No. 23-720

IN THE

Supreme Court of the United States

OMAR AHMED KHADR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Joshua L. Dratel
Co-Chair Amicus
Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
1600 L Street, NW
Washington, DC 20036

Madison Ferris
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001

Christine Haskett
Counsel of Record
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street
Suite 5400
San Francisco, CA 94105
chaskett@cov.com
(415) 591-6000

David Alpert
COVINGTON & BURLING LLP
1999 Avenue of the Stars
Los Angeles, CA 90067

Counsel for Amicus Curiae

February 5, 2024

Motion for Leave to File Brief of *Amicus Curiae* the National Association of Criminal Defense Lawyers

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Criminal Defense Lawyers ("NACDL") moves this Court for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit in the above-captioned matter. Counsel for NACDL was only engaged last week for this matter. Counsel of record for both parties were notified thereafter of NACDL's intent to submit an *amicus curiae* brief in support of Petitioner. Petitioner consented to the filing of the brief; Respondent has not yet responded.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges with experience in both federal and state courts throughout the United States. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL and the clients its attorneys represent

because the overwhelming majority of criminal prosecutions are resolved through plea agreements. NACDL has a strong interest in the uniform interpretation of appellate waivers, which prosecutors have increasingly demanded as a core term in such agreements.

Because the proposed brief will aid this Court's consideration of the petition, NACDL respectfully requests that the Court grant leave to file the attached *amicus curiae* brief in support of Petitioner.

Respectfully submitted,

Joshua L. Dratel
Co-Chair Amicus
Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
1600 L Street, NW
Washington, DC 20036

Christine Haskett
Counsel of Record
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street
Suite 5400
San Francisco, CA 94105
chaskett@cov.com
(415) 591-6000

Madison Ferris
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001

David Alpert
COVINGTON & BURLING LLP
1999 Avenue of the Stars
Los Angeles, CA 90067

Counsel for Amicus Curiae

February 5, 2024

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges with experience in both federal and state courts throughout the United States. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL and the clients its attorneys represent because the overwhelming majority of criminal prosecutions are resolved through plea agreements. NACDL has a strong interest in the uniform interpretation of appellate waivers, which prosecutors have increasingly demanded as a core term in such

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner received timely notice and consented to this filing. Respondent was asked to waive timely notice and has not yet consented at the time of filing.

agreements. Given NACDL's expertise in these matters, NACDL respectfully submits that its perspective on the question presented may assist the Court in evaluating the importance of this case and whether to grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plea bargaining "*is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992)) (internal quotation marks omitted). Over 98% of federal defendants pled guilty in fiscal year 2021, "an all-time high." Glenn R. Schmitt & Lindsey Jeralds, *U.S. Sentencing Comm'n, Overview of Federal Criminal Cases: Fiscal Year 2021*, at 8 (2022). These plea agreements represent a compromise between the government's "interest in enforcing its laws and the defendant's interest in asserting his constitutional rights." David J. Lekich, III. *Criminal Law: Broken Police Promises: Balancing the Due Process Clause Against the State's Right to Prosecute*, 75 N.C. L. Rev. 2346, 2346 (1997). The government avoids the costs of going to trial while securing a key promise that the defendant will not appeal or otherwise mount a collateral attack on the conviction and sentence. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87, 122–26 (2015) (finding that 77% of agreements nationwide contained a collateral attack waiver as of late 2013, a number which has likely risen since.)

Usually, to secure these benefits, the government offers up some combination of reduced or fewer charges, or the potential for a reduced sentence. And the defendant, in exchange, waives important constitutional rights, including the Fifth Amendment right to avoid self-incrimination and the Sixth

Amendment right to confrontation, among other trial rights. Because of the importance of these constitutional guarantees, they are zealously protected. Specifically, the federal courts "have long recognized that Fed. R. Crim. P. 11 provides prophylactic protection for the constitutional rights involved in the entry of guilty pleas." *United States v. Gracia*, 983 F.2d 625, 627 (5th Cir. 1993). These protections include judicial confirmation, via plea colloquies, that the defendant possesses an understanding of the charges they are pleading guilty to and that the plea has a "factual basis." Fed. R. Crim. P. 11.

Here, we are faced with the question of whether a plea agreement predicated on a colloquy that applied an incorrect legal standard—one that failed to articulate a cognizable violation of criminal law—should forever bind a defendant. The Circuits have split in answering this question.. This split undermines faith in the neutral administration of justice and must be reconciled. And the only constitutional way to resolve the Circuit split is to take the perspective of the Second, Third, and Fourth Circuits, in finding that the appellate waivers under these circumstances are unenforceable.

