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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER L. CORN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

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QUESTION PRESENTED

Can an appellate court use the invited error doctrine to preclude review of a plainly erroneous sentence that exceeds the statutory maximum sentence authorized by Congress?

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Petitioner, Christopher Corn, respectfully asks this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered on September 6, 2022, affirming the district court's judgment.

OPINION BELOW

The Eighth Circuit's opinion for which Mr. Corn seeks review is published at *United States v. Corn*, 47 F.4th 892 (8th Cir. 2022), and is attached as Appendix

A. A copy of the order denying the petition for rehearing is attached as Appendix B.

JURISDICTION

Jurisdiction in the United States District Court for the Western District of Missouri was under 18 U.S.C. § 3231, because Mr. Corn was charged and convicted of an offense against the United States, i.e., possession of a firearm in a school zone, in violation of 18 U.S.C. §§ 922(q)(2)(A) and 924(a)(4).

Mr. Corn appealed from his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291. The Eighth Circuit denied the appeal on September 6, 2022. The Eighth Circuit denied rehearing on November 22, 2022.

Under Sup. Ct. R. 13.3 and 30, this petition is filed within ninety days of the date on which the Court of Appeals entered its order denying Mr. Corn's petition for rehearing. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the separation of powers doctrine inherent in the structure of the United States Constitution:

"All legislative Powers herein granted shall be vested in a Congress of the

United States, which shall consist of a Senate and House of Representatives." U.S. Const., Art. I, § 1.

"The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., Art. III, § 1.

This case also involves the Due Process Clause which provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V.

STATEMENT OF THE CASE

A. Proceedings in the District Court

Mr. Corn pled guilty to unlawful possession of a firearm in a school zone, under 18 U.S.C. §§ 922(q)(2)(A) and 924(a)(4) (R. Doc. 150 at 1; R. Doc. 152 at 4).[1] Section 924(a)(4) provides for a sentence of no more than five years. The statute also states, "Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor." 18 U.S.C. § 924(a)(4).

[1] References are to the record in the United States District Court for the Western District of Missouri in *Unites States v. Corn*, No. 16-00097-CR-W-DGK.

The plea agreement stated, however, that the court could impose three years of supervised release and "the defendant further understands that this is a class D felony" (R. Doc. 150 at 3). The plea agreement also contained an appeal waiver stating that Mr. Corn expressly waived his right to appeal his sentence on any ground except claims of ineffective assistance of counsel, prosecutorial misconduct, or an illegal sentence (R. Doc. 150 at 8). The agreement specified that an illegal sentence included a sentence imposed in excess of the statutory maximum (R. Doc. 150 at 8). The district court sentenced Mr. Corn to 55 months' imprisonment and three years of supervised release (R. Doc. 160 at 2-3).

Mr. Corn violated his terms of supervised release and was revoked after a hearing with new counsel. The court found that Mr. Corn committed Grade C violations, applied criminal history category VI as determined in Mr. Corn's presentence investigation report, and calculated a guideline revocation range of 8 to 14 months' imprisonment (R. Doc. 195 at 7; R. Doc. 152 at 19). The court stated that the statutory range of punishment was not more than two years, and the custody and supervised release terms could not total more than 36 months (R. Doc. 195 at 7). Both parties agreed to those calculations (R. Doc. 195 at 7-8).

The prosecuting attorney recommended a sentence of 20 months' imprisonment, to be served consecutively to any sentence imposed on a pending

felony charge in state court, and a year of supervised release (R. Doc. 195 at 8-9). Defense counsel requested a sentence of one year and one day imprisonment with no supervision to follow (R. Doc. 195 at 9-10).

The court imposed a sentence of 20 months' imprisonment to be served consecutively to any sentence imposed in state court (R. Doc. 195 at 13-14). As the court announced the term of supervised release it intended to impose, Mr. Corn interrupted and indicated that he wanted 36 months' imprisonment with no supervision to follow (R. Doc. 195 at 14). Defense counsel said Mr. Corn would rather serve 36 months in prison with no supervision to follow, and "I had to tell him that's not possible via the statute" (R. Doc. 195 at 15). The court finished pronouncing its sentence, imposing one year of supervised release (R. Doc. 195 at 15-16).

