No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID SHANE PAQUETTE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented, on which the circuits are split, is:

Whether an appeal-waiver provision in a plea agreement is enforceable when the agreement provides the defendant with no benefit.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Paquette, Case No. 8:19-cr-264-WFJ-TGW-1.

United States Court of Appeals (11th Cir.)

United States v. Paquette, No. 21-11365.

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PETITION FOR A WRIT OF CERTIORARI

David Shane Paquette respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The Eleventh Circuit's order granting the government's partial motion to dismiss Mr. Paquette's appeal is provided in Appendix A. The Eleventh Circuit's unpublished opinion vacating a special condition of Mr. Paquette's supervised release and remanding the case for further proceedings is provided in Appendix B.

JURISDICTION

The Eleventh Circuit entered its judgment on August 18, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment's Due Process Clause provides:

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

INTRODUCTION

This question presented implicates a circuit split on whether an appeal-waiver provision in a plea agreement is enforceable when the agreement provides the defendant with no benefit. Because the question presented is exceptionally important, Mr. Paquette respectfully requests that this Court grant his petition for a writ of certiorari.

STATEMENT OF THE CASE

1. In 2005, when Mr. Paquette was 18 years old, he engaged in consensual sexual conduct with a 14-year-old girl at a campground in Wexford, Michigan. As a result, he was convicted of Criminal Sexual Conduct in the Fourth Degree—a misdemeanor offense—and sentenced to 365 days in prison. Because it was a Tier II offense, he also had to register as a sex offender for the next 25 years. Mr. Paquette registered as a sex offender in Michigan and signed a form in which he acknowledged that if he moved to another state, he also had to register

as a sex offender there. The last time he verified his registration was on July 20, 2017.

Less than two months later, while on parole for another offense, Mr. Paquette cut off his electronic monitoring device and absconded to Florida. The next year, he and his girlfriend had a child together.

2. In January 2019, law enforcement stopped a car on I-75 in Ruskin, Florida because it had a stolen tag. Mr. Paquette, who was a passenger, initially gave the officers a fake name and later ran away, crossing all three southbound lanes of I-75 before being apprehended in the median. Law enforcement ultimately took him into custody and verified his identity using his fingerprints. Mr. Paquette told law enforcement he had been in Florida for over a year, and a later search of Florida's Sex Offender Registry showed that he had never registered with the state as a sex offender.

3. Mr. Paquette pled guilty to a one-count indictment charging him with failing to register as a sex offender, in violation of 18 U.S.C. § 2250(a). In the plea agreement, Mr. Paquette agreed to waive his right to appeal his sentence on most grounds. In exchange, the government stated that it would recommend that Mr. Paquette receive a

two-level downward adjustment in his offense level for acceptance of responsibility under USSG § 3E1.1(a)—so long as it received no information suggesting the adjustment was unwarranted. The government also agreed to move for an additional one-level adjustment for acceptance of responsibility under USSG § 3E1.1(b) if Mr. Paquette complied with the terms in § 3E1.1(b) and the plea agreement. The government retained the right to determine whether he qualified for the additional level, however. And Mr. Paquette agreed that he could not challenge that determination. The government also reserved the right to defend any decision the district court made. Finally, it retained the right, subject to any limitations in the agreement, to make any recommendations it deemed appropriate regarding the disposition of the case.

4. In anticipation of sentencing, the United States Probation Office prepared a presentence investigation report. As to Mr. Paquette's term of supervised release, Probation told the district court that under 18 U.S.C. § 3583(k), it must impose a term of five years to life. Probation

also recommended that the district court impose a special condition prohibiting Mr. Paquette from having unsupervised contact with minors.

Mr. Paquette objected to the recommended condition because nothing about the offense justified prohibiting him from having unsupervised contact with minors. Probation, however, maintained the condition was justified because Mr. Paquette's 2005 offense involved a minor, he had a history of violating his registration requirements,[1] and he had absconded from parole. *Id.* at 32.

5. During sentencing, the district court overruled Mr. Paquette's objection to the condition prohibiting him from having unsupervised contact with minors, leaving it up to Probation whether Mr. Paquette could be in a minor's presence, including his child's. Mr. Paquette again objected to the imposition of the condition.

