No.

In the Supreme Court of the United States

MUNSON P. HUNTER, III;
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has recognized that "no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 586 U.S. 232, 238 (2019). But the Court has "ma[de] no statement … on what particular exceptions [to appeal waivers] may be required." *Id.* at 238-39 & n.6.

In the decision below, the Fifth Circuit reaffirmed its precedent, holding that there are only two grounds on which defendants who sign general appeal waivers may challenge their sentence on appeal: (1) claims of ineffective assistance of counsel, and (2) claims that the sentence exceeds the statutory maximum. The Sixth, Tenth, and Eleventh Circuits adopt a similarly narrow view of the exceptions to general appeal waivers. In stark conflict, the First, Second, Fourth, and Ninth Circuits permit defendants who sign general appeal waivers to raise a broad range of constitutional challenges to their sentences beyond the limited exceptions recognized by the Fifth Circuit and the other courts on its side of the circuit split.

The Fifth Circuit below also reaffirmed its precedent holding that an appeal waiver applies even when the sentencing judge advises the defendant that he has a right to appeal and the government does not object to that advice. Although other circuits agree with the Fifth Circuit, the Ninth Circuit squarely holds otherwise, releasing defendants from appeal waivers in identical circumstances.

The questions presented are:

1. Whether the only permissible exceptions to a general appeal waiver are for claims of ineffective assistance of counsel or that the sentence exceeds the statutory maximum.

2. Whether an appeal waiver applies when the sentencing judge advises the defendant that he has a right to appeal and the government does not object.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Hunter*, No. 24-20211 (5th Cir. Dec. 6 2024) (dismissing appeal based on appeal waiver)
- *United States v. Hunter*, No. 4:23-cr-00085 (S.D. Tex. May 13, 2024) (entering judgment of conviction and sentence)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Petitioner Munson P. Hunter, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet.App.1a-3a) is unreported but available at 2024 WL 5003582. The district court's oral judgment of conviction and sentence (Pet.App.18a-37a) and written judgment of conviction and sentence (Pet.App.38a-49a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on December 6, 2024. On February 13, 2025, Justice Alito extended the deadline to file a petition for a writ of certiorari to and including April 5, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be … deprived of life, liberty, or property, without due process of law…."

STATEMENT

This case presents the Court with an opportunity to resolve two entrenched, outcome-determinative circuit splits relating to appeal waivers in plea agreements which affect thousands of criminal defendants every year. Both of these recurring issues of substantial importance merit this Court's use of its certiorari jurisdiction.

First, courts of appeal are deeply divided over the circumstances under which a defendant may appeal his sentence notwithstanding a general appeal waiver. There is baseline agreement that "no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 586 U.S. 232, 238 (2019). But this Court has "ma[de] no statement … on what particular exceptions [to appeal waivers] may be required." *Id.* at 238-39 & n.6. In the wake of this Court's silence, the circuits have badly fractured over which exceptions to recognize.

In the decision below, the Fifth Circuit held that there are only two circumstances under which a defendant who signs a general appeal waiver may nevertheless appeal his

sentence: where the defendant alleges (1) ineffective assistance of counsel, or (2) that his sentence exceeds the statutory maximum. The Sixth, Tenth, and Eleventh Circuits join the Fifth Circuit in recognizing only a limited category of enumerated exceptions to general appeal waivers. None of these circuits recognize the exception relevant here: sentences that unconstitutionally violate due process.

In open conflict, the First, Second, Fourth, and Ninth Circuits have long refused to enforce general appeal waivers against various claims alleging unconstitutional sentences. Although these circuits use varying tests to identify the circumstances under which a defendant may appeal notwithstanding a general waiver, they all agree that exceptions to appeal waivers are not limited to the narrow exceptions identified by the courts on the Fifth Circuit's side of the split.

Second, courts of appeals also disagree about whether a sentencing judge's instruction that the defendant has a right to appeal can overcome an otherwise valid appeal waiver. The Ninth Circuit has consistently held that the defendant may appeal where, as in this case, the district court makes such a statement and the government does not object. Other circuits have expressly acknowledged but rejected the Ninth Circuit's approach. Commentators, courts, and the United States have all acknowledged this glaring split. Only this Court's intervention can resolve it.

Both questions are of utmost importance. The criminal justice system "is for the most part a system of pleas, not a system of trials." *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170

(2012)). And within that system, broad, boilerplate appellate waivers are ubiquitous. As a result of the circuit splits, some defendants are protected from unconstitutional sentences, while others are not. And while some defendants can take a judge at her word when she states the defendant has the right to appeal, others cannot. These conflicts undermine the integrity of the justice system and breed uncertainty nationwide. Only this Court can bring clarity.

This case cleanly tees up both circuit splits. Petitioner Munson P. Hunter, III, signed a plea agreement containing boilerplate language generally waiving his right to appeal his sentence. The Fifth Circuit dismissed Hunter's appeal based solely on that waiver and its restrictive precedents recognizing only two circumstances under which a defendant who signs such a waiver may appeal. It did not matter to the Fifth Circuit that the district court sentenced Hunter to mandatory medication over Hunter's objection and in violation of his constitutional rights. Nor did it matter to the Fifth Circuit that the district court informed Hunter at the conclusion of sentencing, and without government objection, that he had "a right to appeal."

