No. _____

In the
Supreme Court of the United States

Vonteak Alexander, Real Party in Interest,

Petitioner,

v.

Jane Doe,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented for Review

May a court reform an accepted, valid, federal plea agreement containing a mutual mistake of law to circumvent the mistake to the defendant's prejudice?

Parties to the Proceeding

Petitioner Vonteak Alexander was the Respondent and Real Party in Interest in the Ninth Circuit Court of Appeals.

Respondent Jane Doe was the Petitioner in the Ninth Circuit Court of Appeals.

The government was the Respondent and Real Party in Interest in the Ninth Circuit Court of Appeals.

The federal district court for the District of Nevada was a nominal Real Party of Interest in the Ninth Circuit Court of Appeals.

Related Proceedings

United States v. Vonteak Alexander, Case No. 2:17cr00072-RFB (D. Nev.).

In re: Jane Doe, 57 F.4th 667 (9th Cir. 2023).

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Introduction

Approximately 98% of all federal criminal cases proceeding to judgment are resolved by plea agreements.[1] Plea bargaining is thus "not some adjunct to the criminal justice system; it is the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)); *see also Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (our criminal justice is largely "a system of pleas, not a system of trials").

For this system of pleas to function, courts must interpret accepted plea agreements as written. *United States v. Hyde*, 520 U.S. 670, 677 (1997) ("If the court accepts the agreement and thus the Government's promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain."). Otherwise, litigants neither have faith in this system of pleas nor incentive to engage in it.

This Court has not addressed how *federal* courts must interpret plea agreements to resolve disputes. Four Justices long-ago recognized this Court had "yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements." *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting, joined by Marshall, Blackmon, and Stevens, JJ.). Thus, while this Court has indicated interpretation of a *state court* plea agreement is a

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[1] U.S. Sent. Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, Table 11 (available at https://www.ussc.gov/sites/default/files /pdf/research-and-publications/annual-reports-and-sourcebooks /2021/2021_Annual_ Report_and_Sourcebook.pdf).

matter of state law to be reasonably interpreted by state courts, *id.* at 5, n.3, it has not identified the interpretive principles federal courts must apply to interpret a federal plea agreement.

Federal courts have thus cobbled their own interpretive principles for resolving plea disputes under federal law, an inexorable task given the volume of plea agreements entered each year.[2] Doing so, federal courts often draw from the interpretive principles applied to commercial contract law between. But as the *Ricketts* dissent recognized, although "the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate," its application is deficient as "plea agreements are constitutional contracts." 483 U.S. at 16. Concerns underlying commercial contracts are simply "not coextensive" with the due process concerns governing federal plea agreements. *Id.*

The lack of Supreme Court guidance on the governing principles for resolving federal plea agreement disputes has reached a critical breaking point. The federal circuit courts have manifested at least eight different doctrines to address mutual mistakes of law in federal plea agreements. This inconsistency repudiates any sense of comity for adjudicating plea disputes arising from a mutual mistake of law.

The most recent doctrine—and the one employed here by the Ninth Circuit—reveals federal appellate judges have given themselves license to rewrite and reform accepted, binding federal plea agreements. Pet. App. 1a–9a. Whatever the

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[2] *See supra* n.1.

constitutional bounds of federal plea agreement interpretation, neither due process nor established precedent permits appellate judges to reconstruct accepted plea agreements. This Court's intervention is needed to identify the rules of construction federal courts must apply in resolving federal plea agreement disputes. Federal litigants have sought such guidance for decades.[3]

This case presents an ideal vehicle for the Court to clarify the applicable doctrines when resolving federal plea agreement disputes. This petition should be granted.

