No. 22-887

In the Supreme Court of the United States

ROGELIO ALBINO DIAZ-TOMAS AND
EDGARDO GANDARILLA NUNEZ,
Petitioners,

v.

NORTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether North Carolina's practice of indefinitely postponing drunk-driving prosecutions where the defendant fails to appear for a scheduled court date unless the defendant pleads guilty and relinquishes his right to a trial violates the speedy trial clause of the Sixth Amendment or the due process clause of the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending the jury trial as the presumptive means of adjudicating criminal charges and ensuring that the serious problem of coercive plea bargaining is not exacerbated by procedural mechanisms designed to achieve quick and easy convictions. Permitting such a practice would further erode the participation of citizen juries in the criminal justice system and deprive defendants of the right to subject prosecutions to meaningful adversarial testing.

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[1] Rule 37 statement: All parties were timely notified to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Rogelio Diaz-Tomas and Edgardo Nunez were charged with driving while impaired and driving with a suspended license. Both men failed to appear at their initial court dates, and the district attorney filed a dismissal with leave in each case. As a result, their cases were removed from the court's docket, and they were left with only one way to dispose of the charges: plead guilty.

Under North Carolina law, the district attorney has the power to file a "dismissal with leave" when a defendant fails to appear at his initial court hearing. A dismissal with leave does not truly dismiss the case; rather, it removes the case from the court's docket, but the criminal charges otherwise remain pending. N.C. Gen. Stat. § 15A-932(a). Only the prosecutor has the ability to reinstate a case after a dismissal with leave has been filed. So when Mr. Diaz-Tomas and Mr. Nunez sought reinstatement of their cases, the prosecutor agreed, but only if they pled guilty and waived their right to an appeal. Pet. at 6–7.

The North Carolina Supreme Court held below that this use of a dismissal with leave did not violate the defendants' speedy trial or due process rights. *State v. Diaz-Tomas*, 382 N.C 640, 653–55 (N.C. 2022). In doing so, the court distinguished this case from *Klopfer v. North Carolina*, 386 U.S. 213 (1967), finding that the defendants' failure to appear justified the district attorney's refusal to reinstate the case absent a guilty plea. *Diaz-Tomas,* 382 N.C. at 655. The Petition explains in detail why certiorari is warranted to address the speedy trial and due process violations made permissible by the lower court's opinions. *See*

Pet. at 8–18. *Amicus* will not retread those arguments here.

Instead, *amicus* writes separately to explain how decisions like the one below prioritize efficiency over the fair administration of justice. Our Constitution prescribes certain procedures necessary for the protection of liberty and which are "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). While these protections may make prosecutions more burdensome, "we may not disregard [them] at our convenience." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009). Giving prosecutors exclusive authority to determine how and when a case is disposed after a defendant misses one court appearance is a clear example of how states are chipping away at constitutional protections to achieve quick and easy convictions.

The cases below likewise illustrates that the practical elimination of modern jury trials is driven in large part by exactly the sort of coercive plea-bargaining tactics employed by the North Carolina district attorney. The state acknowledged that it is standard practice to only reinstate DWI cases if the defendant agrees to plead guilty. Pet. at 5. It is no surprise a defendant would choose to plead guilty rather than remain under the scourge of unresolved criminal charges indefinitely. This Court should grant certiorari and summarily reverse to ensure criminal defendants have access to the rights afforded to them by the Constitution and that the unchecked use of coercive plea-bargaining tactics does not result in the wholesale erosion of the criminal jury trial.

ARGUMENT

I. DISMISSALS WITH LEAVE ARE ONE EXAMPLE OF HOW STATES ARE CHIPPING AWAY AT CONSTITUTIONAL PROTECTIONS TO ACHIEVE QUICK AND EASY CONVICTIONS.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend VI. The Fourteenth Amendment prohibits the state from "depriv[ing] any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. These constitutional guarantees "reflect a profound judgement about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155. "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *Id.* at 156. Thus, to protect against arbitrary action, the Constitution provides the accused with "safeguard[s] against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.*

Yet, despite these protections being "fundamental to the American scheme of justice," they are being chipped away in the name of increased efficiency. *Id.* at 149. Jury trials were once the bedrock of our criminal justice system, but are now being pushed to the brink of extinction. Plea bargaining was completely unknown to the Founders, yet it has become the primary method of criminal adjudication, transforming our "system of trials" into a "system of

pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining 'has swept across the penal landscape and driven our vanquished jury into small pockets of resistance.").

