No. _____

IN THE

Supreme Court of the United States

APPELLANT 1 & APPELLANT 2,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This appeal arose from a sentencing dispute related to a cooperation agreement between the government and Petitioners. The government argued below—and the district court agreed—that Petitioners breached the agreement by omitting certain information from an initial proffer meeting, thereby allowing the district court to use that information to enhance their U.S. Sentencing Guidelines range. Petitioners appealed that ruling, arguing that the government failed to present evidence of any breach and, even if it had, the purported breach was immaterial and cured through their subsequent cooperation.

On appeal, the government abandoned its breach theory and argued for the first time that the information fell outside the scope of the agreement's protections entirely. This newly espoused reading not only was never asserted in the district court, it also directly contradicted the reading argued by the government and adopted by the sentencing judge below. What is more, the government's new argument turned on the meaning of an undefined "crime of violence" term in the contract. Nonetheless, the Fifth Circuit affirmed Petitioners' sentences based on this new theory—taking it further by relying on its own "crime of violence" definition that *neither* party argued.

The question presented is:

Was it unconstitutional and improper for the Fifth Circuit to rely on the government's newly argued application of an undefined contract provision to affirm Petitioners' judgments, absent exceptional circumstances or a risk of injustice resulting from a failure to reach the issue?

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

PETITION FOR WRIT OF CERTIORARI

Petitioners, Appellant 1 and Appellant 2, respectfully ask this Court to review the published decision issued by the U.S. Court of Appeals for the Fifth Circuit in this case.[1]

JUDGMENT AT ISSUE

The Fifth Circuit issued its published decision on November 14, 2022. A copy of the decision is attached as the Appendix, and it is also available at 56 F.4th 385.

JURISDICTION

The Fifth Circuit issued its decision affirming the Appellants' judgments on November 14, 2022. 1a-16a. Appellants timely filed a petition for rehearing en banc,

[1] The Fifth Circuit granted Petitioners' motion to redact identities from the opinion below, and the redacted published opinion is attached as the Appendix. A courtesy copy of the unredacted version will be mailed to the Court for the purpose of recusals.

which was denied on December 21, 2022. 17a-18a. This petition is being filed within 90 days after the denial of that petition, pursuant to Sup. Ct. Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND SENTENCING GUIDELINES

The Fifth Amendment to the U.S. Constitution states, in relevant part:

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

U.S. Sentencing Guidelines Manual (2018) § 1B1.8 states, in relevant part:

> **Use of Certain Information**
>
> (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.
>
> (b) The provisions of subsection (a) shall not be applied to restrict the use of information . . . (4) in the event there is a breach of the cooperation agreement by the defendant[.]

STATEMENT OF THE CASE AND PROCEEDINGS

In August 2016, Petitioners were arrested by federal agents, who had learned that they were receiving packages of methamphetamine through the mail and selling it to people in New Orleans. Petitioners were charged with conspiring to distribute methamphetamine, and they promptly entered into proffer agreements with the government. The stated purpose of the agreements was to "provide the government with an opportunity to assess the value and credibility of any information given by [Petitioners] about [their] criminal activities and the criminal activities of others." The agreements also set forth several terms of the cooperation, including—as relevant here—the following:

> 2. **Truthfulness**: Your client acknowledges he must be completely truthful during the proffer and agrees to make no material misstatements or omissions of fact. He understands that he is obligated to fully disclose any criminal activity of which he has knowledge or in which he has been involved.
>
> 5. **Use of the information provided during the proffer**: The government agrees not to use any statements made during the proffer by your client at sentencing, or in its case-in-chief in this or any other criminal action brought against him, unless such action is for the offense of perjury, false statements, or obstruction of justice based upon statements made during the proffer.
>
> 6. **Impeachment**: The government reserves the right to use any statement made by your client during the proffer on cross-examination of him, should he appear as a defendant or witness in any judicial proceeding, and on cross-examination of any witness he may call in any judicial proceedings. The government also reserves the right to use these statements in a rebuttal against your client regardless of whether he testifies in his own defense.
>
> 7. **Crimes of Violence**: The terms of this agreement do not apply to any crimes of violence committed by your client, and all statements made by

> your client during the proffer concerning his role in crimes of violence may be used against him.
>
> 9. **Sentencing Information**: Your client understands that the government, pursuant to 18 U.S.C. § 3663, must provide the contents of the proffer to the sentencing judge. Pursuant to U.S.S.G. § 1B1.8, however, the proffer may not be used to determine the appropriate guideline sentence, except as stated in the Impeachment paragraph above.