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[3] *See, e.g., Plunkett v. Sproul,* 16 F.4th 248 (7th Cir. 2021), *petition for cert. filed*, 2022 WL 2119483 (U.S. June 8, 2022) (No. 21-1551) ("Whether a plea agreement that is subject to more than one reasonable interpretation must be interpreted in the defendant's favor"), *cert. denied*, 143 S. Ct. 109 (2022); *United States v. Waters*, 846 F. App'x 263 (5th Cir. 2021), *petition for cert. filed*, 2021 WL 3209849 (U.S. Oct. 4, 2021) (No. 21-122) ("Does the doctrine of mutual mistake provide a cognizable basis to find a guilty plea involuntary?"), *cert. denied*, 142 S. Ct. 232 (2021); *United States v. Torres-Nieves*, 828 F. App'x 448 (9th Cir. 2020), *petition for cert. filed*, 2021 WL 722952 (U.S. Nov. 2, 2020) (No. 20-1154) ("Did the 9th Circuit significantly depart from its own precedent when it failed to resolve ambiguity in favor of the defendant in its determination of whether the government breached an admittedly ambiguous plea agreement?"), *cert. denied*, 141 S. Ct. 1693 (2021); *United States v. Li*, 619 F. App'x 298 (5th Cir. 2015), *petition for cert. filed*, 2015 WL 6467831 (U.S. Oct. 23, 2015) (No. 15-534) ("Is this denaturalization proceeding a 'prosecution' that was barred under the terms of the parties' plea agreement?"), *cert. denied*. 136 S. Ct. 813 (2016); *United States v. Rockwell Intern. Corp.*, 124 F.3d 1194 (10th Cir. 1997), *petition for cert. filed*, 1998 WL 34112703 (U.S. Jan. 13, 1998) (No. 97-1178) ("Whether the plea-agreement 'analogy' to contract law suggested in *Blackledge v. Allison*, 431 U.S. 63 (1977), permits a strict application of the parol evidence rule in interpreting a written plea agreement such that no extrinsic evidence of a defendant's reasonable understanding is permitted"), *cert. denied*, 523 U.S. 1093 (1998).

Petition for Writ of Certiorari

Vonteak Alexander petitions for a writ of certiorari to review the writ of mandamus issued by United States Court of Appeals for the Ninth Circuit to the district court.

Opinions Below

The Ninth Circuit's original opinion granting a writ of mandamus is published in the Federal Reporter: *In re Doe*, 51 F.4th 1023 (9th Cir. 2023). Pet. App. 35a–42a. The Ninth Circuit's amended opinion granting a writ of mandamus is published in the Federal Reporter: *In re Doe*, 57 F.4th 667 (9th Cir. 2023). Pet. App. 1a–9a.

The district court's restitution decision is unreported but reprinted at *United States v. Alexander*, No. 2:17-CR-00072-RFB, 2022 WL 1472887 (D. Nev. May 10, 2022). Pet. App. 50a–51a.

Jurisdiction

Following Alexander's timely petition for rehearing and request for en banc review, Pet. App. 10a–33a, the Ninth Circuit entered an amended opinion granting a writ of mandamus on January 23, 2023, Pet. App. 1a–9a. This Court's jurisdiction arises under 28 U.S.C. § 1254(a).

Statutory Provisions

1. 18 U.S.C. § 2259(a) provides in relevant part: "In General.—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under [Chapter 110]."

2. 18 U.S.C. § 3663(a) provides in relevant part:

> (1)(A) The court, when sentencing a defendant convicted of an offense under this title, . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense . . . .
>
> (3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

3. Federal Rule of Criminal Procedure 11(c) provides:

> (c) Plea Agreement Procedure.
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> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
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> (A) not bring, or will move to dismiss, other charges;
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> (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Statement of the Case

A. The district court accepted the parties' binding plea agreement.

The government, after conferring with Respondent Jane Doe's counsel, drafted and offered Alexander a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(A) and (C). Pet. App. 52a–63a. This binding agreement required Alexander to plead guilty to two counts of Interstate Travel in Aid of Unlawful Activity under 18 U.S.C. § 1952(a)(3)(A), contained in Chapter 95 of the United States Code. Pet. App. 53a. As to the incarceration term, the parties agreed the district court would impose an imprisonment range between 60 and 96 months. Pet. App. 59a. As to restitution, the parties agreed:

> The Defendant acknowledges that the conduct to which he is entering a plea is [sic] gives rise to mandatory restitution to the victim(s). *See* 18 U.S.C. § 2259. The Defendant agrees that for the purpose of assessing such restitution, the Court may consider losses derived from the counts of conviction as well as losses caused from dismissed counts and uncharged conduct in which the Defendant has been involved. The Defendant agrees to pay the victim(s) the "full amount of the victim's losses" as defined in 18 U.S.C. § 2259(b)(3).

Pet. App. 59a–60a.

This binding restitution provision incorporated the parties' complete understanding of the district court's authority to impose restitution. Pet. App. 63a. Its first sentence identifies the parties' foundational understanding of the legal basis to impose restitution—a mutual belief that the offenses of conviction mandate restitution under 18 U.S.C. § 2559. Pet. App. 59a. Its second and third sentences advise the district court how to calculate mandatory restitution under § 2259. Pet. App. 59a–60a. The

second sentence explains "such restitution," i.e., the mandated restitution under § 2259, can include losses arising from Alexander's conviction, dismissed counts, and uncharged conduct. Pet. App. 59a–60a. The third sentence explains Alexander agrees to pay the "full amount" of Respondent's losses "as defined in 18 U.S.C. § 2259(b)(3)." Pet. App. 60a.