The Fifth Circuit's wooden approach is wrong. Enforcing Hunter's appeal waiver contravenes longstanding contract-law and constitutional principles. And it has profoundly troubling implications for criminal defendants, the vast majority of whom enter into plea agreements containing waiver provisions similar to Hunter's. This Court should grant certiorari and reverse.

A. The Appeal Waiver and Sentencing

On February 14, 2024, petitioner Munson P. Hunter, III, pleaded guilty to one count of aiding and abetting wire

fraud in the U.S. District Court for the Southern District of Texas. *See* Pet.App.4a-17a (plea agreement); *United States v. Hunter*, No. 4:23-cr-00085 (S.D. Tex. Feb. 14, 2024), Doc. 166 (plea hearing transcript). Hunter's written plea agreement provided, in relevant part:

> Defendant knowingly and voluntarily waives the right to appeal or "collaterally attack" the conviction and sentence, except that Defendant does not waive the right to raise a claim of ineffective assistance of counsel, if otherwise permitted, or on collateral review in a motion under Title 28, United States Code, section 2255.

Pet.App.6a-7a.

On May 10, 2024, the district court conducted Hunter's sentencing hearing. At that hearing, Hunter objected to a proposed special condition of supervised release that stated he "must take all mental health medications that are prescribed by [his] treating physician." Pet.App.24; Pet.App.35a. Hunter explained to the court:

> I want to take mental health programs, but I don't want to take any medication. I don't drink. I don't use drugs. I don't even curse. I don't want to have to be forced to medicate.

Pet.App.24a. The court noted Hunter's objection. Pet.App.24a.

When rendering Hunter's sentence, however, the court nonetheless imposed the mandatory medication condition without further discussion or explanation. *See* Pet.App.35a; Pet.App.45a. The court then informed Hunter: "You have a right to appeal. If you wish to appeal, Mr. Leonard will continue to represent you." Pet.App.36a.

Immediately after informing Hunter of his appeal rights, the court asked counsel if they "wish to say anything else." Pet.App.36a. Counsel for the government responded: "Your Honor, I believe—well, no. I—no." Pet.App.36a.

The court sentenced Hunter to 4 years and 3 months in prison, 3 years of supervised release, and a restitution amount of $235,438. Pet.App.35a.

B. The Appeal

Hunter appealed to the Fifth Circuit, arguing that the mandatory-medication condition of his supervised release terms "infringes on [his] fundamental due process liberty interest in being free of unwanted mental health medication." *United States v. Hunter*, No. 24-20211 (5th Cir. Aug. 8, 2024), Doc. 19 at 9. As relevant here, Hunter contended that the appeal waiver did not bar his constitutional claim and, alternatively, that the sentencing judge's statement that Hunter had a "right to appeal," combined with the government's acquiescence, should void the appeal waiver. *Id.* at 6-9. Hunter acknowledged the Fifth Circuit's contrary precedent on both points. *See Id.* at 9 nn. 5 & 6.

The government moved to dismiss Hunter's appeal, contending only that Hunter had waived his appellate right. *See United States v. Hunter*, No. 24-20211 (5th Cir. Sept. 12, 2024), Doc. 29.

The Fifth Circuit dismissed the appeal. Pet.App.3a. It agreed with the government that Hunter's claim was "barred by the waiver." Pet.App.2a. Relying on circuit precedent, the court "rejected Hunter's suggestion" that his due process challenge could be exempted from the appeal waiver. Pet.App.2a (citing *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020)). The court also held that,

under its precedent, "the district court's statement at the sentencing hearing that Hunter had a right to appeal did not impact the validity of the appeal waiver." Pet.App.2a (citing *United States v. Gonzalez*, 259 F.3d 355, 357-58 (5th Cir. 2001)).

REASONS FOR GRANTING THE PETITION

This petition presents an ideal vehicle for resolving two entrenched, well-recognized circuit splits affecting thousands of defendants across the country.

The circuits are deeply divided over when defendants may challenge their sentences on appeal notwithstanding general appeal waivers. In the Fifth Circuit, there are only two exceptions to general appeal waivers: ineffective assistance of counsel and sentences imposed beyond the statutory maximum. Three other circuits join the Fifth in recognizing only narrow and enumerated categories of exceptions to general waivers. But four more circuits disagree and reject the narrow approach, permitting defendants to raise a broad range of constitutional challenges to their sentences—including due process challenges like the one the Fifth Circuit below refused to consider. Only this Court can resolve the split and say whether the Fifth Circuit's restrictive approach is correct.

The circuits have further divided over whether an appeal waiver bars appeal when the judge at sentencing advises the defendant that he has the right to appeal without objection from the government. The Ninth Circuit has long held that the judge's un-objected to statement permits appeal. Other circuits, including the Fifth Circuit below, have expressly rejected the Ninth Circuit's approach.

Both questions presented are critically important and cleanly presented. First, on the Fifth Circuit's telling, defendants who sign broad, boilerplate appeal waivers as

part of a plea deal are powerless to challenge even plainly unconstitutional sentences on appeal. If Hunter cannot appeal a sentence that forces him to take unwanted mental-health medication, then other defendants will be barred from challenging other sentences that similarly contain fundamentally unconstitutional conditions of supervision—such as forced sterilization, *Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942), a prohibition on having children, *United States v. Smith*, 972 F.2d 960, 962 (8th Cir. 1992), or a prohibition on church attendance, *United States v. Hernandez*, 209 F. Supp. 3d 542, 543-44, 547 (E.D.N.Y. 2016). Second, trust in the criminal system will be undermined if Hunter cannot rely on the sentencing judge's clear statement that he can appeal, and if the government is rewarded for failing to object.