As for the length of supervision, the district court believed—consistent with Probation's recommendation—that it had to impose at least five years of supervision. The district court therefore imposed a

[1] Mr. Paquette has three Michigan convictions for failing to comply with his duties under the Sex Offender Registration Act and one Michigan conviction for failing to register when he changed his address.

term of thirty-three months' imprisonment, followed by five years of supervised release.[2]

6. On appeal, Mr. Paquette raised three issues: (1) the district court plainly erred because it erroneously believed it had to impose a term of supervised release of at least five years; (2) the special condition involved a greater deprivation of liberty than reasonably needed; and (3) the special condition was a plainly erroneous delegation of a judicial function to a probation officer. The government moved to partially dismiss his appeal, arguing that the first two arguments were barred by the appeal-waiver provision in his plea agreement. Mr. Paquette responded that, among other things, the provision was unenforceable because the plea agreement lacked adequate consideration. He noted that he pled guilty to the only count the government charged him with, there were no other potential charges, and he could have received a reduction in his guidelines range for acceptance of responsibility even if he had not waived his right to an appeal. Thus, he argued, he received

[2] The district court ordered that Mr. Paquette's thirty-three-month term of imprisonment run concurrent with five other Michigan state terms of imprisonment.

no greater benefit from his written plea agreement than he would have received if he had pled without it.

The Eleventh Circuit granted the government's motion to partially dismiss Mr. Paqeutte's appeal. Relying on *Dorman v. Publix-Saenger Sparks Theater*, 184 So. 886, 889 (Fla. 1938), the court held that the government's promise to recommend a reduction for acceptance of responsibility was sufficient consideration under Florida law, even if he could have received that benefit without the plea agreement. The court, therefore, dismissed the first the portion of Mr. Paquette's appeal relating to the first two issues raised in his initial brief.

As to the third issue—whether the special condition was a plainly erroneous delegation of a judicial function to a probation officer—the court later entered an unpublished opinion agreeing with Mr. Paquette. It therefore vacated the special condition and remanded the case for

further proceedings. *United States v. Paquette*, No. 21-11365, 2022 WL 3453115 (11th Cir. Aug. 18, 2022).[3]

REASONS FOR GRANTING THE WRIT

I. Courts enforce plea agreements using traditional principles of contract law, like the requirement of adequate consideration, that are tempered by special consideration for the defendant's due process rights.

Plea agreements are contractual in nature, and courts use traditional principles of contract law when interpreting and enforcing them. *See United States v. Robinson*, 924 F.2d 612, 613–14 (6th Cir. 1991); *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980); *see also Puckett v. United States*, 556 U.S. 129, 137 (2009) ("Although the analogy might not hold in all respects, plea bargains are essentially contracts.").

The requirement of adequate consideration is among the traditional contract principles governing the enforceability of plea agreements.

[3] Mr. Paquette has not yet been resentenced. Nevertheless, the issue here is ripe for review. Even if he appeals the outcome of the resentencing, he cannot raise the first two issues he tried to raise in his initial appeal. The Eleventh Circuit would hold those challenges are precluded by the appeal-waiver provision in his plea agreement under the law-of-the case doctrine.

United States v. Brunetti, 376 F.3d 93, 95 (2d Cir. 2004) ("[A] guilty plea can be challenged for contractual invalidity, including invalidity based on a lack of consideration."). If a plea agreement lacks consideration, then on direct appeal, an appeal-waiver provision is unenforceable. *See United States v. Lutchman*, 910 F.3d 33, 38 (2d Cir. 2018) ("[I]n the absence of a request by either party to remand because the plea agreement is unenforceable, we will sever the waiver from the plea agreement and proceed to the merits of [the] arguments.").

Moreover, "because plea agreements are unique contracts, we temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards." *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011). Thus, when strict application of contract principles would result in fundamental unfairness to the defendant, courts err on the side of protecting the defendant's due process rights.!

II. The circuits are split on whether an appeal-waiver provision in a plea agreement that provides no benefit to the defendant is supported by adequate consideration.

Although the circuits agree that a plea agreement must be interpreted and enforced using traditional contract principles, there is a

circuit split on whether a plea agreement that provides no benefit to the defendant, like the one here, is supported by adequate consideration. *Compare, e.g.*, *United States v. Hernandez*, 134 F.3d 1435, 1437–38 (10th Cir. 1998) (holding that the government provided adequate consideration when it stipulated that the defendant had a right to a three-level reduction in his offense level for accepting responsibility), *and* Appendix A ("[T]he government's promise to recommend a two- or three-level reduction for acceptance of responsibility qualifies as consideration under Florida law."), *with Lutchman*, 910 F.3d at 37–38 (holding under similar circumstances that an appeal-waiver provision was unenforceable because it was not supported by adequate consideration). This Court should use this case, which squarely presents this important legal issue, to resolve the conflict.