Plea bargaining emerged toward the end of the nineteenth century "to relieve some of the pressure on a system that found itself with far more defendants than it was equipped to process through constitutionally prescribed channels." Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT'G REP. 284, 285 (2019). Since then, this Court has proclaimed plea bargaining as "an essential component of the administration of justice"—not for its basis in any constitutionally recognized principle of criminal justice, but rather its ability to let courts and prosecutors dispose of cases quickly and cheaply. *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

Plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, at 25. In 2022, 97.5% of federal criminal convictions were obtained through guilty pleas. U.S. SENT'G COMM'N, 2022 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL

SENTENCING STATISTICS 56.[2] This is consistent with historical data demonstrating the steady shift away from the jury trial and toward plea bargaining. John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RSCH. CTR. (June 11, 2019) (the number of federal criminal defendants opting for a trial fell 60% between 1998 and 2018).[3]

The steady erosion of the jury trial is consistent with the growing desire to prioritize efficiency in criminal adjudication. *Neily*, *Jury Empowerment*, *supra*, at 288 (asking "whether the gains in efficiency from plea bargaining are exceeded by the loss of transparency, accountability, and political legitimacy"). And plea bargaining is just one example of how states have attempted to chip away at constitutional protections in order to obtain cheap and easy convictions.[4]

Allowing prosecutors to decide when and how cases will be adjudicated likewise illustrates how states

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[2] Available at https://bit.ly/3Kn2uEV.

[3] Available at https://pewrsr.ch/3Kn1As1.

[4] *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) (rejecting the state's argument to relax the requirements of the Confrontation Clause "to accommodate 'the necessities of trial and the adversary process'"); *Klopfer v. North Carolina*, 386 U.S. 213, 217 (1967) (holding that it violates a defendant's right to a speedy trial by choosing to let defendant's charges pend indefinitely rather than proceeding with a new trial after the first trial resulted in a hung jury); *Brady v. Maryland*, 373 U.S. 83, 84 (1963) (holding that it violates the defendant's right to due process to withhold evidence of a confession that would prove the defendant's innocence until after the defendant was convicted at trial).

promote efficiency over the proper administration of justice. In the present case, both defendants were placed on dismissal-with-leave status after failing to appear at their initial court hearings. Pet. at 6–7. At that point, only the district attorney had the power to reinstate the defendants' cases—which he refused to do unless they agreed to plead guilty and waive their right to an appeal. *Id.* Regardless, the North Carolina Supreme Court failed to find a violation of defendants' due process or speedy trial rights, and instead held that the state was justified in presenting its ultimatum to the defendants because their absence frustrated the court's calendar. *Diaz-Tomas*, 382 N.C. at 654–55.[5]

The court distinguished this case from *Klopfer* on the ground that dismissal with leave, unlike a *nolle prosequi* with leave, requires at least one missed court appearance. *Id.* at 653–55. However, failure to appear does not dispossess the defendants of their right to a speedy trial (or a trial in general). While it may be true that defendants' failure to appear was inconvenient to the trial court and the state, that is not sufficient reason to strip the defendants of their constitutional rights. Though these rights "may make the prosecution of criminals more burdensome," they are "binding and we may not disregard [them] at our convenience." *Melendez-Diaz*, 557 U.S. at 325.

"[T]he perceived need for greater efficiency is widespread and . . . it has driven the relentless trend to resolve each case more quickly and cheaply." Darryl

[5] The North Carolina Supreme Court consolidated defendants' cases for oral argument and affirmed both cases for the reasons stated in *State v. Diaz-Tomas*, 382 N.C. 640 (N.C. 2022). *See also State v. Nunez*, 878 S.E.2d 797 (N.C. 2022).

K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 185 (2014). But "criminal justice is one area where efficiency is not an unalloyed good." *See* Neily, *Jury Empowerment*, *supra*, at 287. Constitutional protections, like the right to a jury trial, have become secondary to convenience, turning "[o]ur modern criminal justice system" into an "assembly line" designed "to process cases and convictions with minimal adversarialism." Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53, 62 (2011).

Trials are expensive and time consuming. But that is no reason to disregard the requirements set forth by the Constitution. "No matter how inefficient or burdensome those procedures may seem today, and no matter how superior an alternative might seem, those protections are absolutes and must be enforced." Fisher, *supra*, at 61. When ease and efficiency become the foundation of criminal adjudication, those within the system are churned through it and stripped of the protections so carefully afforded to them. *See* Neily, *Jury Empowerment*, *supra* at 289 ("[E]fficiency comes at the cost of reducing conviction quality, imposing disproportionately harsh sentences for those who exercise their right to trial, and substantially reducing transparency and the perceived legitimacy of the system.").

II. ALLOWING COERCIVE PLEA BARGAINING TO GO UNCHECKED WILL EXACERBATE THE JURY TRIAL'S VANISHING ROLE IN OUR CRIMINAL JUSTICE SYSTEM.