The parties also agreed that, unless the district court determined Alexander to be indigent, a mandatory special assessment must be imposed under the Justice for Victims of Trafficking Act of 2015 (JVTA), 18 U.S.C. § 3014. Pet. App. 60a.

The plea agreement only provided Alexander with one scenario under which he could withdraw from the plea agreement—if the district court sentenced Alexander to more than 96 months of imprisonment. Pet. App. 61a.

After reviewing the binding plea agreement with the parties, the district court accepted it as written in May 2019. Pet. App. 64a–92a.

B. The district court sentenced Alexander in accordance with the parties' binding plea agreement.

The district court sentenced Alexander pursuant to the binding plea agreement in bifurcated proceedings. The district court sentenced Alexander to 96 months in prison followed by three years of supervised release, imposed a $5,000

JVTA special assessment, and issued a corresponding judgment stating restitution would be determined at a later date.[4]

The parties subsequently engaged in restitution proceedings. Respondent initially requested $15,000 in restitution, but she ultimately increased her restitution request to $1,466,482.82.[5]

During the restitution proceedings, Alexander was appointed new counsel who advised the district court that the binding plea agreement did *not* give the court statutory authority to impose mandatory restitution under 18 U.S.C. § 2259.[6] This is because mandatory restitution under § 2259 is limited to offenses in Chapter 110 of Title 18 of the United States Code.[7] Because Alexander's convictions fall within Chapter 95 of Title 18, his offenses are beyond the statutory reach of § 2259.[8] Alexander thus explained the district court lacked statutory authority to impose mandatory restitution under § 2259.[9] He also explained that a plea agreement cannot convey statutory authority to impose restitution under § 2259 that does not otherwise exist.[10] In other words, restitution under § 2259 did not apply regardless of whether the plea agreement said it did.

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[4] Dist. Ct. Dkt. 302.

[5] *Compare* Dist. Ct. Dkt. 272 ($15,000), *with* Dist. Ct. Dkt. 321 ($1,466,482.82).

[6] Dist. Ct. Dkt. 353; *see also* Dist. Ct. Dkt. 358, Restitution Hrg. Tr., 6–12.

[7] Dist. Ct. Dkt. 353.

[8] *Id.*

[9] *Id.*

[10] *Id.* (citing *United States v. Hicks*, 997 F.2d 594, 600 (9th Cir. 1993) (federal courts have no inherent authority to order a defendant to pay restitution)).

The government stood by the parties' binding plea agreement as written and did seek to withdraw it.[11]

The district court agreed with Alexander and held the binding plea agreement's language prohibited restitution. Pet. App. 50a–51a. The district court correctly recognized its authority to impose restitution must be conveyed by statute. Pet. App. 51a. The district court explained that the parties' agreement to restitution under § 2259 does not give it authority to impose restitution because Alexander's offenses do not fall within the scope of § 2259. Pet. App. 50a–51a. Finding restitution under § 2259 is only mandatory for convictions under Chapter 110 of the United States Code, the district court determined it lacked statutory authority to impose restitution under § 2259 for Alexander's Chapter 95 convictions despite the plea agreement's language to the contrary. Pet. App. 51a.[12]

The mandatory JVTA special assessment was also not statutorily available to the district court. Imposition of a JVTA special assessment requires conviction under Chapters 77, 109A, 110, or 117 of Title 18 of the United States Code or Section 274 of the Immigration and Nationality Act. 18 U.S.C. § 3014. The district court thus agreed with the parties that it must issue an amended judgment removing the JVTA assessment. Pet. App. 43a, 50a–51a.

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[11] Dist. Ct. Dkt. 358, Restitution Hrg. Tr., 12–13.

[12] The district court also concluded neither Alexander's admissions nor the record supported a claim that he committed an offense under Chapter 110. Pet. App. 51a. The district court similarly rejected Respondent's claim for mandatory restitution under 18 U.S.C. § 1593 which applies only to offenses under Chapter 77 of the United States Code. Pet. App. 51a.

After issuing a written order detailing its restitution decision, the district court issued an amended judgment reflecting Alexander's 96-month prison sentence and three-year supervision term without imposing restitution or a JVTA special assessment. Pet. App. 43a–49a.