Whether a defendant can exercise his right to appeal should not depend on where a defendant is sentenced. Only this Court can resolve these ubiquitously recurring splits and establish uniformity nationwide.

I. The Courts of Appeals Are Intractably Divided over Both Questions Presented

A. The Circuits Are Sharply Divided Regarding the Exceptions to General Appeal Waivers

In the decision below, the Fifth Circuit reaffirmed its precedent holding that there are two—and only two—circumstances under which a defendant who agrees to a general appeal waiver may still appeal his sentence. Three other circuits apply similarly narrow tests. But four circuits have embraced a broader approach that permits defendants to raise constitutional challenges to their sentences when doing so is necessary to avoid manifest injus-

tice or protect fundamental rights. Absent this Court's intervention, this split will continue to fester and produce unequal results based solely on geography.

1. **The Narrow Approach**: On one side of the split, the Fifth, Sixth, Tenth, and Eleventh Circuits all hold that defendants who enter into general appeal waivers may appeal their sentence only in a very narrow category of cases. Under their stringent standards, none of these circuits would permit the appeal here.

The Fifth Circuit applies the most stringent standard. It "ha[s] recognized only two exceptions" to a general appeal waiver: "ineffective assistance of counsel" and "a sentence exceeding the statutory maximum." *Barnes*, 953 F.3d at 388-89 (cited by Pet.App.2a). The Fifth Circuit has consistently "decline[d]" to adopt a broader standard for appeal waivers that would permit defendants to raise other constitutional infirmities in their sentences. *See United States v. Chaney*, 120 F.4th 1300, 1303 (5th Cir. 2024), *pet. for cert. filed*, No. 23-30454 (Feb. 6, 2025). The Fifth Circuit has adhered to this cramped view even while acknowledging that caselaw in other circuits "runs counter to ours" on this issue. *Barnes*, 953 F.3d at 389. Thus, in the Fifth Circuit, constitutional challenges to sentences are frequently left unheard and unremedied.[1] And here,

[1] *United States v. Ortiz*, 784 F. App'x 285, 286 (5th Cir. 2019) (per curiam) (due process challenge to conditions of supervised release); *see also United States v. Lytle*, 90 F. App'x 453, 454 (5th Cir. 2004) (per curiam) (Eighth Amendment challenge); *United States v. Medina-Marquez*, 438 F. App'x 310, 311 (5th Cir. 2011) (per curiam) (due process challenge to application of sentencing guidelines); *United States v. Burns*, 770 F. App'x 187, 190 (5th Cir. 2019) (per curiam) (constitutional challenge to sentencing enhancement).

the Fifth Circuit rejected Hunter's challenge to the mandatory mental health medication condition based solely on the court's restrictive precedents. *See* Pet.App.2a-3a.

The Sixth and Eleventh Circuits take a similarly limited approach, adding just one more exception to the Fifth Circuit's list: claims alleging that the sentence was imposed based on a constitutionally impermissible factor (such as the defendant's race). *See*, *e.g.*, *Portis v. United States*, 33 F.4th 331, 335, 339 (6th Cir. 2022) (citing *United States v. Ferguson*, 669 F.3d 756, 764 (6th Cir. 2012)) (listing three "possibilities"); *King v. United States*, 41 F.4th 1363, 1367 (11th Cir. 2022) (citing *United States v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993); *United States v. Howle*, 166 F.3d 1166, 1169 n.5 (11th Cir. 1999)) (listing three "narrow substantive exceptions"), *cert. denied*, 143 S. Ct. 1771 (2023); *United States v. Windham*, 2025 WL 18584, at *7 (11th Cir. Jan. 2, 2025) (per curiam) (applying the exceptions). Like the Fifth Circuit, the Sixth and Eleventh Circuits acknowledge that their approach differs from the broader standards applied by "[s]ome of [their] sister circuits." *Rudolph v. United States*, 92 F.4th 1038, 1048 (11th Cir. 2024), *cert. denied*, 2025 WL 76523 (U.S. Jan. 13, 2025); *see also United States v. Johnson*, 2024 WL 5480549, at *2 (6th Cir. Dec. 18, 2024), *petition for cert. filed*, No. 23-5854 (Mar. 17, 2025).

For its part, the Tenth Circuit recognizes one additional, but equally limited, exception: "the waiver itself is unlawful because of some procedural error or because no waiver is possible." *United States v. Holzer*, 32 F.4th 875, 886 (10th Cir. 2022) (marks omitted) (quoting *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007)); *id.* (waiver unenforceable "only in one of four situations" (citation omitted)). Because the Tenth Circuit's list does

not include a general exception for unconstitutional sentences, the Tenth Circuit has consistently dismissed appeals similar to Hunter's. *See United States v. Kent*, 361 F. App'x 920, 921 (10th Cir. 2010) (restriction on internet access); *Holzer*, 32 F.4th at 886 (restriction on religious practice).

2. **The Broad Approach**. In direct contrast, the First, Second, Fourth, and Ninth Circuits permit defendants to bring a wide range of constitutional challenges to their sentences, notwithstanding a general appeal waiver.