The Founders understood "that the jury right could be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). Now that

plea bargains comprise all but a tiny fraction of convictions, that erosion is nearly complete. *See Lafler*, 566 U.S. at 170; Thomas, *supra*, at 25. The rapid disappearance of the jury trial is especially concerning given that many criminal defendants—regardless of factual guilt—are effectively coerced into taking guilty pleas. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty,* N.Y. REV. (Nov. 20, 2014).[6] According to the National Registry of Exonerations, 18% of known exonerees pleaded guilty to crimes that it is virtually certain they did not commit. *Why Do Innocent People Plead Guilty to Crimes They Didn't Commit?*, THE INNOCENCE PROJECT (2018).[7] Yet, "[i]nstead of vacating their convictions on the basis of innocence, the prosecution offers the wrongly convicted a deal—plead guilty." *Id.*

The government is at a distinct advantage during the plea-bargaining process. "Plea bargaining merges [] the accusatory, determinative, and sanctional phases of [criminal] procedure in the hands of the prosecutor." John H. Langbein, *Torture and Plea Bargaining*, 46 UNIV. CHI. L. REV. 3, 18 (1978). Therefore, it comes as no surprise to learn that many of those who plead guilty "have been induced by the government to do so." Clark Neily, *A Distant Mirror: American-Style Plea Bargaining through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 726 (2020).

Prosecutors have a wide array of tools at their disposal to pressure defendants into pleading guilty, including, but not limited to: threatening increased

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[6] Available at https://bit.ly/3KC6EHa.

[7] Available at https://bit.ly/3OHEptX.

penalties for defendants hoping to go to trial (commonly known as the "trial penalty"),[8] threatening to add charges in an effort to increase a potential sentence,[9] the financial, logistical, and psychological burdens of pre-trial detention,[10] threatening to use uncharged or acquitted conduct to enhance a potential sentence,[11] and threatening to prosecute family members.[12] As a result, the government enjoys "effectively unbridled discretion in deciding what kind of deal (or threats) to offer a defendant." Neily, *Jury Empowerment*, *supra*, at 286.

One could hardly ask for a starker illustration of the coercive nature of plea bargaining than the facts of the cases below. After their cases were placed on dismissed-with-leave status, both defendants sought reinstatement and resolution of their pending charges. But when they approached the district attorney, they were told they had to plead guilty, otherwise their cases would remain pending indefinitely. Pet. Br. at 6–7. This case is therefore an unusually candid and explicit example of the coercive dynamics that underscore the plea-bargaining system generally.

As this Court has recognized, unresolved criminal charges may subject an individual to "public scorn,"

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[8] *See* NAT'L ASSOC. OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://bit.ly/38IF8KG.

[9] *Id.* at 50.

[10] *See* Russel M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1269 (2020).

[11] *See* R. KELLY & ROBERT PITMAN, CONFRONTING UNDERGROUND JUSTICE 75 (2018).

[12] *Id.*; Neily, *A Distant Mirror*, *supra*, at 730.

deprive him of employment "and almost certainly will force curtailment of [his] speech and associations." *Klopfer*, 386 U.S. at 222. Therefore, when the prosecutor tells a defendant the only way to dispose of his case is to plead guilty, it is unsurprising that many defendants will choose to take the deal rather than remain under a "cloud of unliquidated criminal charge[s]." *Id.* at 227 (Harlan, J., concurring). In essence, when a case is dismissed with leave, the defendant is stripped of any meaningful choice regarding the disposition of his case and his right to a jury trial all but vanishes.

Between 2021 and 2022, 146,689 criminal cases were dismissed with leave in North Carolina's district courts. N.C. JUDICIAL BRANCH, STATISTICAL AND OPERATIONAL REPORT OF NORTH CAROLINA TRIAL COURTS 7 (July 7, 2021– June 30, 2022).[13] Of those, 125,983 were traffic misdemeanors including DWIs. *Id.* North Carolina law mandates automatic suspension of a person's driver's license if they are charged with a motor vehicle offence and fail to appear in court. N.C. Gen. Stat. § 20-24.1(a)(1). So for defendants like Mr. Diaz-Tomas and Mr. Nunez, who face not only the pressures of delayed justice but also the inability to lawfully restore their driving privileges, the pressure to plead guilty is all the more severe.

The disappearance of the jury trial is a deep, structural problem that far exceeds the bounds of any one case or doctrine. But when admission of guilt is forced upon an unwilling defendant, it is not just the accused who "can only . . . believe the law contrives

[13] Available at https://bit.ly/3Mubx9G.

against him," *Faretta v. California*, 422 U.S. 806, 834 (1975); it is the public at large. The least we can do to avoid exacerbating this problem is ensure that prosecutors are not permitted to insist upon a guilty plea as the price of exercising a defendant's right to a speedy trial.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

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