Over the next several months, Petitioners met with agents and prosecutors several times pursuant to the proffer agreement. By the government's own account, their cooperation was extensive and helpful—they not only corroborated existing evidence but provided information that was previously unknown to the government. Within a few months, the government was able to obtain a superseding indictment adding nine other co-defendants to the methamphetamine conspiracy charge and broadening the temporal scope of the conspiracy charge by several months.

In November 2017, about a year after Petitioners entered into the proffer agreement, the prosecutor handling their case ("Prosecutor One") notified their lawyers that he wanted to question them about a different matter. Specifically, he wanted to ask them about the death of a man, V.S., whose body was found in a Houston-area bayou in March 2016. Petitioners promptly met with Prosecutor One and fully disclosed their involvement in certain events that led to V.S.'s death. Petitioners explained that they had posted a bond for V.S. in Texas, but V.S. absconded to New Orleans and began missing court dates. Fearing they would lose thousands of dollars, Petitioners solicited help from a contact in New Orleans to find and incapacitate V.S. so that they could transport him back to Texas, turn him into

the authorities, and recover the bond they posted. The contact enlisted the help of others, who met with V.S. and provided him alcoholic drinks containing ketamine and another drug similar to GHB, which Petitioners had supplied. After rendering V.S. unconscious, they met with Petitioners and transferred V.S. to Petitioners' car. However, on the return drive to Texas, Petitioners discovered that V.S. had died. In a panic, they disposed of his body in a bayou, where it was discovered a week later.

After fully disclosing their involvement in the circumstances leading to V.S.'s death, Petitioners continued to meet and cooperate with the government for two more years, providing information and assistance related to both their own crimes as well as other, unrelated cases. During that time, they worked with Prosecutor One to testify before a grand jury and helped secure the indictments, arrests, and guilty pleas of the other people involved in the events leading to V.S.'s death. In February 2020, Petitioners pleaded guilty to their methamphetamine conspiracy charge pursuant to a plea agreement with the government, in which the government agreed not to bring any charges against them arising from their involvement in V.S.'s death.

Prior to Petitioners' sentencings, a U.S. Probation Officer prepared a Presentence Investigation Report (PSR). In calculating the applicable Guidelines range for their methamphetamine conspiracy conviction, the PSR applied a murder cross-reference based on V.S.'s death, resulting in a Guidelines range of life imprisonment that was restricted to 240 months based on the statutory maximum. Petitioners objected to that calculation, arguing that the information related to V.S.'s death was disclosed pursuant to a proffer agreement with the government and thus

was barred from use in the Guidelines calculation under both the terms of the agreement as well as U.S.S.G. § 1B1.8(a).[2]

By the time of sentencing, a new prosecutor ("Prosecutor Two") was handling the case for the government. Although he admittedly was not involved in the execution of the proffer agreement or the years of cooperation that followed, Prosecutor Two argued at sentencing that the proffered information about V.S's death *could* be used in the Guidelines calculation because Petitioners breached the agreement by failing to disclose anything about V.S. at their initial proffer session. Thus, according to Prosecutor Two, Petitioners violated the "Truthfulness" provision of the proffer agreement, rendering the entire agreement (and its protections) void. Neither Prosecutor One nor Prosecutor Two had ever previously suggested a perceived breach of the proffer agreement during the years of cooperation that followed Petitioners' first disclosures about V.S.

At sentencing, the district court heard argument on the breach issue and ultimately sided with the government, finding that the V.S.-related information could be used in the Guidelines calculation pursuant to U.S.S.G. § 1B1.8(b)(4). As a result, Petitioners' Guidelines range for the methamphetamine conspiracy doubled, from 100-to-125 months to the statutory maximum of 240 months.

