a plea bargain. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), for example, the Court held that a prosecutor may penalize a criminal defendant for refusing to accept a plea bargain (also known as imposing a "trial penalty") by threatening, then seeking, a harsher sentence if the defendant goes to trial and is convicted. Specifically, in *Hayes*, the prosecution threatened to charge the defendant as an habitual criminal, a designation carrying a life sentence, if he did not "save the court the inconvenience and necessity of a trial" and plead guilty to a crime carrying a sentence of 2 to 10 years. *Id.* at 358. When the defendant refused to accept the bargain, the prosecutor carried out his threat, and the defendant was convicted and received a life sentence. *Id.* at 359.

The Court upheld the conviction and sentence against a due process challenge. *See id.* at 363-365. In doing so, the Court passed on the voluntariness and public interest in plea bargaining. The Court explained that threatening

to impose a trial penalty is not typically unconstitutionally coercive. *Id.* at 363-364. "Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." *Id.* at 363. "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'"[3] *Id.* at 365 (citation omitted). The Court also explained that there is a significant public interest in encouraging plea bargains that result in the waiver of trial rights. "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Id.* at 363. "[A] rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." *Id.* at 365. The Court thus held that imposing a trial penalty on a criminal defendant who declines to waive his right to a criminal trial does not violate due process. *See id.*

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[3] The Court has made similar statements in subsequent cases. *United States v. Mezzanatto*, 513 U.S. 196, 209-210 (1995) ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'" (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978))); *Brady v. United States*, 397 U.S. 742, 755 (1970) ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

3. Application. Notwithstanding this Court's cases holding that some degree of pressure is permitted in obtaining the plea itself—and thus eliciting a waiver of the rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt—conditioning a guilty plea on a collateral attack waiver violates the unconstitutional conditions doctrine. Unlike those rights, the right to collaterally attack a conviction or sentence has "little" relationship to the benefit conferred by a plea bargain. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). When measured against the level of coercion involved in plea bargaining, and the trivial (possibly nonexistent) public benefit from requiring collateral attack waivers, it is clear that requiring such waivers violates the prohibition on unconstitutional conditions.

a. Coercion. Decades of experience with plea bargaining show that it is inherently coercive and involves a substantial imbalance of power between prosecutor and accused. As a consequence, waivers of the right to collaterally attack in plea bargains are generally more like extortion than a free-and-fair bargain between the prosecutor and the defendant.

Clear information and resource disparities exist between prosecutors and defendants. But beyond those disparities, the normalization and systemization of plea bargaining has led legislatures to increase the penalties for crimes in order to give prosecutors more leverage in plea bargaining, meaning defendants who choose to go to trial risk suffering a severe "trial penalty." Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA, in The Jury Trial in Criminal Justice* 23, 25 (Douglas D. Koski ed., 2003); *see also* Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States,* 105 Colum. L.

Rev. 959, 992 (2005) (average trial penalty ranged from 13 to 461 percent depending on the state and the offense); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines,* 38 U. Mich. J.L. Reform 345, 347-348 (2005) (average sentence for federal defendants who go to trial is three times higher than the sentence for defendants who plead to similar charges). Thus, even if *Bordenkircher* stands for the proposition that threatening a trial penalty is not unconstitutional, the underlying trial penalty itself amplifies the coercion inherent in all plea negotiations and allows prosecutors to extract other concessions—like collateral attack waivers—far removed from the subject of the bargain.

The inherent coerciveness of plea bargaining, and the trial penalty phenomenon, is illustrated by its tendency to lead even *innocent* defendants to plead. Indeed, some scholars have argued that such defendants are even more risk-averse than their guilty counterparts and therefore more likely to accept a plea. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants,* 101 Yale L.J. 2011, 2012 (1992). And because sentencing guidelines often prescribe harsher punishments for those claiming innocence (and thus not accepting responsibility), the pressure on innocent defendants to plead guilty is substantial. *See* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences,* 37 Am. Crim. L. Rev. 1363, 1394-1398 (2000). The effects of this pressure are evident at least in the federal courts, where acquittal rates have steadily dropped as guilty pleas have risen. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice,* 154 U. Pa. L. Rev. 79, 102 (2005) (showing that acquittal rates fell from a peak of 5.5% of adjudicated case outcomes in 1971 to just 1% in 2002). Although guilty pleas have "crowded out" all

trial outcomes, they have "tak[en] the heaviest toll on acquittals." *Id.* at 106.