B. Proceedings in the United States Court of Appeals for the Eighth Circuit

Mr. Corn appealed and argued that the district court had plainly erred in imposing sentence because possession of a firearm in a school zone is deemed a misdemeanor under § 924(a)(4), and the authorized term of supervised release for a misdemeanor is no more than one year. *United States v. Corn*, 47 F.4th 892, 894-95 (8th Cir. 2022); 18 U.S.C. § 3583(b)(3). In imposing sentence upon revocation

of supervised release, a court may impose a term of imprisonment to be followed by a new term of supervised release, but the total term cannot exceed the term of supervised release authorized by the original statute of conviction. *Id*. at 894; 18 U.S.C. § 3583(h). Thus, the sentence of 20 months' imprisonment to be followed by 12 months of supervised release exceeded the statutory maximum. *Id*. at 895.

The government argued that because the offense is not categorized by a letter grade in § 922(q) and the maximum term of imprisonment is five years, the offense is classified as a Class D felony under 18 U.S.C. § 3559(a)(4). *Id*. The authorized term of supervised release for a Class D felony is up to three years. 18 U.S.C. § 3583(b)(2). According to the government, Mr. Corn's sentence was legal because 20 months' imprisonment and 12 months of supervised release were within the applicable range of 36 months. *Corn*, 47 F. 4th at 895.

A panel of the Eighth Circuit did not address the statutory interpretation issue of whether the sentence exceeded the maximum authorized sentence, instead concluding Mr. Corn was not entitled to plain error review because any error was invited by the defense. *Id*. The court said, "Under the invited error doctrine, a defendant who invites the district court to make a particular ruling waives his right to claim on appeal that the ruling was erroneous. *Id*. The two-judge majority opinion rejected the dissenting judge's argument that the invited error doctrine

should not apply "where the government 'first introduced the error' and the sentence imposed allegedly exceeds the statutory maximum penalty." *Id*. at 896.

The majority opinion noted that the Eighth Circuit had previously applied the invited error doctrine even when the government was as much at fault as the defendant for the error. *Id*. Referring to cases involving jury instruction errors and guideline range calculation errors, the majority found "no principled reason why an invited sentence that allegedly exceeds the statutory maximum should be appealable while other invited errors of equal or greater significance to a defendant are not." *Id*. at 896-97.

The majority observed, without discussion, that several courts—primarily in unpublished opinions—have applied the invited error doctrine to claims alleging a sentence exceeds a statutory maximum. *Id*. at 897.[2] The dissenting opinion, noted that the purpose of the invited error doctrine was to prevent a party from profiting from an error it invited, and said the doctrine should not apply to Mr. Corn, who in no way profited from the error. *Id*. at 899. Distinguishing the majority's reference to invited errors regarding jury instructions, the dissent explained that the error in

[2] The majority cited *United States v. Dahda,* 852 F.3d 1282, 1291-92 (10th Cir. 2017); *United States v. Love,* 449 F.3d 1154, 1157 (11th Cir. 2006); *United States v. Cameron*, 808 F. App'x 1020, 1020-21 (11th Cir. 2020) (per curiam); *United States v. Morales-Escobedo*, 367 F. App'x 804, 806 n.2 (9th Cir. 2010) (mem.); and *United States v. Esperanza-Vasquez*, 211 F. App'x 140, 142 (3d Cir. 2007).

Mr. Corn's case "implicates separation of powers concerns not present in most challenges to the jury instructions." *Id*. at 899, n. 4. Furthermore, a defendant like Mr. Corn does not profit from permitting review of an illegal sentence. *Id*. In that situation, the defendant achieves nothing more than what he could have achieved by raising the argument below—a sentence within the statutory parameters. *Id*. A defendant allowed to challenge a jury instruction, however, could have his conviction reversed and receive a new trial—something he may not have achieved had he raised the issue below. *Id*.

The dissent also noted that the Eighth Circuit had previously permitted review of alleged illegal sentences when the defendant had waived the argument. *Id*. at 899, citing *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir. 2003) (en banc) ("In this Circuit a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver"); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000) (explaining "defendants cannot waive their right to appeal an illegal sentence").

Mr. Corn sought rehearing by the Eighth Circuit *en banc*, which was denied over the votes of Chief Judge Smith and Judges Kelly and Grasz. App. B. He now seeks review by this Court.