In the Ninth Circuit, for example, defendants who waived their general right to appeal can nonetheless appeal to "challenge that the sentence violates the Constitution," so long as they "did not expressly waive [appeal as to the] specific constitutional right." *United States v. Wells*, 29 F.4th 580, 587-88 (9th Cir. 2022); *see also United States v. Atherton*, 106 F.4th 888, 893-96 (9th Cir. 2024); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). As the Ninth Circuit has explained, it would be a "miscarriage of justice" to enforce the waiver in the face of an unconstitutional sentence. *Wells*, 29 F.4th at 583-84 (citation omitted).

Applying this rule, the Ninth Circuit has repeatedly considered the merits of appeals materially indistinguishable from Hunter's—*i.e.*, those alleging that a condition of supervised release violates the defendant's "liberty interest." *See United States v. Nishida*, 53 F.4th 1144, 1149-53 (9th Cir. 2022) (citation omitted) (mandatory in-patient medical treatment); *Wells*, 29 F.4th at 588 (computer and internet ban). And the Ninth Circuit's exception to general appeal waivers is not limited to due process claims. The court has frequently "allowed other types of constitutional arguments," as well. *Atherton*, 106 F.4th 894-95 (collecting cases).

The First Circuit takes a similarly expansive approach. The First Circuit considers the "clarity" "gravity," and "character" of the error, "the impact of the error on the defendant," "the impact of correcting the error on the government," and "the extent to which the defendant acquiesced in the result." *United States v. Boudreau*, 58 F.4th 26, 33 (1st Cir. 2023), *cert. denied*, 144 S. Ct. 229 (2023). Under that standard, the First Circuit has considered the merits of constitutional challenges that, like Hunter's here, concern a violation of the defendant's "fundamental constitutional liberty interest." *See, e.g.*, *United States v. Del Valle-Cruz*, 785 F.3d 48, 56-57 (1st Cir. 2015) (restriction on family contact). Like the Ninth Circuit, the First Circuit reasons that "where, as here, the error is of [a] constitutional dimension, there can be no doubt that [the] enforcement of the waiver would be a miscarriage of justice." *Id.* at 57.

The Second Circuit also allows defendants to bring constitutional challenges beyond those permitted by the courts on the Fifth Circuit's side of the split, particularly where the issue on appeal concerns "a fundamental right." *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011). The Second Circuit sometimes does so by reading appeal waivers narrowly, so as "to properly safeguard defendants' rights." *United States v. Burden*, 860 F.3d 45, 53-55 (2d Cir. 2017) (per curiam); *see also United States v. Arevalo*, 628 F.3d 93, 99 (2d Cir. 2010) (due process violation may "void an appeal waiver").

Similarly, in the Fourth Circuit, a general appeal waiver is unenforceable where the "sentencing court violated a fundamental constitutional or statutory right." *United States v. Carter*, 87 F.4th 217, 225-26 (4th Cir. 2023) (quoting *United States v. Archie*, 771 F.3d 217, 223

(4th Cir. 2014)). The Fourth Circuit has applied this exception to permit review of claims that a defendant's due process rights were violated at sentencing. *See, e.g.*, *United States v. Singletary*, 75 F.4th 416, 421-23 (4th Cir.), *cert. denied*, 144 S. Ct. 519 (2023). The Fifth Circuit's side of the split would prohibit that claim.[2]

Under the tests set forth in any of these circuits, Hunter could have raised his constitutional challenge to his sentence on appeal. But because he had the misfortune to be sentenced in the Fifth Circuit, Hunter has no avenue to pursue his claim.

B. The Circuits Are Squarely Divided over the Impact of the Sentencing Judges' Statements on Appeal Waivers

The courts of appeals are also sharply divided on the impact of sentencing judges' statements at the end of sentencing that the defendant has a "right to appeal."

1. The Ninth Circuit has long held the sentencing judge's statement that the defendant "could appeal his

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[2] The Third, Eighth, and D.C. Circuits have also recognized exceptions to general appeal waivers that appear to be broader than the Fifth Circuit's approach; but the contours of those exceptions are not well-defined. *See, e.g.*, *United States v. Grimes*, 739 F.3d 125, 128-30 (3d Cir. 2014); *United States v. Andis*, 333 F.3d 886, 889-91 (8th Cir. 2003) (en banc); *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009). Those circuits, however, do not appear to have considered whether their exceptions would permit a defendant to raise a due process challenge analogous to the one Hunter sought to raise in the Fifth Circuit. The Seventh Circuit has contemplated such challenges in *United States v. Adkins*, 743 F.3d 176, 192-93 (7th Cir. 2014), but the court has been inconsistent in its willingness to hear them, *see, e.g.*, *United States v. Barrett*, 981 F.3d 644, 646-47 (7th Cir. 2020); *United States v. Miller*, 641 F. App'x 563, 566 (7th Cir. 2016).

sentence," combined with "the government['s] fail[ure] to object," make an appeal waiver "unenforceable." *United States v. Felix*, 561 F.3d 1036, 1041 (9th Cir. 2009). Accordingly, the Ninth Circuit has repeatedly refused to enforce appeal waivers after the government fails to object to statements such as "[y]ou have the right to appeal" the sentence of this court. Tr. of Sent'g Hr'g at 71, *United States v. Otis*, No. 92-814 (Aug. 31, 1993); *United States v. Otis*, 127 F.3d 829, 834 (9th Cir. 1997) (per curiam).[3] The United States has acknowledged this longstanding precedent. Recently, for example, the United States conceded in a Ninth Circuit appeal that a "plea agreement waiver [wa]s not enforceable" because "the district court advised [the defendant], without objection from the Government, that she had a right to appeal the sentence." U.S. Answering Br. 10 n.1, *United States v. Hernandez-Gomez*, 2023 WL 1097256 (9th Cir. Jan. 30, 2023) (No. 21-50224), 2022 WL 2718940 (citation omitted).