Because most criminal cases are resolved without trial, a prosecutor's decision about what plea to offer and accept frequently amounts to a final adjudication of guilt and punishment. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law,* 61 Stan. L. Rev. 869, 878 (2009). Lawmakers have taken account of this phenomenon, and "now legislate[] with precisely this framework of prosecutorial power over pleas in mind." *Id.* at 880. Indeed, "the Department of Justice and the various United States Attorneys' Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants." *Id.*; *see* Rachel E. Barkow, *Administering Crime,* 52 UCLA L. Rev. 715, 728 & n.25 (2005) (providing examples). As a result, state and federal prosecutors can typically choose from a menu of charges—and, therefore, from a menu of potential sentences, often including mandatory minimums. That prosecutorial leverage puts pressure on defendants to plead and accept an offer of a lesser sentence. *See* William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 Mich. L. Rev. 505, 538 (2001).

Plea agreements are now far and away the most frequent method by which criminal cases conclude. *See Missouri v. Frye*, 566 U.S. 134, 143-144 (2012). "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[4] *Id.* at 143. Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."

[4] These numbers remain accurate. *See* Statistical Tables for the Federal Judiciary, tbl. D-4 (June 30, 2022), http://bit.ly/3uiudPk.

Id. at 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)). "[T]he reality" is "that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 169-170 (2012). The sheer number of cases resolved by plea is strong evidence of the power prosecutors have to extract a plea from a criminal defendant.

That collateral attack waivers are not negotiated case-by-case, but rather inserted as boilerplate in form plea agreements used by federal prosecutors, further establishes that these waivers are the product of significant coercion. The Department of Justice manual's standard form waiver provides that "[t]he defendant . . . waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255."[5] "[T]his kind of plea agreement is a contract of adhesion. As a practical matter, the government has bargaining power utterly superior to that of the average defendant." *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997), *overruling recognized by United States v. Powers*, 885 F.3d 728, 732-733 (D.C. Cir. 2018); *see also United States v. Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997), *overruling recognized by Powers*, 885 F.3d at 732-733 (similar); *see also, e.g.*, *United States v. Padilla*, 186 F.3d 136, 140 (2d Cir. 1999) ("[T]he Government ordinarily has certain awesome advantages in bargaining power [when negotiating a plea agreement]").

And these stock waivers are now ubiquitous. A 2005 study found that nearly two-thirds of guilty pleas

[5] Dept. of Justice, Criminal Resource Manual, Section 626, https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law.

contained a provision waiving a defendant's right to appeal. Nancy J. King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005). And three-quarters of pleas that included appeal waivers also included collateral attack waivers, suggesting that these waivers often go hand-in-hand. *Id.* at 213. A more recent study examined 114 boilerplate federal plea agreements used in districts across the country and found that 77 of them (67.5%) included collateral attack waivers. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87 (2015). This same study found that in eighty-eight out of ninety-four U.S. Attorney's Offices, appeal waivers—closely related to and often coinciding with collateral attack waivers—were incorporated into the standard plea agreement. *See id.*

The coercive nature of these waivers is amplified by the fact that criminal defendants cannot intelligently waive collateral attack rights because it is impossible to envision and account for all the ways new facts could come to light that call a conviction into question. The Court has said that "[t]o be valid," the waiver of a significant right "must be made with an apprehension of … all … facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948). But even well-counseled criminal defendants cannot possibly envision all of the possible grounds for a future collateral attack on a conviction or sentence.

The sheer number of unknown and unknowable grounds for later collaterally attacking a conviction or sentence illustrate the point. Congress could retroactively decriminalize the grounds for a conviction or provide an opportunity for a retroactively applicable sentence reduction. This Court could recognize a new substantive constitutional right or announce a definitive

interpretation of a federal criminal statute long misinterpreted by every federal court of appeals. A state criminal conviction used to enhance a federal sentence could be found to be invalid and vacated, thus retroactively invalidating the enhanced federal sentence. Serious but latent defects in the investigation or prosecution of the crime could come to light years after the fact, invalidating the conviction. Ineffective assistance of counsel could have been rendered which can only be challenged on collateral review. And even decades after conviction, new evidence could come to light that shows a defendant is actually innocent. This is not an exhaustive list. No criminal defendant—or even criminal lawyer—can possibly intelligently contemplate all of the potential claims he might be waiving by agreeing to a collateral attack waiver.