A. The Second Circuit has held an appeal-waiver provision is unenforceable when the defendant receives no benefit from the plea agreement.

In *Lutchman*, the defendant pled guilty to conspiring to provide material support to a terrorist organization and was sentenced to a maximum sentence of 240 months' imprisonment. 910 F.3d at 35. On appeal, the defendant argued his sentence was procedurally and

substantively unreasonable. *Id.* The government sought to dismiss his appeal because his written plea agreement had an appeal-waiver provision, but the defendant argued that the waiver provision was unenforceable "because the plea agreement conferred no benefit on him in exchange for his guilty plea." *Id.* at 37. The Second Circuit agreed with the defendant, holding that the waiver "was unsupported by consideration" and that he "received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement." *Id.*

To be sure, the government agreed not to oppose a reduction for acceptance of responsibility, "but a three-level reduction . . . was available to [him] even in the absence of an agreement to waive his right to appeal." *Id.*[4] The court also noted that the defendant pled guilty to the only count the government charged, and that the government failed to identify any other counts it could have proven at trial. *Id.* at 38. Because the agreement offered the defendant no benefit, the Second Circuit declined

[4] Although not necessary to its holding, the Second Circuit also observed that an acceptance-of-responsibility reduction would have no "practical impact" because with or without it, the bottom of the defendant's guidelines range was the statutory maximum, and the government stated that it would recommend a sentence in the guidelines range. *Lutchman*, 910 F.3d at 37–38.

to enforce the waiver provision. *Id.*

Thus, in the Second Circuit, an appeal-waiver provision is unenforceable when the plea agreement provides the defendant with no benefit outside of what he could receive without the agreement.

B. The Tenth and Eleventh Circuits have held that an appeal-waiver provision is enforceable even when the defendant receives no benefit.

The Tenth and Eleventh Circuits, on the other hand, have enforced similar appeal-waiver provisions, holding those agreements were supported by adequate consideration. In *Hernandez*, for example, the defendant pled guilty to bank robbery, and on appeal, he challenged the calculation of his guidelines range. 134 F.3d at 1436. The government sought to dismiss his appeal based on a waiver provision in his plea agreement. *Id.* at 1436. The defendant argued that his plea agreement was not supported by adequate consideration. *Id.* at 1437. The Tenth Circuit disagreed, holding that the government agreed to recommend a reduction in the defendant's offense level for accepting responsibility and agreed not to prosecute the defendant for any other

related crimes it knew about. *Id.* at 1437–38.[5] Therefore, the court held, the plea agreement was supported by adequate consideration, and the waiver provision was enforceable.

The Eleventh Circuit has similarly held an appeal-waiver provision is enforceable in this situation. As explained, in this case, the government sought to partially dismiss Mr. Paquette's appeal, including a claim that the district court erroneously believed that it had to impose at least 5 years of supervised release. Mr. Paquette argued that the appeal-waiver provision was unenforceable because it was not supported by adequate consideration. Relying on Florida law, however, the Eleventh Circuit held that consideration exists when "a promisee performs . . . any lawful action he is not otherwise legally obliged to do, without regard to the benefit conferred, or not conferred unto the promisor." *See* Appendix A. Thus, the Eleventh Circuit concluded, "the government's promise to recommend a two- or three-level reduction for acceptance of responsibility" was adequate consideration, "even if it

[5] The Tenth Circuit also noted that the government stated that it was unaware of any evidence that the defendant held a gun when he robbed the bank, even though the defendant told the teller he had a gun and held his hand behind his back. *Hernandez*, 134 F.3d at 1436, 1438.

provided only marginal benefits." *See id.*; *see also United States v. Coney*, No. 21-13736, 2022 WL 4489155 (11th Cir. Sept. 28, 2022).

Thus, contrary to the Second Circuit, the Tenth and Eleventh Circuits have held that a plea agreement is supported by adequate consideration, and an appeal-waiver is thus valid, so long as the government promises to recommend a downward adjustment for acceptance of responsibility—even though this promise results in no benefit to the defendant because it is available without an agreement.

