

No. 24-1063

IN THE
Supreme Court of the United States

HUNTER P. MUNSON, III,
Petitioner,
v.
UNITED STATES,
Respondent.

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

**BRIEF OF *AMICUS CURIAE*
BRETT MORRIS MCALPIN
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
CONSTITUTIONAL PROVISIONS INVOLVED..	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT.....	3
I. APPEAL WAIVERS VIOLATE SEPA- RATION OF POWERS BY PERMIT- TING EXECUTIVE BRANCH PROSE- CUTORS TO BIND ARTICLE III COURTS FROM EXERCISING THEIR CONSTI- TUTIONAL REVIEW FUNCTION.....	3
A. The Constitution Vests Judicial Power Exclusively in Article III Courts, Including the Power to Review Criminal Sentences	4
B. Appeal Waivers Impermissibly Transfer Core Judicial Functions to Executive Branch Prosecutors	5
C. <i>Missouri v. Frye</i> and <i>Lafler v. Cooper</i> Create a Constitutional Paradox That Makes Appeal Waivers Even More Problematic.....	6
II. THE FIFTH CIRCUIT’S RESTRICTIVE APPROACH COMPOUNDS THE SEPA- RATION OF POWERS VIOLATION BY ESSENTIALLY ELIMINATING MEAN- INGFUL JUDICIAL OVERSIGHT.....	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	4
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012).....	6-8
<i>McAlpin v. United States</i> , No. 24-1293 (docketed June 18, 2025)	11
<i>Missouri v. Frye</i> , 566 U.S. 134 (2012).....	2, 6-8
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	4
CONSTITUTION	
U.S. Const. art. II	4
U.S. Const. art. III.....	2-8, 10, 11
U.S. Const. art. III, § 1	1, 4
U.S. Const. amend. V	2
STATUTES	
18 U.S.C. § 3742	2
OTHER AUTHORITIES	
The Federalist No. 51 (James Madison).....	4

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Brett Morris McAlpin is the Petitioner in this Court seeking a writ of certiorari to the Fifth Circuit Court of Appeals in case number 24-1293. McAlpin is a convicted federal prisoner denied review of his sentence by reason of an invalid appeal waiver.

In the present action, McAlpin urges grant of the Writ of Certiorari because the issue is one closely related to his own case. While Hunter's petition addresses which constitutional violations may overcome an otherwise valid appeal waiver, McAlpin's case addresses whether an appeal waiver should be enforced when the underlying plea agreement lacks consideration entirely.

Relevant to both petitioners and their respective criminal appeals of their sentences, the government practice requiring appeal waivers in plea agreements implicates separation of powers concerns. Accordingly, the Court should take up both cases for review.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. III, § 1.

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

¹ Rule 37 Statement: *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *Amicus* or his counsel has made monetary contributions to its preparation and submission. Pursuant to the Rule, counsel for both parties have received timely notice of *Amicus's* intent to file this brief in support of the Petition.

U.S. Const. Amend. V.

... nor be deprived of life, liberty, or property,
without due process of law;

18 U.S.C. § 3742

A defendant may file a notice of appeal in the
district court for review of an otherwise final
sentence

SUMMARY OF THE ARGUMENT

This case presents a separation of powers crisis hiding in plain sight. When federal prosecutors include appeal waivers in plea agreements, they are not merely obtaining waivers of individual rights—they are systematically dismantling the constitutional architecture that makes Article III courts a meaningful check on executive power.

The Constitution vests “the judicial Power” exclusively in Article III courts, including the essential function of reviewing criminal sentences for legal and constitutional compliance. Yet appeal waivers permit executive branch prosecutors to negotiate away this judicial power, creating vast domains of federal criminal law where courts cannot fulfill their constitutional oversight role.

Missouri v. Frye makes this constitutional violation even more stark. After *Frye* prohibited judges from participating in plea negotiations to preserve prosecutorial independence, prosecutors now control both sides of the equation: they decide what charges to bring, what plea terms to offer, and—through appeal waivers—whether courts will ever be permitted to review their work.

The Fifth Circuit’s decision below epitomizes this constitutional breakdown. By restricting appeal waiver exceptions to a narrow list that excludes most constitutional violations, the Fifth Circuit has essentially ratified a system where prosecutors can immunize unconstitutional sentences from judicial review through the simple expedient of including boilerplate waiver language in plea agreements.

This Court should reverse and hold that appeal waivers violate separation of powers when they prevent Article III courts from exercising their constitutional duty to ensure that criminal sentences comply with law and the Constitution.