In addition, prior to sentencing, the government had filed a motion requesting a lesser sentence pursuant to U.S.S.G. § 5K1.1 based on Petitioners' substantial

[2] They also argued that the information related to V.S.'s death was not "relevant conduct" to the methamphetamine conspiracy. That issue was litigated on appeal as well, but it is not the subject of this petition and therefore is not discussed herein.

assistance in numerous investigations and cases. However, because the government successfully convinced the district court that Petitioners had breached the agreement by not discussing V.S.'s death at the outset of their cooperation, the court determined that no reduction for substantial assistance was warranted, even for information provided in *other* cases. The court explained that it had "significant questions" about the usefulness of their assistance because they "omitted talking about the murder for a year." Additionally, the court expressed doubt about the completeness of the information Petitioners provided about other cases unrelated to their own conduct, because the court was "not certain that they were completely honest in their co-conspirators' cases by their omissions[.]" The court sentenced Petitioners to the statutory maximum of 240 months, conferring no benefit under § 5K1.1.

Petitioners appealed to the U.S. Fifth Circuit Court of Appeals, arguing that the district court legally erred in its determination that the proffer-protected information related to V.S.'s death could be considered in the Guidelines calculation.[3] Specifically, there was no breach of the agreement. And even if the government had established a breach, the record proved that it was immaterial or, at the very least, fully cured through Petitioners' subsequent disclosures and cooperation—*i.e.*, their continued performance of the contract, which the government allowed and, in fact, solicited. Petitioners also argued that the government's improper, eleventh-hour assertion of breach and advocacy for the enhanced Guidelines range constituted a

[3] Both Appellants adopted arguments advanced in the other's brief.

breach of the proffer agreement by the *government*, independently mandating resentencing.

In response to those arguments, the government—now represented by a third prosecutor on appeal ("Prosecutor Three")—did a complete 180. The government abandoned its assertion of breach and argued, for the very first time, that the V.S.-related information fell outside the scope of the proffer agreement's obligations and protections based on the "crime of violence" provision. Prosecutor Three reasoned that the conduct leading to V.S.'s death constituted a federal kidnapping, pointing to a 2020 holding by the Fifth Circuit that kidnapping qualifies as a categorical crime of violence under 18 U.S.C. § 924(c). Thus, according to Prosecutor Three's new theory, *neither* party breached the agreement because Petitioners had no obligation to disclose the information about V.S., and that information—if disclosed—was not protected under the agreement.

The government conceded that it never asserted this theory in the district court. In fact, the only party to mention the "crime of violence" provision in the proceedings below was defense counsel, who explained why the information remained protected regardless of whether Petitioners' conduct could be classified as such—an understanding that Prosecutor Two never disputed. Importantly, the proffer agreement did not define or explain what the contracting parties contemplated as "crimes of violence," much less define the term with reference to the statutory definition in § 924(c). Moreover, the Fifth Circuit case upon which the government relied was decided several years *after* the parties entered the proffer agreement, and

the court noted that the question of whether kidnapping qualified as a crime of violence was an issue of "first impression." And, as the government acknowledged, the scope of what qualifies under the statutory "crime of violence" definition has been in flux over the years.

In reply, Petitioners argued that the government's new position on appeal constituted an improper request for affirmance on an alternative ground that was not "properly raised below" and was far from being "apparent" or "fully supported by the record," as required. Quite the opposite, the record showed that the prosecutors and defense counsel below consistently understood their proffer agreement as encompassing the information related to V.S.'s death. Prosecutor One solicited that very information from Petitioners as part of their ongoing cooperation agreement, and Prosecutor Two's assertion of breach was explicitly premised on a reading of the agreement that required the information's disclosure. In other words, the government not only failed to previously raise this argument, but its new argument directly contradicted its own previous conduct and interpretation of the agreement. Accordingly, under longstanding caselaw, the Fifth Circuit could not consider and affirm on that alternative ground. Moreover, the government's previous conduct and reading of their proffer agreement to encompass the information related to V.S.'s death proved that the meaning and application of the "crime of violence" provision were, at the very least, ambiguous, requiring resolution in favor of the defense.

On November 14, 2022, the Fifth Circuit issued a published decision affirming the district court's use of the proffered information in Petitioners' Guidelines

calculations based on its own interpretation of the "crime of violence" provision. 9a-10a. It acknowledged "the government's shifting interpretation" of the agreement and the fact that the "crime of violence" theory was asserted for the first time on appeal. However, the Fifth Circuit concluded that none of that mattered, stating:

> [The Appellants] are right, of course, that the general rule is we "do not ordinarily consider issues that are forfeited because they are raised for the first time on appeal." *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021). But what the government *says* the proffer means doesn't control—the language of the proffer itself does. The government's shifting interpretation does not change our ability to read the proffer for ourselves.