C. Respondent petitioned for a writ of mandamus seeking restitution beyond that provided in the binding plea agreement.

Seeking to expand the terms of the parties' binding plea agreement, Respondent petitioned for a writ of mandamus directing the district court to impose restitution under 18 U.S.C. § 3663(a)(3)—a different restitution statute not included in the binding plea agreement. Alexander opposed the writ as the parties' binding plea limited restitution to that mandated by § 2259, and the district court correctly found § 2259 statutorily unavailable under the plea's unambiguous terms. Alternatively, Alexander urged any ambiguity as to whether the plea agreement limited restitution to § 2259 must be construed in his favor because the government drafted the plea agreement.[13]

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[13] Alexander also argued Respondent waived the right to request restitution under 18 U.S.C. § 3663(a)(3), as the binding plea agreement limited to restitution to that mandated by 18 U.S.C. § 2259. The Ninth Circuit rejected Alexander's waiver argument, holding Respondent forfeited but did not waive a claim to discretionary restitution under § 3663(a)(3). Pet. App. 6a.

D. The Ninth Circuit rewrote and reformed the parties' binding plea agreement, construing its perceived ambiguity against Alexander to grant a writ of mandamus.

The Ninth Circuit Court of Appeals granted a writ of mandamus. It did so by reconstructing and rewriting the parties' binding plea agreement to avoid the parties' mutual mistake of law concerning the applicability of 18 U.S.C. § 2259 and construing the agreement's perceived ambiguity to Alexander's detriment. Pet. App. 1a–9a.

The Ninth Circuit began its reformation by reading the restitution provision's three substantive sentences in reverse order. Pet. App. 7a. This reverse-order reading excised the parties' mutual understanding and agreement that Alexander's offenses of conviction only gave rise to mandatory restitution under § 2259.

Reading the provision's final sentence as the operative sentence ("The Defendant agrees to pay the victim(s) the 'full amount of the victim's losses' as defined in 18 U.S.C. § 2259(b)(3)."), the Ninth Circuit interpreted it to convey an unqualified agreement by Alexander to pay restitution under a statute the parties never contemplated in the agreement—18 U.S.C. § 3663(a)(3). Pet. App. 7a–8a. The Ninth Circuit then interpreted the second sentence ("The Defendant agrees that for the purpose of assessing such restitution, the Court may consider losses derived from the counts of conviction as well as losses caused from dismissed counts and uncharged conduct in which the Defendant has been involved."), as explaining the loss types the district court may consider in awarding restitution. Pet. App. 7a–8a.

So restructured, the Ninth Circuit interpreted the provision's first sentence ("The Defendant acknowledges that the conduct to which he is entering a plea is [sic] gives rise to mandatory restitution to the victim(s). *See* 18 U.S.C. § 2259."), as ambiguous because § 2259 does not mandate restitution in this case. Pet. App. 8a. Rather than finding the first sentence to be a mutual mistake of law or an ambiguity construed against the government, the Ninth Circuit interpreted the first sentence as "simply acknowledging [Alexander's] obligation to pay restitution" untethered to any statutory obligation. Pet. App. 7a.

After excising the parties' mutual mistake of law under § 2259—a mistake the Ninth Circuit believed rendered the provision ambiguous—and rewriting the provision to Alexander's detriment, the Ninth Circuit held restitution was authorized under § 3663(a)(3). Pet. App. 7a–8a. This statute, not included by the parties in the plea agreement, only permits restitution "to the extent agreed to by the parties in a plea agreement." Pet. App. 7a–8a (citing 18 U.S.C. § 3663(a)(3)). The Ninth Circuit claimed it need not construe ambiguity against the government, asserting Alexander's "obligation to pay was never in doubt" even though his offenses of conviction did not give rise to mandatory restitution under any statute. Pet. App. 8a.

Reasons for Granting the Petition

I. Federal courts must review plea agreements with greater scrutiny than commercial contracts.

Though this Court generally describes plea agreements as contracts, it recognizes the analogy is imperfect. *Puckett v. United States*, 556 U.S. 129, 137 (2009); *see also United States v. Partida-Parra*, 859 F.2d 629, 634 (9th Cir. 1988) ("The contract analogy is imperfect."); *United States v. Newbert*, 504 F.3d 180, 187 (1st Cir. 2007) (same). This is because the plea process places a defendant's liberty at stake. *United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999). Thus, "the considerations justifying the practice of plea bargaining 'presuppose fairness in securing agreement between an accused and a prosecutor'—a presupposition derived from the constitutional guarantee of due process." *United States v. Randolph*, 230 F.3d 243, 249 (6th Cir. 2000) (quoting *Santobello v. New York*, 404 U.S. 257, 261 (1971)); *see also United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (plea agreements give rise to constitutionally-based "due process concerns that differ fundamentally from and run wider than those of commercial contract law") (citing *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)).