ARGUMENT

I. There is a genuine Circuit split because criminal defendants are subjected to diametrically opposite outcomes in the Second, Third, and Fourth Circuits, as compared to the Seventh, Ninth, and D.C. Circuits.

The Seventh, Ninth, and D.C. Circuits continue to enforce a defendant's appellate waiver even after an intervening change in law renders a defendant's conduct no longer criminal. The Second, Third, and Fourth Circuits refuse to do so. In arriving at these opposing conclusions, the Circuits have split along two different aspects of appeal. The Second Circuit has invalidated the appellate waiver on grounds that the appeal was no longer knowing and voluntary. The Third and Fourth Circuits have done so on grounds that continued enforcement of the waiver would work a miscarriage of justice. Either ground is ripe for this Court to take up this Petition.

A. Circuits have directly split over whether the waiver was knowing and intelligent.

In *United States v. Balde*, 943 F.3d 73 (2d. Cir. 2019), the Second Circuit vacated a guilty plea no longer supported by the facts required to meet each element of a criminal violation. The Circuit acted following this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). "Balde pled guilty to unlawful possession of a firearm by 'an alien . . . [who] is illegally or unlawfully in the United States,' in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2)." *Balde*, 945 F.3d at 77 (alterations in original). Balde

appealed, contesting the meaning of "illegally or unlawfully in," and the Second Circuit initially affirmed Balde's conviction. *Id.* Eight days later, this Court handed down its opinion in *Rehaif*, clarifying that the contested phrase had an additional knowledge requirement neither advised of by the district judge who accepted Balde's plea nor established in the factual record. *Id.* at 78. Accordingly, the Second Circuit vacated Balde's conviction and remanded. *Id.*

The government attempted to rely on Balde's explicit appellate waiver to maintain the conviction, but the Circuit found that such argument "necessarily assumes a valid plea that was knowingly and intelligently entered in compliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure." *Id.* at 93. As previewed above, Rule 11 requires (1) that the district court "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading," Fed. R. Crim. P. 11(b)(1)(G), and (2) that "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea," Fed. R. Crim. P. 11(b)(3). "Both of these requirements are at the heart of the plea process." *Balde*, 943 F.3d at 95.

Balde's plea failed to meet either of these requirements. First, the description of the offense at the plea hearing failed to include the knowledge requirement. "That, of course, was through no fault of the district court: the court was merely applying what had long been the law of the circuit in requiring knowledge only of the possession of the firearm. But

in interpreting the statute, *Rehaif* instructs us about what § 922(g)(5)(A) has always meant." *Id.* at 94. Second, there was no longer "a factual basis for the plea," as the record lacked any information concerning Balde's knowledge of his unlawful status. *Id.* at 95. Therefore, the Second Circuit held that Balde's explicit appellate waiver would not preclude his ability to attack his plea. *Id.*

Despite the sensible nature of this ruling, the Seventh, Ninth, and D.C. Circuits have come to the opposite conclusion in analogous cases. The Seventh Circuit rejected the argument that a waiver was not knowing and intelligent because "no one at [the defendant's] plea hearing—neither [the defendant], his attorney, nor the judge—knowingly or intelligently understood [an] element" of the crime. *United States v. Crockett*, No. 20-3025, 2023 WL 3497875, at *3 (7th Cir. May 17, 2023). Instead, the Circuit relied on the general framework that "appeal waivers do not become invalid just because 'the law changes in favor of the defendant after sentencing.'" *Id.* at *3 (quoting *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005)). The Seventh Circuit explained that the plea agreement's voluntary, knowing, and intelligent requirements do not require "perfect information," and "imperfect information can produce plea deals that, like any contract, will still be knowing and intelligent despite 'the risk of future changes in circumstances' and an inability to foresee them. *Id.* at *4 (quoting *Bownes*, 405 F.3d at 636).

The Ninth and D.C. Circuits have ruled similarly to the Seventh Circuit. *See United States v. Goodall*, 21 F.4th 555, 562 (9th Cir. 2021) (holding that a

waiver was voluntary and knowing because "[a] change in the law does not make a plea involuntary and unknowing" (quoting *United States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005)); Pet. App. 23a–24a (holding that a waiver was voluntary and knowing even though the defendant argued "his plea is invalid because the military judge misinformed him about the nature and constitutionality of the charges against him" because "the basic principle behind an appeal waiver is that the defendant gives up his right to have an appellate court review the merits of his arguments in exchange for valuable consideration").