REASONS FOR GRANTING REVIEW

The Eighth Circuit expanded the invited error doctrine—intended to prevent parties from profiting from error deliberately introduced—to include illegal sentences, unwittingly acquiesced to by defense counsel, that exceed the maximum punishment allowed by Congress. In doing so, the court created at least two constitutional problems. The first involves the separation of powers doctrine. The court refused to perform its normal judicial role of statutory interpretation to decide whether Mr. Corn was sentenced beyond the maximum punishment authorized by Congress (which he was), and instead applied a court-created procedural doctrine to deny review altogether. The court did not offer a persuasive reason as to why a court-created procedural doctrine can trump an act of Congress.

Second, by invoking the invited error doctrine when a defendant and defense counsel neither intentionally nor knowingly promoted the error, the Eighth Circuit upended the meaning of waiver. Waiver has long been defined as the "intentional relinquishment or abandonment of a known right," but under the Eighth Circuit's formulation would now include unwittingly requesting a sentence that exceeds the statutory maximum. *United States v. Olano*, 507 U.S. 725, 733 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Applying the invited error doctrine

in this manner violates due process because it deprives a defendant of: 1) his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, and 2) his statutory right to meaningful appellate review of the illegal sentence.

Applying the invited error doctrine to a sentence exceeding the maximum term authorized by Congress leads to absurd analysis. No defendant would intentionally "invite" a sentence above the statutory maximum. Defense counsel cannot ethically allow such a sentence to be imposed, a prosecutor cannot stand by while such an error occurs, and a court cannot accept an invitation to violate an act of Congress.

The Eighth Circuit's opinion widens a circuit split on the standard for applying the invited error doctrine. Most circuits recognize that because the invited error doctrine is a form of waiver, not mere forfeiture, it requires an intentional and intelligent decision designed to induce error by the trial court. *See*, *United States v. Bastian*, 770 F.3d 212, 218-19 (2d Cir. 2014) (invited error doctrine precludes review only if a defendant intelligently and deliberately engages in a course of conduct as a "strategic gambit," rather than forgoing an objection as a matter of oversight); *United States v. Long*, 997 F.3d 342, 353 (D.C. Cir. 2021) (invited error involves intentional strategic conduct and does not extend

to unintentional oversight or mistakes by counsel); *United States v. Magdaleno*, 43 F.4th 1215, 1220 (9th Cir. 2022) (even if a defendant causes an error, the invited error doctrine applies only to rights that have been intentionally relinquished or abandoned); *also see*, *United States v. Egli*, 13 F.4th 1139, 1144 (10th Cir. 2021) (waiver includes invited error and abandonment, and it requires intent, not mere neglect).

The Fifth and Sixth Circuits treat invited error as a type of error distinct from waiver. See, *United States v. Montgomery*, 998 F.3d 693, 697-98 (6th Cir. 2021) (treating invited error as being on a spectrum between waiver and forfeiture and defining it as contributing to the error without intentionally relinquishing a defendant's rights); *United States v. Bolton*, 908 F.3d 75, 92 (5th Cir. 2018) (describing invited error as one provoked by the defendant, but not as a waiver since relief is possible if manifest injustice occurred); *United States v. Taylor*, 973 F.3d 414, 418 (5th Cir. 2020) (manifest injustice is an "error so patent as to have seriously jeopardized the rights of the appellant").

Like the Eighth Circuit in *Corn*, the Eleventh Circuit treats as invited error conduct that does not necessarily include an intentional, knowing relinquishment or abandonment of a right. *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006) (because defendant requested a sentence of time served and a term of

supervised release, he could not argue on appeal that supervised release was precluded by statute).

In the past, this Court has declined to examine the parameters of the invited error doctrine. *See*, *United States v. Olano*, 507 U.S. 725, 737 (1993) (declining to address whether an error in allowing alternate jurors to be present during jury deliberations that the defendant consented to would have been reviewable absent the government's concession that an error had occurred); *Ohler v. United States*, 529 U.S. 753, 754-56 (2000) (declining to review the admissibility of evidence that the defendant had herself introduced, but not stating an absolute prohibition on reviewing evidence of this kind). This case is a good vehicle for this Court to address the scope of the invited error doctrine.

ARGUMENT

A. Using the invited error doctrine to uphold a district court's sentence that exceeds the maximum authorized by Congress violates the separation of powers doctrine.

Of the three branches of government, only Congress has the power to define federal crimes and their punishment. *Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("the substantive power to prescribe crimes and determine punishments is vested with the legislature"); *United States v. Lanier*, 520 U.S. 259, 265 n. 5 (1997) ("The

fair warning requirement also reflects the deference due the legislature, which possesses the power to define crimes and their punishment"). "[A] defendant may not receive a greater sentence than the legislature has authorized." *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980); *Ex parte Lange*, 18 Wall. 163, 21 L.Ed. 872 (1874).