General contract principles do not adequately protect individual defendants' constitutional due process rights nor address broader "concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." *Harvey*, 791 F.2d at 300 (internal quotation marks and citation omitted). Given the constitutional protections at stake, criminal justice purposes, and public concerns inherent in plea

agreements, federal courts often review plea agreements with greater scrutiny than civil commercial contracts. *See United States v. Warner*, 820 F.3d 678, 683 (4th Cir. 2016) (internal quotation marks and brackets omitted); *see also Barron*, 172 F.3d at 1158 ("The interests at stake and the judicial context in which they are weighed require that something more than contract law be applied.").

This Court has not yet defined the depth of scrutiny to be applied to federal plea agreements.[14] Rather, the Court has only defined the analytical floor: "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello,* 404 U.S. at 262.

Lacking meaningful guidance from this Court, federal courts struggle to ferret out the proper "interpretive doctrine" to resolve plea disputes. This struggle has caused courts to apply "an amalgam of constitutional, supervisory, and private [contract] law concerns" to resolve plea agreement disputes. *Harvey*, 791 F.2d at 300.

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[14] The Court has confirmed, however, that defendants with binding Fed. R. Crim. P. 11(c)(1)(C) plea agreements can seek relief under 18 U.S.C. § 3582(c)(2) when the Sentencing Guidelines range at issue "was part of the framework the district court relied on in imposing the sentence or accepting the agreement." *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018). The *Hughes* decision, however, was not based on the contract principle of mutual mistake but on Congress's decision to empower district courts "to correct sentences that depend on frameworks that later prove unjustified." *Freeman v. United States*, 564 U.S. 522, 526 (2011), *modified by Hughes,* 138 S. Ct. 1765.

For instance, federal circuit courts almost universally apply two contract law principles to plea agreements: (1) limiting plea agreements to their literal terms; and (2) construing any ambiguities in plea agreements in favor of the defendant and against the government as the drafter under the doctrine of *contra proferentem*.[15] "Strict compliance with the terms of a plea agreement is not only vital to the efficient function of our criminal justice system," but necessary to "preserve the integrity of our constitutional rights." *United States v. Miller*, 833 F.3d 274, 284 (3d Cir. 2016) (cleaned up); *see also United States v. Moreno-Membache*, 995 F.3d 249, 254 (D.C. Cir. 2021) (these principles adhere to both the Constitution and established contract law).

But critical intra- and inter-circuit conflicts exist over plea agreements containing a mutual mistake of law, such as Alexander's. This Court long ago held a valid guilty plea agreement "does not become vulnerable because later judicial

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[15] *United States v. Farias-Contreras*, 60 F.4th 534, 542 (9th Cir. 2023) ("We enforce [plea agreements] by their literal terms but construe any ambiguities in favor of the defendant."); *United States v. Warren*, 8 F.4th 444, 448 (6th Cir. 2021) ("we enforce [plea agreements] according to their literal terms" and "construe ambiguities against the government"); *United States v. Giorgi*, 840 F.2d 1022, 1026 (1st Cir. 1988) ("Given the relative interests implicated by a plea bargain, we find that the costs of an unclear agreement must fall upon the government" and "hold that the government must shoulder a greater degree of responsibility for lack of clarity in a plea agreement."); *Harvey*, 791 F.2d at 300 ("[B]oth constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements."); *see also* Restatement (Second) of Contracts, § 206 (Am. Law Inst. 1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757 (1970). However, this Court has not addressed whether an accepted, valid, binding plea agreement containing a mutual mistake of law at inception is similarly impervious.

Federal circuits cannot agree whether reformation is a permissible remedy for plea agreements or whether to hold the parties to the written terms, construing mutual mistakes and ambiguities against the government. This Court's intervention is needed to bring comity among the circuit courts by clarifying the interpretive doctrine to be applied when a valid, binding, accepted federal plea agreement contains a mutual mistake of law.

II. Though federal courts must enforce accepted plea agreements as written, a circuit split exists on how to enforce agreements containing a mutual mistake of law.