B. Circuits have directly split over whether there would be a miscarriage of justice if the waiver were enforced.

In a series of cases, the Fourth Circuit has held that enforcing a waiver when an intervening judicial decision revealed that the facts established beyond a reasonable doubt fail to establish a crime would be a miscarriage of justice. In *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016), the Fourth Circuit vacated a conviction and sentence for robbery and related crimes because, in light of intervening Circuit precedent, Adams was actually innocent. *Id.* at 185. Adams had pleaded guilty in 2009 to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). *Id.* at 180. "The plea agreement contained a provision in which Adams waived his right to challenge his conviction or sentence in a motion pursuant to 28 U.S.C. § 2255 unless he did so on the basis of ineffective assistance of counsel or prosecutorial misconduct." *Id.* Two years later, in *United States v. Simmons*, 649 F.3d 237 (4th Cir.

2011), the Fourth Circuit overruled its earlier precedent and held that "for an offense to be a prior felony . . . a defendant must have actually faced the possibility of more than a year in prison," a requirement that Adams's prior offenses did not meet. *Adams*, 814 F.3d at 181. Based on this subsequent clarification of the law and despite the waiver, Adams filed a § 2255 motion to vacate his conviction. *Id.* The Fourth Circuit held that, under *Simmons*, Adams had made "a cognizable claim of actual innocence," which met the standard for miscarriage of justice such that the waiver did not bar his claim. *Id.* at 182–83 (citing *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013)). The Fourth Circuit then found that Adams was actually innocent and vacated his conviction, stating: "Just as the criminal justice system must see the guilty convicted and sentenced to a just punishment, so too it must ferret out and vacate improper convictions." *Id.* at 185.

In *United States v. Sweeney*, 833 F. App'x 395 (4th Cir. 2021), the Fourth Circuit applied this holding in the context of a direct appeal. Sweeney had pleaded guilty to using a firearm in relation to a crime of violence under 18 U.S.C. § 924(c), predicated on both conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery, and waived his right to appeal. *Id.* at 395.

Sweeney then appealed. While his appeal was pending, key decisions eliminated both potential means of affirming his conviction. This Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), holding that the residual clause in § 924(c)(3) was unconstitutionally vague. *Id.* at 2323–24. And the

Fourth Circuit, in another matter, held that neither conspiracy to commit Hobbs Act robbery nor such attempt were crimes of violence under the statute. *United States v. Simms*, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc); *United States v. Taylor*, 978 F.3d 73, 77–78 (4th Cir. 2020). Thus, even though the Fourth Circuit in *Sweeney* found that the waiver was valid, it held that Sweeney's claim of actual innocence had to be outside the scope of the waiver to prevent a miscarriage of justice. *Sweeney*, 833 F. App'x at 396–97.

The Fourth Circuit once again applied this standard just last year in *United States v. McKinney*, 60 F.4th 188, 192–93 (4th Cir. 2023) ("Under *Davis* and *Simms*, Hobbs Act conspiracy no longer qualifies as a predicate offense for a § 924(c) conviction. McKinney, like Adams, has made a cognizable claim of actual innocence and so, like Adams, has satisfied the miscarriage-of-justice requirement. Accordingly, McKinney's appeal waiver does not bar his claim for relief." (citation omitted)).

Even more broadly, in *United States v. Castro*, 704 F.3d 125 (3d Cir. 2013), the Third Circuit vacated a conviction and sentence not supported by the facts, even though a later plea agreement as to another count related to the same conduct contained a broad waiver of appellate rights regarding "any . . . matter relating to th[e] prosecution." *Id.* at 136. Even without an intervening judicial decision, the Third Circuit held that there would be a miscarriage of justice in these circumstances if the waiver were enforced because "allowing [the defendant's] conviction . . . to stand would be to allow a conviction

when there has been a complete failure of proof on an essential element of the charged crime, and that would seriously impugn the fairness, integrity, and public reputation of our courts." *Castro*, 704 F.3d at 139.

The Seventh Circuit disagrees. That court has held that there would not be a miscarriage of justice to uphold a waiver in the circumstances at issue because the government's "only arguable 'wrongdoing' . . . was failing to anticipate changes in the Supreme Court's jurisprudence," and "the government could easily have premised the [disputed counts] on [different charges]." *Oliver v. United States*, 951 F.3d 841, 847 (7th Cir. 2020).

II. Upholding the appellate waiver works a manifest injustice that seriously affects the fairness, integrity, and public reputation of the criminal justice system.