6a n.3 (emphasis in original).

Relying on its own interpretation of the proffer agreement, the Fifth Circuit held that the "crime of violence" paragraph "leaves no doubt that the proffer's terms . . . *are not applicable to crimes of violence*," which are "wholly exempted from the proffer's general scheme." 9a (emphasis in original). It rejected the contrary interpretation expressed by defense counsel below as "unreasonable," despite the fact that the government never disputed that reading, either in its written response to the defense's PSR objections or orally at sentencing. *Id.* With respect to whether the circumstances leading to V.S.'s death constituted a "crime of violence" under the terms of the proffer agreement, the Fifth Circuit acknowledged that "crime of violence" is "not defined in the proffer." 10a. It also rejected the government's reliance on the Fifth Circuit's 2020 decision holding that kidnapping is a categorical "crime of violence" because there was "no indication that the parties intended 'crime of violence' in the proffer to import the statutory term of art, complete with its categorical

approach baggage." 10a n.4. Nevertheless, the Fifth Circuit determined that "the V.S. affair involved a crime of violence" based on a single dictionary definition of the term "violence" and thus concluded that "its use in sentencing was not barred by the proffer[.]" 10a.

Petitioners filed a timely petition for rehearing en banc, arguing that the panel violated longstanding Supreme Court precedent by addressing the government's forfeited issue on appeal and also erred by affirming Petitioners' sentences based on the panel's own interpretation of ambiguous language in the proffer agreement. The petition was denied. 17a-18a.

REASONS FOR GRANTING THE PETITION

The U.S. Fifth Circuit Court of Appeals upheld Petitioners' erroneous sentences under an argument raised by the government for the first time on appeal, which directly contradicted its previous position argued in the district court below. The government had forfeited the argument. This case was not exceptional, nor did its particular circumstances constitute an exception to the rule against reaching arguments for the first time on appeal. The Fifth Circuit's resolution of this case under a novel appellate argument contradicted this Court's longstanding precedent, created conflict with other circuits, and violated Petitioners' due process rights by depriving them of the opportunity to be heard—to present evidence and argument regarding an ambiguous provision in their proffer agreement. Indeed, the basis for the Fifth Circuit's affirmance required the appellate court to improperly engage in fact-finding in the first instance, without receiving any evidence or testimony on the

contracting parties' understanding of the agreement. Allowing the Fifth Circuit's decision to stand wreaks havoc on the fair and orderly resolution of appellate cases. That havoc should not be tolerated.

I. The Fifth Circuit's decision conflicts with prior decisions by this Court.

This Court has so far declined to announce a definitive rule identifying the circumstances in which an appellate court may reach new arguments on appeal that were never presented to the district court below. However, the Court has set forth general parameters that govern an appellate court's decision on whether to exercise discretion to reach such forfeited issues. *See, e.g.*, *Hormel v. Helvering*, 312 U.S. 552 (1941); *Singleton v. Wulff*, 428 U.S. 106 (1976). The Fifth Circuit's affirmance in this case directly conflicts with this Court's guidance on when an appellate court should reach forfeited arguments.

First, in *Hormel v. Helvering*, this Court explained that appellate courts ordinarily do not consider issues not raised in the proceedings below because "our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact." 312 U.S. at 556. The Court further explained that this structure "is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues" and so that "litigants may not be surprised on appeal by final decision[s]" based on issues for which "they have had no opportunity to introduce evidence." *Id.* However, the Court recognized that there may be "exceptional cases or particular circumstances which will prompt a reviewing or appellate court, *where injustice might otherwise result*, to

consider *questions of law* which were neither pressed nor passed upon" by the court below. *Id.* (emphasis added).