Once a district court accepts a plea agreement under Rule 11 of the Federal Rules of Criminal Procedure, no authority permits that court to later reject or modify that agreement. *United States v. Olesen*, 920 F.2d 538, 540 (8th Cir. 1990);[16] *see also United States v. Skidmore*, 998 F.2d 372, 375 (6th Cir. 1993) ("Nothing in the rules even remotely allows the district court to accept a guilty plea but rewrite the plea agreement, even if the modified agreement is more favorable to the

[16] An exception to this rule has been made in cases involving the commission of fraud on the court. *Olesen*, 920 F.2d at 540. No fraud allegation exists here.

defendant."). District courts are therefore obligated to enforce all provisions of an accepted plea agreement as written.[17]

Binding plea agreements under Rule 11(c)(1)(C), such as Alexander's, further limit district courts. Under 11(c)(1)(C), district courts "simply implement[] the terms of the agreement it has already accepted" when imposing sentence. *Freeman*, 564 U.S. at 535–36 (Sotomayor, J., concurring in judgment). District courts have no ability to change the terms of the agreed-upon sentence. *Id.* A district court that changes the terms of an agreed-upon and accepted Rule 11(c)(1)(C) plea breaches that plea agreement. *Skidmore*, 998 F.2d at 376 (finding district court breached plea agreement by rewriting it to excise a key provision).

Appellate courts have authority no greater than district courts and cannot reform valid, accepted plea agreements. *United States v. Madrid*, 978 F.3d 201, 205 (5th Cir. 2020). Appellate courts may only "ensur[e] freely negotiated terms of plea agreements are enforced." *Id.* (citing *United States v. Johnson*, 132 F.3d 628 (11th Cir. 1998)); *see also Descamps v. United States*, 570 U.S. 254, 271 (2013) (rejecting invitation to rewrite the parties' plea bargain); *United States v. Oliver*, 630 F.3d 397, 413 (5th Cir. 2011) (holding court lacked authority to reformulate the accepted plea agreement). Thus, an appellate court that reforms the terms of a valid,

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[17] *See United States v. Ritsema*, 89 F.3d 392, 399 (7th Cir. 1996); *Skidmore*, 998 F.2d at 374–76; *United States v. Fagan*, 996 F.2d 1009, 1013 (9th Cir. 1993); *United States v. Yesil*, 991 F.2d 1527, 1531–32 (11th Cir. 1992); *United States v. Cunavelis*, 969 F.2d 1419, 1422–23 (2d Cir. 1992); *Olesen*, 920 F.2d at 540–43; *United States v. Cruz*, 709 F.2d 111, 114–15 (1st Cir. 1983); *United States v. Blackwell*, 694 F.2d 1325, 1338–39 & n.19 (D.C. Cir. 1982).

accepted, and binding Rule 11(c)(1)(C) plea agreement breaches that plea agreement. *See Skidmore*, 998 F.2d at 376.

Rule 11 thus prohibits all federal courts from rewriting valid, accepted plea agreements and from conjuring ambiguities that do not exist. *United States v. Under Seal*, 902 F.3d 412, 418 (4th Cir. 2018). Yet federal circuit courts disagree over how to resolve disputes arising from plea agreements containing a mutual mistake of law under varying rationales. Federal circuits employ no less than eight differing doctrines to address mutual mistakes of law in federal plea agreements. The resulting inconsistencies repudiate any sense of comity for adjudicating plea disputes arising from a mutual mistake of law.

The Eighth Circuit declines to invalidate plea agreements based on the presence of any mutual mistake of law. *United States v. Ritchison*, 887 F.3d 365, 369 (8th Cir. 2018) ("One contract principle we have declined to extend to the plea agreement context is the doctrine of mutual mistake.").

In the Second Circuit, reformation of a plea agreement due to mutual mistake depends on the nature of the error. The Second Circuit will not reform a plea agreement containing a mutual mistake of law involving a Sentencing Guidelines error where the agreement gave discretion to the district court to calculate the guideline range. *United States v. Rosen*, 409 F.3d 535, 548 (2d Cir. 2005) (rejecting defendant's argument that contract law principles render plea agreement void or voidable given the parties mutual mistake "as to the applicable Guidelines range"). If, however, the mutual mistake arises from a non-Guidelines error, the Second Circuit holds the error may be subject to reformation if the error

pertains to the "foundation" of the parties' agreement "such that it prevents the contract from representing the meeting of the minds 'in some material respect.'" *United States v. Hilliard*, No. 21-2358-CR, 2022 WL 4479520, at *1 (2d Cir. Sept. 27, 2022); *see also United States v. Frazier*, 805 F. App'x 15, 17 (2d Cir. 2020) (to seek relief based on a mutual mistake the defendant "must show that 'the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out'") (quoting Restatement (Second) of Contracts, § 152 cmt. c (Am. Law Inst. 1981)).