ARGUMENT

I. APPEAL WAIVERS VIOLATE SEPARATION OF POWERS BY PERMITTING EXECUTIVE BRANCH PROSECUTORS TO BIND ARTICLE III COURTS FROM EXERCISING THEIR CONSTITUTIONAL REVIEW FUNCTION.

The Fifth Circuit’s enforcement of Hunter’s appeal waiver does more than deny an individual defendant his day in court—it represents a fundamental violation of the constitutional separation of powers. When prosecutors can negotiate away appellate review through plea agreements, they effectively transfer core judicial functions to the executive branch, creating exactly the kind of power concentration that the Framers designed our constitutional system to prevent.

The separation of powers is not merely a procedural nicety or a matter of governmental etiquette. It is, as this Court has repeatedly recognized, “a self-executing safeguard against the encroachment or aggrandize-

ment of one branch at the expense of the other.” *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (citing to *The Federalist* No. 51 (James Madison)). Appeal waivers represent precisely such an encroachment—a systematic transfer of Article III power to Article II prosecutors.

A. The Constitution Vests Judicial Power Exclusively in Article III Courts, Including the Power to Review Criminal Sentences.

Article III provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1. This grant is both exclusive and comprehensive—it vests all federal judicial power in Article III courts, not just the portions that other branches find convenient to respect.

The power to review criminal sentences for legal and constitutional compliance sits at the very core of “the judicial Power.” As this Court explained in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995), the judicial power includes “not merely the power to rule on cases, but to rule on them with finality, subject to review only by superior courts in the Article III hierarchy.” When prosecutors can negotiate away this review power through appeal waivers, they are not merely affecting the rights of individual defendants—they are reallocating constitutional power from the judicial branch to the executive branch.

This reallocation is particularly problematic in the criminal context, where the executive branch already wields enormous power through its prosecutorial function. The Constitution creates a careful balance:

prosecutors decide whom to charge and what charges they can lay and prove, but Article III courts retain the essential function of ensuring that the resulting sentences comply with constitutional and statutory requirements. Appeal waivers upset this balance by giving prosecutors control over both prosecution and the availability of judicial review.

Consider the implications of the government's position. If prosecutors can eliminate appellate review through plea negotiations, what prevents them from negotiating away other core judicial functions? The logic of the government's position provides no limiting principle that would prevent such obvious constitutional violations.

B. Appeal Waivers Impermissibly Transfer Core Judicial Functions to Executive Branch Prosecutors.

The constitutional problem with appeal waivers becomes even clearer on examining their practical operation. In effect, these waivers transfer the judicial function of ensuring legal compliance from Article III courts to executive branch prosecutors. Instead of independent judicial review, there results a system where prosecutors police themselves.

This transfer violates fundamental separation of powers principles in multiple ways. First, it concentrates in a single branch power that the Constitution deliberately separates. Prosecutors already control charging decisions, plea negotiations, and sentencing recommendations. When they can also control the availability of appellate review, they accumulate power that the Constitution distributes across multiple branches.

Second, appeal waivers eliminate the structural safeguards that separation of powers is designed to provide. The Framers did not create independent Article III courts as a favor to criminal defendants—they created them as a structural protection for the constitutional system itself. When prosecutors can negotiate away judicial review, they eliminate a crucial check on executive power that protects not just individual defendants but the constitutional order itself.

Third, appeal waivers create perverse incentives that undermine the rule of law. When prosecutors know their decisions will never face appellate scrutiny, they lose the institutional pressure that normally encourages careful attention to legal requirements. The result is a system where legal errors proliferate because the structural mechanisms designed to correct them have been negotiated away.

The government may argue that defendants “voluntarily” agree to these waivers, but this response misses the constitutional point. Separation of powers protects the allocation of governmental power, not just individual rights. Even if every criminal defendant in America enthusiastically agreed to waive appellate review, such waivers would still violate separation of powers because they would still transfer constitutional power from Article III courts to executive prosecutors.

**C. *Missouri v. Frye* and *Lafler v. Cooper*
Create a Constitutional Paradox That
Makes Appeal Waivers Even More
Problematic.**

Missouri v. Frye, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012), create a constitutional paradox that makes appeal waivers even more constitutionally problematic. These companion cases

simultaneously expanded judicial oversight of plea bargaining while prosecutors continue to eliminate that very oversight through appeal waivers.

In *Lafler*, this Court held that defendants have a right to effective counsel during plea negotiations and that courts must fashion remedies when ineffective assistance leads to rejected plea offers.

Yet the logic of *Lafler* directly contradicts the Fifth Circuit's approach to appeal waivers. *Lafler* establishes that Article III courts have both the power and the duty to review plea bargaining outcomes when constitutional violations occur. If courts can order remedies for ineffective assistance during plea negotiations, they certainly have the power to review constitutional violations in the sentences that result from those negotiations.