Hormel involved a dispute over a tax deficiency assessed against the petitioner by the Commissioner of Internal Revenue (the respondent). The Board of Tax Appeals ruled in favor of the petitioner, finding that none of the statutory provisions upon which the Commissioner relied made the income at issue taxable. *Hormel*, 312 U.S. at 554. On appeal to the Eighth Circuit, the Commissioner argued that the income was taxable under an entirely different statutory provision. *Id.* at 555. In the interim, though, this Court had held in a different case that income that was materially indistinguishable from the petitioner's income was taxable under the statutory provision the Commissioner asserted for the first time on appeal. *Id.* at 559. Thus, the Court found *Hormel* to be "exactly the type of case where application of the general [appellate] practice [of not reaching new arguments] would defeat rather than promote the ends of justice" because it "would result in permitting [the petitioner] wholly to escape payment of a tax which . . . he clearly owes" based on the new precedent and existing factual record. *Id.* at 560. But even then, the Court found that the lack of factual findings and consideration of the intervening precedent by the lower court required affording the petitioner an "opportunity to offer evidence before the [lower court] on this issue, however remote may be his chance to" distinguish his case and overcome the intervening precedent. *Id.*

In *Singleton v. Wulff*, this Court expressly stated: "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon

below." 428 U.S. at 120. In the underlying proceedings in that case, the respondent had filed a lawsuit challenging the constitutionality of an abortion-related statute, and the district court granted a motion to dismiss based on its conclusion that the respondent lacked standing to challenge the statute. *Id.* at 108-11. On appeal, the Ninth Circuit reversed the district court's standing ruling and then reached the respondent's substantive arguments, holding the statute unconstitutional. *Id.* at 111-12. The Ninth Circuit justified its decision to reach the previously unadjudicated merits question by reasoning that the statute was "obviously unconstitutional," and thus "the question of the statute's validity could not profit from further refinement, and indeed was one whose answer was in no doubt." *Id.* This Court found that to be "an unacceptable exercise of its appellate discretion," noting that the petitioner had "not had the opportunity to present evidence or legal arguments in defense of the statute" and, therefore, "injustice was more likely to be caused than avoided" in that circumstance. *Id.* at 119-20.

As this Court emphasized in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), appellate waiver and forfeiture rules "ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression." *Id.* at 487 n.6. The Court explained:

> The reason for the rules is not that litigation is a game, like gold, with arbitrary rules to test the skill of the players. Rather, litigation is a "winnowing process," and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.

Id. (quotation marks and citation omitted).

In this case, the Fifth Circuit clearly should not have reached the merits of the government's forfeited argument. The Fifth Circuit acknowledged that the "crime of violence" argument had not been advanced below and even recognized that the government's novel reading represented a "shift" from the government's own previous interpretation of the agreement. 6a n.3. Not only that, but the court actually *rejected* the government's newly asserted definition of the undefined "crime of violence" term in favor of a dictionary definition that the court located on its own, laying bare the indisputable ambiguity in that provision. 10a n.4. Despite having to engage in its own fact-finding to determine the meaning of an undefined contract term—and despite disagreeing with even the government's asserted reading—the Fifth Circuit maintained that the forfeited argument could be addressed on appeal because, in its view, it only required interpreting an unambiguous proffer agreement that the court was perfectly capable of reading for itself. 6a-10a, 6a n.3.

The Fifth Circuit failed to follow or even invoke this Court's precedent. Indeed, it only cited Fifth Circuit caselaw holding that "the general rule is 'we do not ordinarily consider issues that are raised for the first time on appeal.'" *Id.* (quoting *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021)). It never considered whether this was one of the "exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon" by the court below. *Hormel,* 312 U.S. at 556. If it had, the court necessarily would have recognized that the issue and circumstances in this case do not fall into that category.

First, no exceptional or particular circumstances existed in this case that could have justified reaching a forfeited argument involving the interpretation of the undefined "crime of violence" contract provision. This was not a case in which relevant law was clarified or changed between the district court decision and appeal briefing, rendering a new argument on appeal necessary. To the contrary, the appellate court simply decided to engage in its own fact-finding to reach the merits of the newly urged contract interpretation. 9a-10a. The record below showed that the parties and district court all believed that the V.S.-related information *was* encompassed by the proffer agreement, and Petitioners' sentencing ranges were only enhanced because the district court agreed with the government that Petitioners were required to disclose the information earlier, voiding the proffer protections when they failed to do so. It was only Prosecutor Three on appeal who, seemingly realizing the deficiencies in the breach ruling below, decided to advance a different contractual argument that had not been made below. The government's forfeited argument should not have been considered at all on appeal.