The Fourth Circuit holds the ability to reform a plea agreement containing a mutual mistake of law depends on whether the mistake "materially affect[ed] the exchange of performances or deprive[d] [the defendant] of the benefits for which he bargained." *United States v. Johnson*, 915 F.3d 223, 234 (4th Cir. 2019).

The Tenth Circuit applies a three-part test to decide whether a court may reform a plea agreement containing a mutual mistake. To reform a plea agreement to avoid a mutual mistake of law: (1) the mistake must relate to a basic assumption underlying the contract; (2) the party seeking avoidance must show the mistake materially effects the agreed exchange of performances; and (3) the party seeking relief must bear the risk of mistake. *United States v. Frownfelter*, 626 F.3d 549 (10th Cir. 2010).

The Seventh and Eleventh Circuits hold a plea agreement containing a mutual mistake may be reformed only when the agreement fails to accurately reflect the terms of the parties' agreement. *United States v. Atkinson*, 979 F.2d

1219, 1223 (7th Cir. 1992); *United States v. Weaver*, 905 F.2d 1466 (11th Cir. 1990) (citing Restatement (Second) of Contracts § 155 (Am. Law Inst. 1979)).

The Ninth Circuit endorses opposing views in published opinions, creating an untenable intra-circuit conflict. The Ninth Circuit has held a mutual mistake does not give rise to relief. *United States v. Transfiguracion*, 442 F.3d 1222, 1229 (9th Cir. 2006) ("The inability to rescind a plea agreement based on a mutual mistake of law applies to criminal defendants as well as to the government."). Yet, in this case, the Ninth Circuit took the unprecedented approach of rewriting the plea agreement to excise the mistake to the defendant's prejudice. Pet. App. 1a–9a (reforming accepted, binding plea agreement to avoid mutual mistake of law).[18]

This Court's intervention is needed to maintain a plea agreement enforcement process that honors and protects defendants' constitutional due process rights. This resolution is also necessary to obtain a consistent and reliable manner to ensure finality and public confidence in the fair and effective administration of our criminal justice system. Without this Court's intervention, the deep circuit split on this continuing issue jeopardizes our system of pleas.

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[18] The Sixth Circuit's position in unclear. *Compare United States v. Foster*, 527 F. App'x 406, 410 (6th Cir. 2013) ("while plea bargains are essentially contracts, many of the remedies that would ordinarily be available in a commercial contract dispute do not apply in the context of a plea bargain"), *with United States v. Peveler*, 359 F.3d 369, 379 (6th Cir. 2004) (noting Fed. R. Crim. P. 35(b) is a potential basis for relief in exceptional cases, such as "to avoid a miscarriage of justice or to correct a mutual mistake" as suggested by the Tenth Circuit in *dicta*) (cleaned up), *holding overruled by Freeman*, 564 U.S. 522.

III. The Ninth Circuit's decision to rewrite an accepted, binding plea agreement and interpret its perceived ambiguity against Alexander is patently wrong.

Among the approaches to enforcing plea agreements containing a mutual mistake of law, the Ninth Circuit appears to be the only circuit court to completely restructure a plea agreement by excising the mistake and enforce the reformed plea in the government's favor. No federal appellate court has ever adopted the Ninth Circuit's approach of rewriting the plea agreement to excise the mutual mistake to the defendant's prejudice. In reforming Alexander's plea agreement, the Ninth Circuit contravened the two contract law principles universally applied to plea agreement interpretation in other circuits: (1) limiting plea agreements to their literal terms; and (2) construing ambiguities against the government as the drafter and in favor of the defendant.[19]

First, the Ninth Circuit's decision to rewrite the binding plea agreement's restitution provision's sentences, reading them in reverse order to excise the mistake of law, fails to limit the plea agreement to its literal terms. A plea agreement must be literally read in the context it is written: "[T]he accepted common inquiry into a sentence's meaning is a contextual one." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). Reading the restitution provision in context, the parties did not agree Alexander had a generalized obligation to pay restitution. Rather, the parties tethered Alexander's restitution obligation to their belief (albeit a mistaken one) that restitution was statutorily mandated under 18

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[19] *See infra* n.15.