III. The Eleventh Circuit's ruling is wrong.

Respectfully, the Eleventh Circuit got it wrong. As an initial matter, the Eleventh Circuit relied on Florida law to determine that Mr. Paquette's agreement was supported by adequate consideration. *Compare* Appendix A (relying on *Dorman*, 184 So. at 889), *with United States v. Herrera*, 928 F.2d 769, 773 (6th Cir. 1991) (holding that plea agreements cannot be interpreted and enforced using state law because "otherwise identical agreements would be subject to different interpretations depending upon which state rule was being applied").

That said, the Eleventh Circuit also incorrectly held that the defendant receives adequate consideration simply because the

government "promise[s] to recommend a two- or three-level reduction for acceptance of responsibility." Appendix A. But as the *Lutchman* court explained, a defendant can receive a reduction for acceptance of responsibility when he pleads guilty without a plea agreement. 910 F.3d at 37–38 (explaining that an acceptance-of-responsibility reduction "was available to Lutchman even in the absence of an agreement to waive his right to appeal").

Moreover, if there is any doubt that the government's promise to move for a downward adjustment for acceptance of responsibility was inadequate, it should be dispelled by the fact that the government retained the right to not recommend the two-point reduction if it received information suggesting a reduction would be inappropriate, retained the right to determine whether the defendant qualified for the additional one-point reduction, and retained the right to defend the district court's decision to reject any downward adjustment. Thus, the government's promise to recommend an adjustment for acceptance of responsibility is

not adequate consideration.[6]

Finally, although plea agreements are reviewed using traditional contract principles, courts must temper the application of those principles "with special due process concerns for fairness and the adequacy of procedural safeguards." *Riggi*, 649 F.3d at 147. Given these concerns, as well as the government's unequal bargaining power, it is important that courts ensure that defendants actually receive a benefit when pleading guilty. Here, Mr. Paquette received no greater benefit from his written plea agreement than he would have received had he pled without it. His agreement therefore lacks adequate consideration and is fundamentally unfair. The Eleventh Circuit erred in concluding to the contrary and holding that the waiver provision was enforceable.

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[6] The government also suggested to the Eleventh Circuit that its promise not to pursue additional charges constitutes adequate consideration. The Eleventh Circuit did not find that promise to be adequate consideration. Nor could it. The government neither charged nor identified any other crimes that it could have proved at trial. *See Lutchman*, 910 F.3d at 38. Indeed, the government has never asserted that it was pursuing any investigations outside the scope of the indictment. "[S]o any suggestion of consideration on this point is illusory." *Walsh v. United States*, 2019 WL 2117648, at *6 (S.D.N.Y. Apr. 25, 2019). The government's promise not to charge with Mr. Paquette with another crime was not adequate consideration.

IV. The question presented is extremely important.

According to the Pew Research Center, 90% of federal defendants plead guilty.[7] Plea agreements are used in many of those cases, and if a plea agreement has an appeal-waiver provision, it generally bars all claims that come within its scope, even claims of blatant error. *See United States v. Grinard-Henry*, 399 F.3d 1294, 1296–98 (11th Cir. 2005). The question presented, therefore, affects not only the constitutional rights of thousands of people, but also whether these individuals will have access to federal appellate courts. It is important that this Court resolve the split and clarify whether an appeal-waiver provision in a plea agreement that, like the one here, provides a defendant no benefit, is enforceable.

V. This case is an excellent vehicle to resolve the conflict.

This case provides a particularly good opportunity to resolve the entrenched disagreement among the courts on the question presented. First, the parties fully litigated the question on appeal, and the Eleventh

[7] *See* John Gramlich, Only 2% of federal criminal defendants go to trial, and most who do are found guilty (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

Circuit clearly decided it. Second, the split is squarely implicated here, and this case does not involve unique or disputed factual findings. Third, if this Court adopts the position of the Second Circuit, Mr. Paquette may have a right to relief.

* * *

Appellate courts routinely enforce appeal-waiver provisions in plea agreements. But the circuits are split on whether those provisions are enforceable in the absence of a benefit to the defendant, a split that is all the more significant given the due process concerns courts must keep at the forefront when evaluating the enforceability of these agreements.

If Mr. Paquette's case were reviewed by the Second Circuit rather than the Eleventh Circuit, the court would have refused to enforce the waiver provision and reviewed his arguments on the merits. The ability to receive meaningful appellate review should not depend on geographical happenstance. This Court's intervention is needed.

CONCLUSION

For the above reasons, Mr. Paquette respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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