Second, even if the circumstances of this case permitted the Fifth Circuit to consider the forfeited argument, the court should have remanded it to the district court to receive evidence and resolve the meaning of the newly asserted contract provision in the first instance. This was not a case in which the proffer agreement was unambiguous—the Fifth Circuit itself recognized that "crime of violence" has multiple meanings in different contexts. 10a n.4. The court ultimately did not even adopt the government's newly proposed interpretation, specifically citing the lack of

evidence that "the parties intended" that definition. 10a n.4. That alone shows that the Fifth Circuit, at the very least, should have remanded this matter to the district court for fact-finding regarding what the parties *did* intend by that term. Petitioners were entitled to present evidence in support of their reading and understanding of the contract in the district court.

This was a clear case in which "injustice was more likely to be caused than avoided" by the Fifth Circuit ruling on the government's forfeited argument. *See Singleton*, 428 U.S. at 119-20. No injustice would have resulted from a remand. The Fifth Circuit's decision to engage in its own fact-finding and affirm on that basis flies in the face of decades-old principles and precedent. This Court should intervene.

II. Pervasive conflict exists among the Courts of Appeals regarding when to reach forfeited arguments, and the Fifth Circuit's decision conflicts with rules articulated by several other circuits.

In the decades since *Singleton*, several U.S. Courts of Appeals have crafted their own specific rules and standards for deciding when to reach forfeited arguments raised for the first time on appeal. This has resulted in a hodgepodge of conflicting frameworks, inconsistent application of the default rule articulated in *Singleton*, and often arbitrary enforcement of the forfeiture principle across the country. The Fifth Circuit's approach and affirmance in this case conflicts with many of the frameworks set forth by other circuits, further demonstrating the need for this Court's review.

For example, the Second, Ninth, and Tenth Circuits have held that they generally will only reach a forfeited issue if it involves a "purely legal" question for which no additional fact-finding is necessary, or if reaching the issue is necessary to avoid manifest injustice. *See, e.g.*, *Fickling v. New York State Dep't of Civil Service*,

108 F.3d 1369, at *1 (2d Cir. 1997); *Planned Parenthood of Greater Washington and N. Idaho v. U.S. Dep't of Health & Human Serv's*, 946 F.3d 1100, 1110-11 (9th Cir. 2020); *United States v. Jarvis*, 499 F.3d 1196, 1202 (10th Cir. 2007). That was not the case here. The Fifth Circuit had to engage in its own fact-finding to determine the meaning of an undefined contract term that was not the subject of any litigation in the proceedings below and does not have a single, unambiguous meaning. As the Fifth Circuit itself recognized, and as shown by the government's own briefing, the term "crime of violence" has been used in a variety of legal contexts and has been the subject of decades of disputes and litigation. There was no evidence whatsoever in the record regarding the parties' understanding of that term at the time they entered and were performing under the cooperation agreement.

The Sixth Circuit, D.C. Circuit, and Federal Circuit appear to require "exceptional" or "compelling" circumstances in order to reach a forfeited argument. *See, e.g.*, *St. Mary's Foundry, Inc. v. Employers Ins. Of Wausau*, 332 F.3d 989, 996 (6th Cir. 2003) ("We exercise our discretion to rule on an issue not decided below only in 'exceptional cases.'"); *Campbell v. District of Columbia*, 894 F.3d 281, 288 (D.C. Cir. 2018) ("Although we have discretion to address issues raised for the first time on appeal, we generally exercise this discretion only in "exceptional cases or particular circumstances," such as when a case presents "a novel, important, and recurring question of federal law, or where the new argument relates to a threshold question such as the clear inapplicability of a statute."); *Veterans4You LLC v. United States*, 985 F.3d 850, 857 (Fed. Cir. 2021) ("We have explained that a circuit court will

disregard the rule of waiver in compelling circumstances, particularly if the issue has been fully briefed, if the issue is a matter of law or the record is complete, if there will be no prejudice to any party, and if no purpose is served by remand" (alterations and citation omitted)).