Regardless of a defendant's agreement to a term in a plea agreement, a court cannot enforce an illegal provision because parties cannot confer authority on a court that the law proscribes. *State v. Robertson*, 249 Ariz. 256, 468 P.3d 1217, 1223 (2020); *also see*, *In re West*, 154 Wash.2d 204, 110 P.3d 1122, 1126 (2005) (a defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law, because a defendant cannot empower a court to exceed its statutory authorization). A sentencing court has discretion in imposing sentence, but that discretion is bound by the sentencing options prescribed by the legislature. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000); *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

The doctrine of separation of powers is derived from the fact that the Constitution allocates power among three coequal branches of government and describes the legislative, executive, and judicial functions in three separate articles of the Constitution. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443

(1977); *Geraghty v. U.S. Parole Com'n*, 719 F.2d 1199, 1210 (3d Cir. 1983). The doctrine is meant to be a "bulwark against tyranny" such that "if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will." *Geraghty*, 719 F.2d at 1211, quoting *United States v. Brown*, 381 U.S. 437, 443 (1965). "The separation of powers inquiry is not so much a review of theoretical abstractions about 'who ought to do what' as it is a pragmatic analysis of the extent to which an act by one branch of government prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government." *Id*.

In *Greenlaw v. United States*, this Court decided whether an appellate court could, acting on its own initiative, order a district court to increase a defendant's sentence, as required by statute, absent a cross-appeal by the government. 554 U.S. 237, 243 (2008). In 18 U.S.C. § 3742(b), Congress said that when the government files a notice of appeal, the government cannot further prosecute the appeal without approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General. *Id*. at 245-46. The Court determined that this statutory provision, by vesting this power in the Executive Branch, prohibited a court from correcting a sentence on its own initiative absent a

cross-appeal:

> Congress thus entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed. It would severely undermine Congress' instruction were appellate judges to 'sally forth' on their own motion, *cf. supra*, at 2577, to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence the trial court imposed.

Id. at 246.

The Court in *Greenlaw* recognized that courts cannot act when Congress has spoken to the contrary, vesting power in another branch of government. *Id*. Here, the Eighth Circuit's panel opinion violates the separation of powers doctrine by upholding a sentence beyond the maximum authorized by Congress. The majority opinion affirmed the sentence imposed by the district court not by interpreting the relevant statutes enacted by Congress but by applying a court-created procedural doctrine—invited error—that denies review altogether. As a result, Mr. Corn is deprived of his liberty longer than Congress allows. This sets a dangerous precedent of allowing appellate courts to uphold illegal sentences with no consideration of the law enacted by Congress.

B. Applying the invited error doctrine to preclude review of a sentence that exceeds the statutory maximum authorized by Congress violates due process.

If a federal court exceeds its own authority by imposing a punishment not authorized by Congress, it violates "the constitutional principal of separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689 (1980). Whether a sentence exceeds the maximum authorized by law cannot be resolved without determining what punishment Congress has authorized. *Id*. at 688. But the Eighth Circuit did not do that in Mr. Corn's case. It refused to interpret the pertinent statutes and instead ruled that Mr. Corn invited the alleged error and waived his right to appellate review. 47 F.4th at 896-97. The Eighth Circuit, therefore, violated Mr. Corn's right to due process under the Fifth Amendment by denying his "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress" and by denying him appellate review based on his purported waiver of the issue. *Whalen*, 445 U.S. at 690.

Some rights are not waivable. *See*, *Class v. United States*, 138 S.Ct. 798, 803-05 (2018) (discussing Supreme Court precedent holding that a guilty plea does not waive claims challenging the government's power to prosecute or a court's

power to enter a conviction or impose sentence). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary; all depend on the right at stake." *Id*.

Thus, the Eighth Circuit's assertion that there is no reason to distinguish between an invited sentence that exceeds the statutory maximum and other invited errors is incorrect. 47 F.4th at 897 ("Whatever the merit of an 'illegal sentence' exception in the different context of appeal waivers, we think it would be anomalous to carve out one type of alleged error from the operation of the invited error doctrine"). The nature of the right matters and, there is good reason to distinguish between a claim in which a defendant is deprived of his liberty for a term a court had no authority to impose and a claim in which a defendant asserts he did not receive an error free trial even though he intentionally induced an error.