Hunter's appeal clearly would not have been dismissed had he been sentenced in the Ninth Circuit. The sentencing judge unambiguously and unqualifiedly told Hunter, "You have a right to appeal." Pet.App.36a. The government did not object. *Id.* To the contrary, when immediately asked whether it "wish[ed] to say anything else," the government hesitated and then said "no." *Id.*

2. By contrast, the First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have "expressly decline[d] to adopt the Ninth Circuit's rule."

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[3] *See also United States v. Buchanan*, 59 F.3d 914, 917-18 (9th Cir. 1995); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997); *United States v. Hernandez-Vega*, 746 F. App'x 631, 631 (9th Cir. 2018); *United States v. Macias*, 2022 WL 501135, at *1 (9th Cir. Feb. 18, 2022); *United States v. Perry*, 2024 WL 2874155, at *1 (9th Cir. June 7, 2024).

United States v. Fleming, 239 F.3d 761, 765 (6th Cir. 2001); *see also United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001); *United States v. Fisher*, 232 F.3d 301, 304 (2d Cir. 2000); *Gonzalez*, 259 F.3d at 358; *United States v. Ogden*, 102 F.3d 887, 888-89 (7th Cir. 1996); *United States v. Michelsen*, 141 F.3d 867, 872 (8th Cir. 1998); *United States v. Atterberry*, 144 F.3d 1299, 1301 (10th Cir. 1998); *United States v. Bascomb*, 451 F.3d 1292, 1297 (11th Cir. 2006). These circuits hold that an appeal waiver "cannot be vitiated or altered by comments the court makes during sentencing." *Bascomb*, 451 F.3d at 1297. The Fifth Circuit adhered to this view in the decision below. *See* Pet.App.2a-3a.

3. The United States has acknowledged this split, explaining that "the courts of appeals have divided over how to resolve a mismatch between a district court's sentencing colloquy and a written appellate waiver." U.S. Supp. Resp. Br. at 12 n.1, *United States v. Marsh*, 944 F.3d 524 (4th Cir. 2019) (No. 18-4609), 2019 WL 526984. Prominent scholars have also observed courts' "disagree[ment]." 5 Orin Kerr et al., *Criminal Procedure* § 21.2(b) n.90 (4th ed.); *see also* Laurie L. Levenson, *Federal Criminal Rules Handbook* R. 11 n.45. Only this Court's intervention can resolve this open conflict.

II. These Questions Are Important, Recurring, and Squarely Presented

1. The scope of a defendant's ability to challenge his sentence notwithstanding a general appeal waiver is a question of exceptional importance. "[W]holesale waiver[s] of the right to appeal," *Atherton*, 106 F.4th at 896, are all too common in federal criminal cases, *see* Nancy J. King, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 221, 231 (2005). Guilty

pleas account for ninety-seven percent of all federal convictions—the overwhelming majority of which are by plea agreement. *See* U.S. Sent. Comm'n, Sourcebook of Federal Sentencing Statistics (2024), https://tinyurl.com/ydnhmmvm; *see also* Vera Inst. of Just., *In the Shadows: A Review of the Research on Plea Bargaining*, at 1 (Sept. 2020), https://tinyurl.com/ychwxeax; *Frye*, 566 U.S. at 143. Such agreements—tens of thousands of which are entered into each year—almost always contain appeal waivers. Indeed, many U.S. attorneys' offices "*require* [appeal waivers'] inclusion in every plea agreement offered, and many more follow this approach as a matter of practice if not policy." Quin M. Sorenson, *Appeal Rights Waivers*, Fed. Law 33 (2018), https://tinyurl.com/5n8j7eka (emphasis added); *accord* Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 85-87 & App. H (2015); Catherine M. Goodwin, *Federal Criminal Restitution* § 14:7 (West 2024) ("It is common practice for the plea agreement to include some version of the defendant's agreement to waive appeal.").

Appeal waivers tend to be extraordinarily broad. Consider, for example, the sample waiver provided by the Department of Justice to U.S. Attorneys' Offices: It prohibits the defendant from "appeal[ing] *any* sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined)" "on any ground." U.S. Dep't of Just., Crim. Res. Manual § 626 (2024), https://tinyurl.com/3e76pfmh. Or consider the appeal waiver in this case, which permits only one explicit exception that courts already recognize (ineffective assistance of counsel). *See* Pet.App.6a-7a; *accord* U.S. Dep't of Just., Crim. Just. Manual § 9-27.420 (2024), https://tinyurl.com/shrbtmwu ("As long as prosecutors ex-

empt ineffective-assistance claims from their waiver provisions, they may request waivers of appeal … to the full extent permitted by law.").[4]

Given the prevalence of broad appeal waivers, the extent to which courts can impose constitutionally-sufficient safeguards around them is deeply important. Plea agreements are offered at the discretion of prosecutors and negotiated behind closed doors. *See* Vera Inst. of Just., *supra* p.16, at 1. That behind-the-scenes "horse trading," this Court has observed, is what "determines who goes to jail and for how long"—"[i]t is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 143-44 (citation and quotation omitted).