Certainly, no exceptional or compelling circumstances existed here, and the Fifth Circuit found none. The court easily could have remanded Petitioners' case for fact-finding and argument on the government's novel interpretation of the contract. Instead, the Fifth Circuit simply decided to resolve the question on its own, "usurping the role of the first-level trial court with respect to the newly raised issue rather than reviewing the trial court's actions." *Cf. Estate of Quirk v. Comm'r*, 928 F.2d 751, 757 (6th Cir.1991) ("In order to preserve the integrity of the appellate structure, [the Court of Appeals] should not be considered a 'second shot' forum, a forum where secondary, back-up theories may be mounted for the first time."). In doing so, it deprived Petitioners of any opportunity to present evidence and additional arguments regarding the parties' mutual understanding of the "crime of violence" term—for example, by subpoenaing Prosecutor One and defense counsel to testify about their understandings and communications regarding the terms of the agreement.

In contrast with the circuits cited above, the Fifth Circuit has not articulated any coherent standard for addressing forfeited issues, relying on the open-ended language in *Singleton* to exercise unbridled discretion to reach (or not reach) such issues as it sees fit. *See, e.g.*, *Green Valley Special Utility Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 474 (5th Cir. 2020) ("[I]t is within our discretion to determine whether

to consider an issue presented for the first time on appeal."). The result has been arbitrary and uneven exercise of the appellate court's discretion. For example, the court has summarily dismissed forfeited arguments without explanation, relying on truncated language from *Singleton* suggesting that the default rule is rigid and without exceptions. *See Paulin v. Mayorkas*, 2022 WL 17496028, at *5 (5th Cir. Dec. 8, 2022). On the other hand, the Fifth Circuit has reached forfeited errors simply because doing so "allow[ed] [it] to avoid setting aside the lower court's judgment." *Atkins v. Hooper*, 979 F.3d 1035, 1050 (5th Cir. 2020).

The Third and Fourth Circuits appear to share the Fifth Circuit's approach, invoking the discretionary language from *Singleton* to decide whether to reach issues without any particular test or limitations. *See, e.g.*, *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013) ("Despite [*Singleton*'s] general rule, it is within our discretion to consider an issue that the parties did not raise below."); *United States v. Heater*, 63 F.3d 311, 331 n.5 (4th Cir. 1995) (noting that the decision whether to reach a forfeited sentencing issue "is wholly discretionary"). *But see Williams v. Professional Transp. Inc.*, 294 F.3d 607, 614 (4th Cir. 2002) ("Issues raised for the first time on appeal are generally not considered absent exceptional circumstances.").

Notably at least one Fifth Circuit judge has observed the dangerous and unfair consequences of the Fifth Circuit's arbitrary and uneven application of this Court's discretionary forfeiture rule. In dissenting from a majority decision that relied on a

forfeited harmlessness argument to affirm a district court judgment in favor of the government, Judge Gregg Costa opined:

> [T]he leniency the majority affords the government's forfeiture is hardly, if ever, shown when habeas prisoners fail to raise an issue in the district court. One can look far and wide yet not find a decision from our court excusing a prisoner's failure to preserve. We routinely apply forfeiture to habeas prisoners, without even contemplating using our discretion to excuse it.

Id. at 1054 (Costa, J., dissenting) (internal quotation marks and citations omitted).

"[F]air treatment [in the justice system] depends on the neutral application of procedural rules. That evenhandedness is part of what is meant by the 'rule of law' or 'equal justice under law,' ideals that are guiding lights of our justice system." *Atkins*, 979 F.3d at 1052 (Costa, J., dissenting). Without this Court's intervention and guidance, federal appellate courts will continue to apply the forfeiture rule in vastly different and often arbitrary ways, resulting in uneven and inequitable treatment of litigants. This Court should intervene to resolve this inter- and intra-circuit tension and restore equal justice under the law.

III. This case raises an important constitutional question regarding the scope of appellate court discretion, which this Court should address.

"The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting

Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Ironically, while appellate courts can decide an issue never raised or considered in the district court in the interest of justice, "injustice [is] more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." *Singleton*, 428 U.S. at 120. Absent this Court's review, the Fifth Circuit's undue exercise of discretion to reach this unadjudicated issue will deprive Petitioners' of their due process right to be heard. This Court's intervention is warranted and desperately needed.

CONCLUSION

Petitioners respectfully ask this Court to grant certiorari to address the Fifth Circuit's flagrant violation of longstanding rules designed to both ensure orderly litigation and protect constitutional due process rights.

Respectfully submitted,

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