Courts themselves have consistently acknowledged that, given all of these contingent possibilities, actual knowing and intelligent waiver of collateral attack rights would require a power of foresight akin to "clairvoyance," *United States v. White*, 794 F. App'x 159, 164 (3d Cir. 2019) (citation omitted); *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017) (same); *In re Garner*, 664 F. App'x 441, 443 (6th Cir. 2016) (same); *United States v. Theriot*, 536 F. App'x 506 (5th Cir. 2013) (same). These waivers are "inherently uninformed and unintelligent" because their ultimate consequences "cannot be known at the time of the plea." *Johnson*, 992 F. Supp. at 439, *overruling recognized by Powers*, 885 F.3d at 732-733; *Raynor*, 989 F. Supp. at 49, *overruling recognized by Powers*, 885 F.3d at 732-733 (similar). Yet courts have nonetheless consistently enforced these waivers to the limits of their language.

The justification for permitting these coercive, uninformed, and unintelligent waivers is always the same: plea bargaining is about allocating risks, and criminal

defendants willingly assume the risk that they are waiving a crucially valuable right. *United States v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005) (Sutton, J., for the court). These courts frame this as *beneficial* to criminal defendants, writing that failure to enforce these waivers would "reduce the likelihood that prosecutors will bargain away counts . . . with the knowledge that the agreement will be immune from challenge." *Id.* It is difficult to imagine any court making a similar claim that extortive exactions must be permitted because otherwise municipalities would be less inclined to permit landowners to engage in redevelopment projects. *Cf. Koontz*, 570 U.S. at 605-606. Yet that is the logic of these cases. Given the unequal bargaining power at issue, the courts' concern should be exactly the opposite: that prosecutors will use their ability to "bargain away counts" to coerce defendants into forfeiting significant constitutional rights. *See United States v. Perez*, 46 F. Supp. 2d 59, 67-68 (D. Mass. 1999).

b. Public interest. In addition to their intolerable coerciveness, there is little public interest in collateral attack waivers. To be sure, requiring the waiver of collateral attack rights superficially saves resources that might be spent on hypothetical future postconviction motions. But in fact collateral attack waivers do almost nothing to save time and resources. These waivers do not, in practice, prevent criminal defendants from filing post-conviction motions. And the sheer number of already-recognized exceptions further erodes any cost-savings justifications. Moreover, any cost-savings justifications from permitting these waivers are vastly outstripped by the serious tendency such waivers have to harm criminal defendants and harm the public reputation and integrity of the federal courts.

Collateral attack waivers do not result in significant cost savings. These waivers are justified as a way to

reduce the burden on courts and prosecutors, who would otherwise be forced to expend time and resources defending against a supposed torrent of appeals and collateral challenges. *See* King & O'Neill, *supra*, at 230. But courts have recognized that criminal defendants who have valid merits claims nonetheless have every incentive to appeal or seek collateral relief despite a waiver, on the chance their particular case falls within a recognized exception to waiver. *See United States v. Whitlow*, 287 F.3d 638, 639 (7th Cir. 2002) (decrying the "common" practice of defendants appealing despite an appeal waiver). And the data bear this out: appeal waivers do not, in fact, reduce the rate of criminal appeals. One study found that in the Fourth Circuit, where appeal waivers were present in 70% of plea agreements, the number of criminal appeals actually *increased* 5.3% annually. *See* Andrew Dean, *Challenging Appeal Waivers*, 61 Buff. L. Rev. 1191, 1208 (2013). Conversely, the First Circuit, which used appeal waivers in only 9% of plea agreements, saw only 1.9% growth in the number of appeals filed. *Id.*

Even as they gain prosecutors little or nothing in terms of reducing cost, collateral attack waivers inflict serious costs on prisoners and the integrity and reputation of the judicial system. The right to petition for habeas corpus or its substitute is among the most vital and fundamental rights the Constitution secures to individuals. Habeas is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-291 (1969); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights."). The availability of habeas relief ensures that individuals who are unlawfully detained may resort to judicial review. *Scaggs v. Larsen*, 396 U.S. 1206, 1208 (1969) (habeas is "designed to protect every person from being detained, restrained, or confined by any

branch or agency of government"). Courts have consistently recognized the due-process protective role of the writ of habeas corpus, and its vital functions as "a bulwark against convictions that violate fundamental fairness," *Engle v. Isaac*, 456 U.S. 107, 126 (1982), and "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty," *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976); *see, e.g. Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 151 (3d Cir. 2017) ("[I]t is difficult to see how concerns of finality would trump rudimentary demands of justice and fundamental fairness when those are precisely the values the writ of *habeas corpus* is intended to protect.").