If courts cannot impose constitutionally sufficient guardrails on broad appeal waivers, perverse consequences would follow. For example, absent exceptions, broad appeal waivers could allow (if not encourage) prosecutors to recommend unconstitutional sentences and judges to impose the same, without any recourse for defendants. The United States has warned of such results, noting appeal waivers could "encourage a lawless district court to impose sentences in violation of" the law. U.S. Dep't of Just., Crim. Res. Manual § 626, https://tinyurl.com/3e76pfmh; *see also Atherton*, 106 F.4th at 896 ("A wholesale waiver of the right to appeal a sentence would therefore allow a court unpredictably to violate a defendant's constitutional rights with impunity."). If a defendant in the Fifth Circuit cannot appeal a sentence of

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[4] These broad appeal waivers are not always reciprocal. *See* U.S. Dep't of Just., Crim. Res. Manual § 626, https://tinyurl.com/3e76pfmh ("The use of a sentencing appeal waiver in a plea agreement to bar an appeal by the defendant does not require the government to waive its right to appeal.").

mandating mental-health medication upon release from prison, there is no reason to believe he could appeal a sentence of involuntary sterilization, a prohibition against church attendance, or other violations of the defendant's fundamental rights.

Other systemic consequences attach to the enforcement of broad appeal waivers in the face of constitutional violations. For example, the Fifth Circuit's restrictive standard stunts the growth of appellate law on important constitutional issues. And it undercuts appellate courts' ability to guide and standardize the sentencing decisions of district judges. *See* King, *supra* p.15, at 251-53.

2. Whether a defendant may rely on a judge's statement authorizing an appeal notwithstanding a general appeal waiver is an equally significant question. Despite appeal waivers, sentencing judges frequently lead defendants to believe they have an unqualified right to appeal—just as the sentencing judge did here. *See* Pet.App.36a.

Rule 32 requires sentencing courts to "advise the defendant of any right to appeal the sentence" "regardless of the defendant's plea." Fed. R. Crim. P. 32(j)(1)(B). But that rule directs courts only to remind a defendant of the appeal rights he "*retained*" *after* "waiv[ing] most of [them]." *United States v. Schuman*, 127 F.3d 815, 818 (9th Cir. 1997) (per curiam) (Kozinski, J., concurring) (emphasis added). It does not ask courts to inform defendants, contrary to their appeal waivers, of an unqualified right to appeal.

Notwithstanding Rule 32's targeted scope, even "careful and experienced district judge[s]" misstate or inadvertently suggest such appeal rights after sentencing. *Id.* The result: nearly every court of appeals has had to decide whether the sentencing judge's statement that the

defendant has the right to appeal supersedes a prior appeal waiver. *See supra* pp.13-15.

Dismissing these misstatements as harmless erodes "trust [in] the oral pronouncements of district court judges." *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995). Worse still, it rewards the government for sitting idly by. The government is well-positioned to "develop instructions and training for its attorneys to make it part of their routine practice to help ensure that district courts" do not mischaracterize the defendant's appeal rights. *United States v. Brown*, 892 F.3d 385, 397 (D.C. Cir. 2018) (per curiam) (citation omitted). Yet in a majority of circuits, it has no reason to do so. A defendant's confusion is no skin off the prosecutor's nose.

3. This case is an ideal vehicle for resolving both circuit splits. The Fifth Circuit dismissed Hunter's appeal solely because of the appeal waiver, offering no other reason his appeal would be barred. *See* Pet.App.2a-3a. And the Fifth Circuit's decision to enforce the appeal waiver—notwithstanding Hunter's unconstitutional sentence, and the judge's erroneous statement as to Hunter's appeal rights—rested solely on ultra-restrictive circuit precedents, which the Fifth Circuit has repeatedly reaffirmed. *See* Pet.App.2a; *supra* pp.9-10.

Nor is there any procedural barrier to review. Hunter objected to the mandatory medication condition at sentencing. *See* Pet.App.24. He also briefed and preserved below both questions presented. *See United States v. Hunter*, No. 24-20211 (5th Cir. Aug. 8, 2024), Doc. 19 at 8-9. And Hunter's challenge to the procedural imposition of the mandatory medication condition by the district court was ripe for the Fifth Circuit's review. As courts have recognized, "supervisory conditions are ordinarily ripe for

challenge upon imposition, especially when as here the argument … require[s] no further factual development." *United States v. Rock*, 863 F.3d 827, 833 n.1 (D.C. Cir. 2017) (citation omitted).

Courts therefore generally do "not require[] violation of a specified supervised release condition to permit appellate review" and instead review them on direct appeal. *United States v. Williams*, 356 F.3d 1045, 1051-52 (9th Cir. 2004).[5] The general rule applies here. No further record development is needed to assess the constitutionality of the challenged condition in this case. The sentencing court's decision to impose a mandatory medication condition (without analyzing the need for such a condition) was "either proper or not as a procedural matter when [the condition] was imposed"—regardless of "how the condition may play out in [the defendant's] supervised release." *United States v. Fonville*, 2022 WL 817990, at *2 (10th Cir. Mar. 18, 2022) (quotation marks omitted).