The Eighth Circuit endorsed this unconstitutional practice for no better reason than invited error doctrine has been used in the past to preclude review of other purported errors, such as flawed jury instructions. 47 F.4th at 896-97. The majority claimed that flawed jury instructions may be "of equal or greater significance to a defendant." *Id*. at 897. In the instance of flawed jury instructions, the majority said a defendant's conviction could be "illegal." *Id*. The majority's

use of quotation marks is telling.

A conviction obtained on flawed jury instructions is only "illegal" in the sense that the instructions contained legal error. Flawed jury instructions, evidentiary errors, and erroneous guideline calculations do not necessarily result in sentences that exceed the maximum authorized by Congress. Such errors may be deemed serious and unfair but typically defendants convicted after the commission of such errors are sentenced within the range of punishment prescribed by Congress.

Flawed jury instructions are the "paradigmatic example" of invited error because the defendant who offers a legally incorrect instruction has considered the law and intentionally offered an instruction he believes will further his defense strategy. *Magdaleno*, 43 F.4th at 1220. Another example that fits well with the invited error doctrine is a defendant's presentation of evidence that he later argues should have been excluded. *Id*. Both examples involve intentional conduct, an understanding of the law, and a strategic decision from which the defendant can profit.

These factors—intent, knowledge, and strategy—can often be discerned from the record and, when present, permit a finding of waiver. "'[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States*

Olano, 507 U.S. 725, 733 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The invited error doctrine is meant to prevent "sandbagging" by a defendant, where defense counsel purposely builds plain error into a trial so that if a conviction is obtained the defendant might receive a new trial on appeal, or when counsel makes a strategic decision at trial thinking it will benefit the defendant. Without an intentional decision to forgo a known right, the invited error doctrine does not apply.

Here, there is nothing in the record indicating that the district court, the prosecuting attorney, defense counsel, or Mr. Corn were aware of the statute treating the offense as a misdemeanor. The plea agreement merely suggests that all involved *thought* the offense was a Class D felony, not that the defense *knew* that § 924(a)(4) treats the offense as a misdemeanor for all purposes other than imposing a term of imprisonment of no more than five years. Without knowledge on Mr. Corn's part that the offense is deemed a misdemeanor for all purposes other than imposing a term of imprisonment, he could not relinquish or abandon a known right. Furthermore, the plea agreement specifically reserved the right to file an appeal challenging the imposition of an illegal sentence, which was defined as a sentence in excess of the statutory maximum (R. Doc. 150 at 8).

Neither Mr. Corn nor any other defendant benefits from an error that

subjects him or her to a longer deprivation of their liberty. It is difficult if not impossible to imagine a situation in which a defendant would knowingly and voluntarily agree to be sentenced beyond the maximum sentence authorized by statute. It is doubtful that an error could ethically be "invited" by defense counsel, who is obligated to act in the best interest of his or her client, provide zealous advocacy, and be knowledgeable of the applicable law. Moreover, it is doubtful that defense counsel could invite such an error on behalf of a defendant. *See*, *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case"). Nor could a prosecutor ethically advocate for a sentence outside the statutory range of punishment knowing that the sentence was unlawful. The purpose of the invited error doctrine simply is not served in this case.

C. The Eighth Circuit's opinion widens an existing circuit split as to the scope of the invited error doctrine.

In *United States v. Perez*, the Ninth Circuit held that the invited error doctrine can only be employed if the defendant intentionally relinquished or abandoned a known right. 116 F.3d 840, 842 (9th Cir. 1997). Although both defendants in that case submitted flawed jury instructions, neither they, the prosecution, nor the court apparently was aware that the law regarding 18 U.S.C. §

924(c)(1) had changed, making the carrying of a firearm a crime only if it had some relationship to a drug trafficking offense. *Id*. at 842-44, citing *United States v. Mendoza*, 11 F.3d 126, 129 (9th Cir. 1993).

The court stated that its invited error doctrine had previously "focused solely on whether the defendant induced or caused the error," but recognized that following *Olano*, it mattered whether the defendant intentionally relinquished or abandoned a known right or whether the defendant had merely forfeited the error. *Id*. at 845. Only if the defendant both relinquished a known right and invited the error could a court apply the invited error doctrine and deem the issue unreviewable. *Id*. The court did not refuse to apply the invited error doctrine merely because the defendants claimed to be unaware of the error, but because the record revealed no evidence that they were aware of the change in the law or submitted the flawed instructions for "some tactical or other reason." *Id*. In the absence of any evidence in the record that the defendants had intentionally waived the error, the court found that the error was forfeited and was reviewable for plain error. *Id*.