Indeed, the protections of the writ are so vital that one could make a serious argument that the right to challenge the legality of detention via habeas corpus or its substitute should not be capable of categorical waiver *at all*. As this Court has said, "[t]here are many rights, some of them guaranteed by the Constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive." *Howard v. Kentucky*, 200 U.S. 164, 175 (1906); *United States v. Riggi*, 649 F.3d 143, 148 (2d Cir. 2011) ("[A] defendant may be deemed incapable of waiving a right that has an overriding impact on public interests."). Among these are the rights "so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts." *Halbert v. Michigan*, 545 U.S. 605, 637 (2005) (Thomas, J., dissenting) (quoting *Mezzanatto*, 513 U.S. at 204). The Court has thus held that a defendant may not "insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). The right to seek habeas relief would fit comfortably among the rights this Court has recognized as

nonwaivable, and, consequently, advance the public's interest in a fair judicial process.

Collateral attack waivers are especially contrary to the public interest because they are procured solely at the arbitrary discretion of prosecutors without any specific legislative authorization by Congress. Even the President cannot unilaterally suspend the writ of habeas corpus. *Ex parte Merryman*, 17 F. Cas. 144, 148-149, 151 (C.C.D. Md. 1861) (Taney, C.J.). Yet federal prosecutors now procure collateral attack waivers from criminal defendants every day. "[I]f the high power over the liberty of the citizen now claimed, was intended to be conferred on" federal prosecutors, "it would undoubtedly be found in plain words" of Article II, "but there is not a word in it that can furnish the slightest ground to justify the exercise of the power." *Id.* at 149; *see also id.* at 151 (similar).

B. Review is also warranted to determine whether collateral attack waivers are unenforceable where their enforcement would work a miscarriage of justice

Even if the Court declines to hold that collateral attack waivers are categorically unconstitutional, the decision below warrants review because it wrongly resolved a question of exceptional importance over which the courts of appeals are divided: whether collateral attack waivers in plea agreements are unenforceable when enforcement would result in a miscarriage of justice. Nine circuits have identified a miscarriage exception to enforceability of appeal and collateral attack waivers; no circuit has rejected one in a published opinion, but three circuits (the Fifth, Sixth, and Seventh) have repeatedly and consistently refused to recognize the exception in unpublished opinions. The conflict between the courts of appeals over this question, which is basic, vitally important, and implicated in nearly every federal criminal

case, is square and intractable. There is no realistic prospect that this conflict will resolve itself unless and until this Court intervenes. Even if the Court declines to review the broader question whether collateral attack waivers in plea agreements violate the unconstitutional conditions doctrine, review of this narrower question—whether these waivers are unenforceable when their enforcement would result in a miscarriage of justice—is urgently warranted.

1. The miscarriage of justice in this case. To begin, this Court's cases establish that the circumstances of this case—involving a sentence enhanced on the basis of a later-vacated conviction—is a miscarriage of justice warranting habeas relief.

One of the four circumstances in which a criminal defendant may obtain Section 2255 relief occurs when the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a); *see, e.g.*, *Bullard*, 937 F.3d at 658. A sentence is "otherwise subject to collateral attack" when "the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). In a trio of cases—*Johnson v. United States*, 544 U.S. 295 (2005); *Daniels v. United States*, 532 U.S. 374 (2001); and *Custis v. United States*, 511 U.S. 485 (1994)—this Court has held that "a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated" through § 2255's gateway for challenging sentences "otherwise subject to collateral attack." *Johnson*, 544 U.S. at 303; *see also Daniels*, 532 U.S. at 382; *Custis*, 511 U.S. at 497.