III. The Decision Below Is Wrong

A. The Fifth Circuit's Wooden View of Exceptions to General Appeal Waivers Is Incorrect

1. Familiar contract principles warrant reversal on the first question presented. Plea agreements are "essentially contracts." *Garza*, 586 U.S. at 238 (quotation omitted). They are subject to the "constraints that bear upon

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[5] *See also, e.g.*, *United States v. Medina*, 779 F.3d 55, 64-67 (1st Cir. 2015) (PPG testing); *United States v. Loy*, 237 F.3d 251, 253-54, 261 (3d Cir. 2001) (pornography proscription); *United States v. Cabral*, 926 F.3d 687, 696-97 (10th Cir. 2019) (risk notification); *United States v. Zinn*, 321 F.3d 1084, 1088-89 (11th Cir. 2003) (polygraph examination); *United States v. Rock*, 863 F.3d 827, 833 & n.1 (D.C. Cir. 2017) (PPG testing); *see also United States v. Fonville*, 2022 WL 817990, at *3 (10th Cir. Mar. 18, 2022) (mandatory medication).

the enforcement of other kinds of contracts." *Cook v. United States*, 111 F.4th 237, 255 (2d Cir. 2024) (Robinson, J., dissenting from denial of rehearing en banc) (quotation omitted). Two independent sets of contract principles render Mr. Hunter's waiver unenforceable against his challenge to the mandatory mental-health medication condition of his supervised release.

First, like all contracts, plea agreements must be "construed most strongly against the drafter, which in this case was the United States." *Cf. United States v. Seckinger*, 397 U.S. 203, 210 (1970); *see also United States v. Bell*, 915 F.3d 574, 576 (8th Cir. 2019) ("[o]rdinarily" courts read appeal waivers "against the Government and in favor of a defendant's appellate rights" (citation omitted)). Where, as here, the waiver prohibits the defendant from appealing his "sentence," the waiver should be construed to include the implicit assumption that the sentence be constitutional. *See, e.g.*, *United States v. Lajeunesse*, 85 F.4th 679, 694 (2d Cir. 2023); *Atherton*, 106 F.4th at 897; *Wells*, 29 F.4th at 586-87; *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994).

Second, courts do not enforce contractual agreements "when, in their sound discretion, the agreements have been deemed unconscionable" or against public policy. 8 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 18:1 (4th ed.) (Traditional Rule that Unconscionable Agreements Are Not Enforceable); Derek Teeter, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. Kan. L. Rev. 727, 764-65 (2005). The unconscionability doctrine precludes applications of contract terms that lead to oppression or unfair surprise, and public policy considerations preclude the enforcement of contract provisions when necessary to avoid conflicts with important public interests. *See* Bus. & Com.

Litig. in Fed. Cts. § 106:33 (5th ed.); Restatement (Second) of Contracts § 179 (Am. Law Inst. 1981); 5 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 12:1 (4th ed.) (Definition of Public Policy).

Here, unfair surprise is self-evident yet permitted by the Fifth Circuit's narrow approach: Plea agreements are executed pre-sentencing, and sentences are typically "beyond the control of the parties and their plea agreement." *United States v. Goodall*, 21 F.4th 555, 563 (9th Cir. 2021). It would surely surprise a defendant expecting a lawfully-imposed sentence to receive a sentence that violates the constitution. In this regard, waiving the right to appeal a sentence materially differs from other rights waived in a plea agreement: "Where a defendant waives a trial right … the act of waiving the right occurs at the moment the waiver is executed." *Atherton*, 106 F.4th at 896 (quotation omitted). But "[w]hen waiving the right to appeal a sentence in a plea agreement entered into before sentencing, … the defendant waives the right to appeal constitutional violations" before they "happen." *Id.*

The Fifth Circuit's rule is also oppressive. Permitting courts to impose unconstitutional sentences does not serve the public. *See Atherton*, 106 F.4th at 896. Yet the Fifth Circuit's rule leaves a myriad of unconstitutional sentences unheard and unremedied. *See supra* p.9 & n.1. These sentences are not just "unreasonably harsh," Bus. & Com. Litig. in Fed. Cts. § 106:33 (5th ed.), they infringe upon some of the most fundamental rights protected by the Constitution, *see also* Williston & Lord, *supra* p.22, § 12:1 (courts will not enforce contract that "undermine[s]" one's "sense of security" in his "personal liberty").

Consider Hunter's case: "No right is held more sacred, or is more carefully guarded, by the common law,

than the right of every individual to the possession and control of his own person." *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (quotation omitted). This Court has repeatedly held that "only an essential or overriding [government] interest" can "overcome" the "constitutionally protected liberty interest in avoiding involuntary administration of [medication]." *Sell v. United States*, 539 U.S. 166, 178-79 (2003) (citation omitted); *see also Washington v. Harper*, 494 U.S. 210, 221-22 (1990). Yet the sentencing court here made no findings to justify imposing the mandatory mental-health medication condition. Instead, the court wholesale "adopt[ed]" the U.S. Probation Office's recommendation, Pet.App.25a, which stemmed exclusively from Hunter's "*self-reported* history of mental health diagnoses" that he received at age ten, *United States v. Hunter*, No. 4:23-cr-85 (S.D. Tex. Apr. 1, 2024), Doc. 121 at 19, 24.