A. Imprisonment for non-criminal conduct is unjust.

"Our legal system does not convict people of being bad." *Castro*, 704 F.3d at 140. "If they are to be convicted, it is for specific crimes . . . ." *Id. see also Class v. United States*, 583 U.S. 174 (2018) (describing the "nature of guilty pleas" and noting that "if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged"); *Fiore v. White*, 531 U.S. 225, 228–29 (2001) (per curiam) (stating that due process does not permit the government to "convict a person of a crime" for engaging in "conduct that its

criminal statute, as properly interpreted, does not prohibit").

"There can be no room for doubt" that sustaining "conviction and punishment . . . for an act that the law does not make criminal . . . inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346–47 (1974); *United States v. Jones*, 471 F.3d 478, 480 (3d Cir. 2006) ("[A]ffirming a conviction where the government has failed to prove each essential element of the crime beyond a reasonable doubt affect[s] substantial rights, and seriously impugns the fairness, integrity and public reputation of judicial proceedings." (internal quotation marks omitted)).

It is a bedrock principle of our legal system that a punishment must fit the crime. But under these circumstances, there is no crime. When the Court interprets a statute, it clarifies the existing law; it does not make new law. *Bousley v. United States*, 523 U.S. 614, 626 (1998) (Stevens, J., concurring) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule").

When the facts established via admissions or pr plea colloquy do not constitute a crime, a person remains innocent. Yet the Seventh, Ninth, and DC Circuits would imprison that person, which offends black letter criminal law. In essence, the Seventh, Ninth, and D.C. Circuits impose their own *ex post facto* law, making criminal an action that would not otherwise be punishable.

Moreover, it is difficult to imagine an element of any legal system that could more grievously impair public confidence than the conviction and punishment – possibly including imprisonment for mandatory minimum terms – for conduct *that is not a crime*.

B. Imprisonment based on the timing or location of a plea is unjust.

"[F]reedom from a wholly arbitrary deprivation of liberty" is "the most elemental of due process rights." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). Yet, under the current regime in several Circuits, a person could face up to life in prison simply for pleading guilty one day before a higher court determined that person never actually committed a crime. Consider again the facts in *Balde*. The Supreme Court's decision in *Rehaif* was handed down eight days after the Second Circuit initially affirmed Balde's conviction. That gap would have been fatal in the Seventh, Ninth, and D.C. Circuits.

And, due to the current Circuit split, a person who pled guilty to a crime in Washington, D.C. may remain in prison while, directly across the border in Maryland or Virginia, another person who pled guilty to the exact same crime under the exact same circumstances

may go free. Such inconsistency violates "the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005). While the Seventh Circuit speaks of a plea deal "like any contract" subject to the same risks of changed circumstances, *Crockett*, 2023 WL 3497875 at *3, what that view elides is that it is more than just the government and the defendant sitting at the negotiating table; the public too has an interest in the proper administration of justice.

The accident of geography in this respect could also be achieved by deliberate manipulation. For example, for those offenses that occur, and therefore can be prosecuted, in multiple districts, prosecutors could choose the district that lacked the protections afforded in another.

III. This issue has a substantial impact, in large part due to this Court's own rulings.

"[O]urs 'is for the most part a system of pleas, not a system of trials.'" *Frye*, 566 U.S. at 143 (2012) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)). As detailed above, pleas predominate in the criminal justice system.

It is not uncommon for higher courts to hand down a decision that implicates some aspect of the underlying criminal law or conduct at issue not contemplated by the district court when entering and accepting the defendant's plea. This Court and the various Courts of Appeal regularly issue rulings clarifying the interpretation and scope of federal criminal statutes. *See United States v. Dubin*, 27 F.4th 1021, 1041 (5th Cir. 2022) (Costa, J., dissenting)

("The Supreme Court's message is unmistakable: Courts should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable. In the last decade, it has become nearly an annual event for the Court to give this instruction." (internal citation omitted) (citing eight recent cases in which this Court clarified that a federal criminal statute should be read more narrowly)), *vacated and remanded*, 143 S. Ct. 1557 (2023) (holding that "[t]he text and context of the statute do not support [the] boundless interpretation" that the Fifth Circuit had given to the criminal statute at issue).

Thus, this issue also has substantial practical importance and clear guidance from this Court on what to do when these two realities inevitably intersect is urgently needed.

CONCLUSION

For the reasons set out above and in Petitioner's brief, Petitioner's writ of certiorari should be granted.

Respectfully submitted,

Joshua L. Dratel
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L Street, NW
Washington, DC 20036

Christine Haskett
Counsel of Record
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street
Suite 5400
San Francisco, CA 94105
chaskett@cov.com
(415) 591-6000

Madison Ferris
COVINGTON & BURLING LLP
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David Alpert
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