As multiple circuits have since recognized—including the Sixth Circuit itself—those three cases unmistakably stand for the proposition that enhancing a sentence on the

basis of a later-vacated conviction is a "miscarriage of justice" that warrants resentencing. *Bullard*, 937 F.3d at 658 (to meet the "miscarriage of justice" standard required to obtain § 2255 relief a prisoner "must prove" "that a prior conviction used to enhance his sentence has been vacated"); *Watt v. United States*, 162 F. App'x 486, 503 (6th Cir. 2006) (similar); *see also Spencer v. United States*, 773 F.3d 1132, 1139 (11th Cir. 2014) (en banc) (W. Pryor, J., for the court) (similar).

As the First Circuit explained in a comprehensive opinion, *Johnson*, *Daniels*, and *Custis* clearly stand for the proposition that a petitioner whose prior state conviction has been vacated is "entitled to federal resentencing" via § 2255 because forcing the prisoner to serve out his unlawfully-enhanced original sentence would result in a "complete miscarriage of justice." *Cuevas v. United States*, 778 F.3d 267, 272 (1st Cir. 2015). That is the necessary "premise" of *Custis* and *Daniels*. *Id.* (quoting *Johnson*, 544 U.S. at 303). As the First Circuit documented in *Cuevas*, both "[t]he majority of . . . sister circuits" and the leading civil procedure treatise "have held or expressly assumed that a defendant whose sentence is increased based on convictions that are subsequently vacated can reopen his or her sentence via a § 2255 proceeding" because refusing to do so would result in a complete miscarriage of justice. *Id.* at 274 (citing, *inter alia*, 3 Wright & Miller, *Federal Practice and Procedure* § 626 (4th ed. 2014)).

2. The "miscarriage of justice" circuit split. Nine circuits have held that appeal and collateral attack waivers in plea agreements are unenforceable when—as in this case—their enforcement would work a miscarriage of justice. In those circuits, petitioner's waiver would have been found unenforceable under the circumstances of this case. The Sixth Circuit's contrary result deepens the inter-circuit divide.

a. The Sixth Circuit's refusal to recognize the miscarriage of justice exception conflicts with settled law in the First Circuit. In *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001), the First Circuit adopted a rule squarely at odds with the ruling of the panel below, explaining that "if denying a right of appeal" on the basis of an appeal waiver in a plea agreement "would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver." *Id.* at 25. As *Teeter* elaborated:

> [P]lea-agreement waivers of the right to appeal from imposed sentences are presumptively valid (if knowing and voluntary), but are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs.

Id. at 25-26.

In *Teeter*, the defendant pleaded guilty to charges arising out of two murders. *Id.* at 18-20. She initially pleaded guilty to several of the charges in exchange for dismissal of some others and waiver of her right to appeal any sentence imposed by the district court. *Id.* at 20. Her plea included an agreed-upon base offense level, but at sentencing she argued for a lower level. *Id.* The district court nonetheless applied the higher level and sentenced her to 352 months. *Id.* She appealed. *Id.* at 20-21.

The First Circuit held that it would not enforce the waiver. *Id.* at 21-27. The court outlined several considerations that would guide its analysis, but explained that any recognition of circumstances implicating a miscarriage of justice would be "fact-specific" and turn ultimately on whether the appellant in the particular case was "truly deserving" of relief from the waiver. *Id.* at 26. It found that standard met for the defendant in *Teeter*:

Notwithstanding her plea agreement and waiver, the court could not "say with the requisite assurance that the appellant's surrender of her appellate rights was sufficiently informed" to permit enforcement of the waiver. *Id.* at 26-27.

b. The Sixth Circuit's refusal to recognize the miscarriage of justice exception also conflicts with settled law in the Third Circuit. In *United States v. Khattak*, 273 F.3d 557 (3d Cir. 2001), the Third Circuit joined the First Circuit in "declin[ing] to adopt a blanket rule prohibiting all review of certain otherwise valid waivers of appeals," instead recognizing that "[t]here may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver." *Id.* at 562 (citing *Teeter*, 257 F.3d at 25). In *Khattak*, the defendant pleaded guilty to certain drug charges, stipulated to various sentencing enhancements and reductions, and waived his right to appeal and collaterally attack his sentence, but nonetheless appealed. *Id.* at 559-560. Like the First Circuit, the Third Circuit recognized the miscarriage exception and chose "not to earmark specific situations" for its application, but rather explained that the "governing standard" is simply "whether the error would work a miscarriage of justice." *Id.* at 563. While the *Khattak* court found no support for invalidating the defendant's waiver there, *id.*, there is no doubt that the Third Circuit would have found a miscarriage of justice in the case at bar. *See United States v. Foley*, 273 F. Supp. 3d 562, 570-571 (W.D. Pa. 2017) (declining to enforce a collateral attack waiver in circumstances identical to petitioner's).