2. Moreover, "plea agreements are not ordinary contracts." *Lajeunesse*, 85 F.4th at 692. They "demand[] the utmost solicitude of which courts are capable" in protecting the rights of the accused. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). As relevant here, the Constitution "imposes a floor below which a defendant's plea, conviction, and sentencing may not fall." *Wells*, 29 F.4th at 587 (quotation omitted). That floor counsels against the Fifth Circuit's rule.

By allowing for only two exceptions—ineffective assistance of counsel and sentences that exceed the statutory maximum—the Fifth Circuit fails to provide defendants with constitutionally-sufficient safeguards. Many "important constitutional rights *require* some exceptions to the presumptive enforceability of a waiver." *Campusano v. United States*, 442 F.3d 770, 774 (2d Cir. 2006) (Sotomayor, J.) (emphasis added). Yet the Fifth Circuit

gives judges a green light to impose unconstitutional sentences on defendants who broadly waive their appeal rights. *See United States v. Baty*, 980 F.2d 977, 979 (5th Cir. 1992) ("After waiving her right to appeal, the district court could … impose an illegal sentence."). Under the Fifth Circuit's rule, a defendant who is sentenced to "public flogging" would have no recourse. *Cf. Windham*, 2025 WL 18584, at *6. Nor would a defendant who is sentenced to mandatory sterilization or a prohibition on church attendance. *Cf. Buck v. Bell*, 274 U.S. 200, 207-08 (1927); *Hernandez*, 209 F. Supp. 3d at 547. More examples abound. *See United States v. Keele*, 755 F.3d 752, 756 (5th Cir. 2014) ("[Defendant's] Eighth Amendment claims are … waived."). If due process means anything, it *requires* that such sentences be reviewable on appeal, notwithstanding a broad appeal waiver.

The Fifth Circuit's rule is also arbitrary. Under the decision below, an interstate bus driver sentenced to sixteen years for drunk driving can always appeal that sentence because it exceeds the statutory maximum. *See* 18 U.S.C. § 342. Yet if a court sentenced a trespasser to the pillory, that obvious Eighth Amendment violation would be unassailable under the Fifth Circuit's current approach. Those lines make no sense. While it is important to correct sentences that violate Congress' statutory maximum subject, it is equally (if not more) important to right sentences that violate fundamental constitutional protections. Likewise, it makes no sense to find only ineffective assistance of counsel claims can overcome an appeal waiver, whereas other, equally important constitutional rights are blocked by the waivers.

B. The Fifth Circuit's Refusal To Honor Sentencing Judges' Unobjected-to Statement of Appellate Rights Is Wrong

Familiar contract and constitutional principles also warrant reversal on the second question presented.

Parties to plea agreements contract for certain accepted and foreseeable risks. By precluding Hunter from appealing his sentence despite the sentencing court's contrary instruction, the Fifth Circuit failed to contemplate that the "sentencing decision" may have been "reached in a manner that the plea agreement did not anticipate." *United States v. Liriano-Blanco*, 510 F.3d 168, 173-74 (2d Cir. 2007). Indeed, a sentencing judge's statement of the defendant's appeal rights may "directly affect[]" the "sentence imposed on [the defendant.]" *Id.* at 173. For example, if a judge "doubts" whether "applicable law" allows for "a more lenient sentence," he might "rel[y] on the possibility of appeal in choosing the higher sentence." *Id.* Such sentences, based on a judge's "own misreading of the record," are "inconsistent with due process of law." *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). They are also inconsistent with the contractual principle against the enforcement of "unfair surprises." Bus. & Com. Litig. in Fed. Cts. § 106:33 (5th ed.); *see also supra* pp.21-22.

Moreover, by failing to object, the government forfeited its right to enforce the appeal waiver against Hunter. A "waived appellate claim can still go forward if the prosecution … waives the waiver." *Garza*, 586 U.S. at 238-39. That is precisely what the prosecution did. The government failed to object to the sentencing court's statement that Hunter had the right to appeal, thereby "intentional[ly] relinquish[ing]" its "known right" to enforce the appeal waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

A defendant's reliance on the government's acquiescence also estops the government from enforcing the waiver. To "promote the ends of justice," a party who "leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U.S. (10 Otto) 578, 580 (1879). Thus, when the government gives a criminal defendant the wrong impression of its intended course of action, "there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding" contrary to that impression. *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973).

The government's failure to object to the sentencing judge's statement gives a defendant the impression that the government would not enforce the appeal waiver such that the defendant indeed has a right to appeal. Relying on that impression, a defendant may, as Hunter did here, decline to file a motion to correct his sentence within fourteen days of sentencing. *See* Fed. R. Crim. P. 35(a). He may also file an appeal as the sentencing court instructed he could, at risk of the government later arguing breach of the plea agreement for doing so. *See, e.g.*, *United States v. Erwin*, 765 F.3d 219, 233-35 (8th Cir. 2014) (collecting cases). Under these circumstances, the government should not be allowed to later enforce the waiver on "every reason of justice and good faith." *Dair v. United States*, 83 U.S. (16 Wall.) 1, 4 (1872).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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