U.S.C. § 2259. Pet. App. 59a. The rest of the plea agreement's restitution provision merely advises the district court how to calculate the (mutually-mistaken) mandatory restitution amount under § 2259. Pet. App. 59a–60. The Ninth Circuit thus failed to interpret the binding plea's literal terms as written, violating a fundamental tenet contract law applied to plea agreement. *See* 11 Williston on Contracts § 32:5 (4th ed. Nov. 2022) (footnote omitted) ("every word, phrase or term of a contract must be given effect[]" and should not be interpreted to render a portion of the writing "superfluous, useless or inexplicable"); *United States v. Hamdi*, 432 F.3d 115, 123–24 (2d Cir. 2005) (applying principle of contract law preferring an interpretation that does not leave a portion of the plea agreement superfluous)*; United States v. Brye*, 146 F.3d 1207, 1211 (10th Cir. 1998) (same).

The parties' agreement that § 2259 mandated restitution is not a superfluous provision. Without the predicate condition that restitution is mandated by § 2259, nothing in the plea agreement provides the district court authority to award restitution. That the parties were both mistaken as to § 2259's applicability gives no court the authority to excise the mistake. Because § 2259 does not apply to Alexander's offenses of conviction, mandatory restitution cannot be ordered under the plea's literal terms.

Second, any perceived ambiguity the government created by drafting the plea's restitution provision is construed against the government, not Alexander.[20]

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[20] Indeed, though the record reveals the mistake was mutual, a "necessary corollary" to the heightened scrutiny given to plea agreements requires even

But rather than hold the government responsible for its drafting mistake, the Ninth Circuit excised the parties' agreement limiting restitution to that mandated by § 2259. In its place, the Ninth Circuit inserted a non-referenced statute, 18 U.S.C. § 3663(a)(3), a statute that confers *discretionary* restitution neither contemplated nor agreed to by the parties.

The Ninth Circuit's decision to rewrite the parties' binding plea agreement is untenable. The result deprives Alexander of his constitutionally protected due process rights and jeopardizes the rights of all defendants seeking to enforce the literal terms of their plea agreements.

IV. This issue presents an important question.

Over 71,000 new federal criminal cases were filed between March 31, 2021, and March 31, 2022.[21] With 98% of all federal criminal cases proceeding to judgment resolved by plea agreements,[22] our justice system hinges on the plea

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"derelictions on the part of defense counsel that contribute to ambiguities and imprecisions in plea agreements may not be allowed to relieve the Government of its primary responsibility for insuring precision in the agreement," given the overarching constitutional and supervisory concerns. *Harvey*, 791 F.2d at 300. "While private contracting parties would ordinarily be equally chargeable—so far as enforceability and interpretation are concerned—with their respective counsels' derelictions in negotiating commercial contracts, different concerns apply to bargained plea agreements. Unlike the private contract situation, the validity of a bargained guilty plea depends finally upon the voluntariness and intelligence with which the defendant—and not his counsel—enters the bargained plea." *Id.*

[21] U.S. Courts, *Federal Judicial Caseload Statistics*, U.S. District Courts - Criminal Defendants Filed, Terminated, and Pending (Including Transfers), Table D (available at https://www.uscourts.gov/statistics/table/d/federal-judicial-caseload-statistics/2022/03/31).

[22] *See infra* n.1.

process. *Frye*, 566 U.S. at 144; *Lafler*, 566 U.S. at 170. But the plea process cannot remain a viable means for resolving federal cases if defendants cannot trust that courts will honor and enforce accepted plea agreements.

The circuit split over how to resolve plea agreement disputes thus jeopardizes our justice system. Unlike state plea agreements that rely on state law for interpretive guidance, *Ricketts*, 483 U.S. at 5 n.3, federal plea agreements have no cohesive interpretive guidance for resolving disputes. Federal courts rely on this Court for guidance. Lacking that guidance, federal courts are conclusively split. The Court should resolve the question presented to bring comity to federal courts and restore faith and consistency in the plea process.

V. This case presents an ideal vehicle to identify the doctrines courts must apply when interpreting federal plea agreements.

This case is an ideal vehicle for the Court to resolve the federal circuit split about how to resolve plea agreements containing a mutual mistake of law. Whether courts must enforce a binding federal plea as written is an issue squarely presented and preserved for adjudication.

Moreover, both Alexander and the government seek to enforce the binding plea agreement as written. Only third-party Respondent seeks to reform the binding plea.

And, among all the federal interpretive iterations for resolving a mutual mistake of law in plea agreements, the Ninth Circuit has adopted the most aggressive by rewriting a binding plea agreement to the defendant's prejudice. As

the Ninth Circuit's approach is the most damaging to defendants' due process constitutional rights, its approach warrants this Court's scrutiny and review.

Conclusion

For these reasons, this Court should grant the petition for a writ of certiorari.

Dated this 12th day of April 2023.

Respectfully submitted,

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