c. The Sixth Circuit's refusal to recognize the miscarriage of justice exception also conflicts with settled law in the Eighth Circuit. In *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003), the en banc Eighth Circuit adopted a rule diametrically at odds with the panel ruling

below, holding that even "[a]ssuming that a waiver has been entered into knowingly and voluntarily, we will still refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice." *Id.* at 891. Like the First and Third Circuits, the Eighth Circuit stated that "we have not provided an exhaustive list of the circumstances that might constitute a miscarriage of justice," but instead simply "caution[ed] that this exception is a narrow one." *Id.* The court suggested, however, that—as in this case—enhancing a sentence based on categorically "impermissible factors" would likely fall within the exception. *Id.*

d. The First, Third, and Eighth Circuits' holdings align with the decisions of five other circuits, all of which will decline to enforce an appeal or collateral attack waiver when its enforcement would work a miscarriage of justice. *See United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995) (explaining that a "defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court" and that "[p]lea agreements are subject to the public policy constraints that bear upon the enforcement of other kinds of contracts"); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) ("We will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice" and "[a] proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice' requirement."); *United States v. Wells*, 29 F.4th 580, 584 (9th Cir. 2022) ("Even if a defendant knowingly and voluntarily waives the right to appeal his sentence, we have held that '[a] waiver of the right to appeal does not bar a defendant from challenging an *illegal* sentence.'"), *cert. denied*, No. 22-5340, 2022 WL 4657045 (U.S. Oct. 3, 2022); *United States v. Hahn*, 359 F.3d 1315, 1325, 1327 (10th Cir. 2004) ("[A] court [is required] to determine whether enforcing the waiver will result in a miscarriage

of justice."); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009) ("[A] waiver [should not] be enforced if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice.").

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THESE QUESTIONS

1. The questions presented are of exceptional legal and practical importance. Nearly all criminal charges in the United States are resolved through plea agreements. As explained above, plea agreements are the means by which virtually all criminal cases conclude. *See supra* 17-18. Confidence in the fairness of outcomes achieved through the plea process is therefore absolutely central to the administration of criminal law in this country. And even as guilty pleas are now universal, as explained above, collateral attack waivers are now an exceedingly common feature of those guilty pleas. *See supra* 18-19. A practice that is this widespread, and that results in the waiver of such significant rights, often resulting in prolonged deprivations of liberty that would otherwise be subject to challenge, should be reviewed by this Court. The sheer number of cases implicating only the miscarriage of justice exception shows that this issue warrants guidance from this Court, especially because the disparate treatment of miscarriages of justice across the circuits continues to result in unequal treatment based solely on where cases happen to arise.

2. This case is an ideal vehicle for deciding these significant questions. The dispute turns on a pure question of law: whether petitioner's collateral attack waiver is enforceable. It has no factual or procedural impediments. There is no conceivable obstacle to deciding either of the questions presented. The first question is reviewable because it was foreclosed by controlling Sixth

Circuit precedent and thus petitioner was not required to raise it in the court below. *See Watson v. United States*, 165 F.3d 486, 488-489 (6th Cir. 1999) (specifically holding that collateral attack waivers are lawful); *accord Portis*, 33 F.4th at 334-335 (reaffirming); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (holding parties need not raise futile arguments in the courts of appeals to preserve them for this Court's review); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (similar). And the second question presented was squarely raised at every stage of this case.

Furthermore, the lower courts have thoroughly ventilated the questions presented. Taking their cue from this Court's precedent, the courts of appeals have uniformly held, with respect to the first question, that conditioning guilty pleas on collateral attack waivers is not unconstitutional because this Court's cases suggest that plea bargains are not coercive and serve the public interest. On the second question, the courts on both sides of the conflict have thoroughly analyzed the competing views. Courts that hold collateral attack waivers unenforceable when they would work a miscarriage of justice recognize that there must be substantive limitations on the enforcement of these waivers to avoid harming the fundamental fairness and public integrity of the federal courts. The Sixth Circuit panel below, in contrast, held that by knowingly and voluntarily waiving collateral attack rights, a criminal defendant assumes the risk that the waiver will work a miscarriage of justice in the future. These questions are ready for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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