Later, in *United States v. Magdaleno*, a panel of the Ninth Circuit reiterated the court's *en banc* holding in *Perez* that even if a defendant causes an alleged error, the invited error doctrine cannot be applied unless the government

establishes, by pointing to evidence in the record, that the defendant knew of and intentionally relinquished the right at issue. 43 F.4th at 1220.

In *United States v. Egli*, the Tenth Circuit considered whether a defendant waived his challenge to a supervised release condition imposing a lifetime prohibition on using computers and the internet. 13 F.4th 1139, 1143 (10th Cir. 2021). The court declined to find that the defendant waived the issue because there was no evidence that defense counsel had considered the issue and deliberately abandoned it, thus the issue was merely forfeited. *Id*. at 1144. Based on the record, the court concluded that neglect, rather than abandonment, better explained counsel's failure to object. *Id*. at 1145. The court said, "mental state matters," in that "waiver is accomplished by intent" while "forfeiture comes about through neglect." *Id*. at 1144. "Abandonment requires some evidence that the waiver is knowing and voluntary." *Id*. With no evidence of waiver, the court reviewed the claim for plain error. *Id*. at 1146.

The law in the Eleventh Circuit is just the opposite. In *United States v. Love*, a panel of the Eleventh Circuit did not address whether the defendant had waived the error he purportedly invited. 449 F.3d 1154 (11th Cir. 2006) 998 F. The defendant pled guilty to contempt in violation of 18 U.S.C. § 401(3), a statute which provided the offense could be punished by a fine or imprisonment, or both.

Id. at 1155, n. 2. The statute did not specify that a term of supervised release could be imposed, nor did it designate the offense as a felony or misdemeanor, which would have triggered application of 18 U.S.C. § 3583(a), which permits imposition of a term of supervised release when a court imposes a term of imprisonment for a felony or misdemeanor. *Id*. at 1156, n. 4. At sentencing, the defendant repeatedly requested a sentence of time served to be followed by supervised release. *Id.* at 1155. On appeal, however, he argued that the statutes cited above did not permit the imposition of supervised release. *Id*. at 1156.

The Eleventh Circuit refused to address the merits of the argument, finding that the defendant had invited the ruling he claimed was erroneous. *Id*. at 1157. The court focused solely on the fact that in his plea agreement, the plea colloquy, and at sentencing he acknowledged, and even requested, that a term of supervised release be imposed. *Id*. The Eleventh Circuit did not consider whether the defendant, at the time of his plea and sentencing, was aware of the statutory argument he made on appeal and intentionally waived it.

The Sixth Circuit occupies a middle ground, treating invited error as something in between forfeiture and waiver. In *United States v. Montgomery*, a panel of the Sixth Circuit said, "A litigant invites error when he contributes in some way to the district court's error without intentionally relinquishing his

rights." 998 F.3d at 698. The court deemed forfeiture to be a "passive failure to make a timely assertion of a right," while waiver is intentional relinquishment of a known right. *Id*. at 697-98. Forfeiture would result in plain error review, while waiver would preclude review altogether. *Id*. at 697-98. According to the Sixth Circuit, a defendant who invites error is more responsible for the court's error than a defendant who merely forfeits an argument but did not make a conscious choice to waive the argument. *Id*. at 698.

Since invited error is neither forfeiture nor waiver according to the Sixth Circuit, the court applies a different standard: "We do not review invited errors as a matter of course, but we are also not foreclosed from reviewing them; instead, we review for plain error when 'the interests of justice demand' it." *Id.* The interests of justice typically favor review if the government and defense are equally to blame, and a constitutional right is at stake. *Id*. at 699. When a constitutional violation is not at issue, a court may review "any error of sufficient gravity if failing to do so would result in manifest injustice." *Id*.

Like the Sixth Circuit, the Fifth Circuit has said, "The standard of review for invited error is higher than that of plain error review." *Bolton*, 908 F.3d at 92. The court "will not reverse on the basis of invited error, absent manifest injustice." *Id*.

The significant differences among these three strains of invited error

doctrine discussed above demonstrate the need for this Court to grant certiorari and authoritatively set forth the scope of the invited error doctrine.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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