The constitutional paradox becomes even starker when we consider *Frye*'s recognition that plea bargaining "is not some adjunct to the criminal justice system, it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (emphasis in original). If plea bargaining is the system, and if *Lafler* establishes that courts must oversee that system to ensure constitutional compliance, then appeal waivers that eliminate such oversight violate the structural constitutional principles that both *Frye* and *Lafler* were designed to protect.

Moreover, *Lafler*'s analysis of remedial discretion proves that judicial oversight of plea outcomes does not violate separation of powers—it enforces it. When *Lafler* authorized courts to "exercise discretion in choosing to vacate a conviction and accept the original plea bargain, resentence the defendant, or leave the original conviction undisturbed," 566 U.S. at 171, the

Court was implementing the essential Article III function of ensuring constitutional compliance.

Consider Hunter’s case through this lens. The district court imposed a sentence requiring involuntary medication—exactly the kind of constitutional issue that *Lafler* suggests warrants judicial oversight. But the appeal waiver prevents the very judicial review that *Lafler* and *Frye* establish as constitutionally necessary. This creates an untenable situation where the Court’s recognition of judicial authority in plea contexts is nullified by prosecutorial agreements that eliminate judicial authority entirely.

Lafler also undermines the argument that defendants “voluntarily” agree to appeal waivers. If defendants need effective counsel to evaluate plea offers, as *Lafler* holds, then they certainly need effective counsel to evaluate the constitutional significance of waiving appellate review of constitutional violations. The Fifth Circuit’s approach treats appeal waivers as less consequential than the underlying plea decisions that *Lafler* subjects to careful judicial scrutiny.

The constitutional logic is inescapable: If separation of powers permits courts to review and remedy plea bargaining outcomes under *Lafler*, then separation of powers requires courts to review constitutional violations in the sentences that result from plea bargaining. Prosecutors cannot negotiate away judicial review functions that *Lafler* establishes as essential to constitutional compliance.

II. THE FIFTH CIRCUIT'S RESTRICTIVE APPROACH COMPOUNDS THE SEPARATION OF POWERS VIOLATION BY ESSENTIALLY ELIMINATING MEANINGFUL JUDICIAL OVERSIGHT.

The Fifth Circuit's approach to appeal waiver exceptions makes these separation of powers problems even worse. By limiting exceptions to ineffective assistance of counsel and sentences exceeding statutory maximums, the Fifth Circuit has created a system where prosecutors can immunize virtually any constitutional violation from judicial review simply by including boilerplate waiver language in plea agreements.

This approach transforms appeal waivers from limited waivers of individual rights into broad grants of immunity from judicial oversight. When prosecutors know that constitutional violations will never face appellate review, they have little incentive to ensure constitutional compliance. The result is a systematic degradation of constitutional protections that violates both individual rights and structural constitutional principles.

The Fifth Circuit's narrow approach also creates arbitrary and irrational distinctions. Under the court's logic, a sentence that exceeds a statutory maximum by one day warrants appellate review, but a sentence that violates fundamental constitutional rights does not. A sentence imposed by an incompetent defense attorney warrants review, but a sentence that violates due process does not. These distinctions make no sense from either an individual rights or a separation of powers perspective.

More fundamentally, the Fifth Circuit's approach eviscerates Article III's grant of judicial power. If courts cannot review constitutional violations because prosecutors have waived such review, then prosecutors effectively control the scope of judicial power. This result is exactly backwards—the Constitution vests judicial power in courts, not prosecutors.

The proper remedy is not to expand the narrow exceptions that the Fifth Circuit recognizes, but to recognize that appeal waivers cannot constitutionally eliminate judicial review of constitutional violations. When prosecutors attempt to negotiate away judicial review of constitutional questions, they exceed their constitutional authority and invade the province of Article III courts.

CONCLUSION

The systematic use of appeal waivers represents a quiet constitutional crisis that this Court must address before the separation of powers suffers irreparable harm. When prosecutors can negotiate away appellate review of constitutional violations, they arrogate power that the Constitution deliberately distributes among separate branches.

The Fifth Circuit's decision in this case epitomizes the problem. By enforcing Hunter's appeal waiver to prevent judicial review of a potentially unconstitutional sentence, the court has ratified a system where prosecutors control both prosecution and the availability of judicial oversight. This concentration of power violates fundamental separation of powers principles and threatens the constitutional balance that protects both individual liberty and governmental accountability.

Appeal waivers violate separation of powers when they prevent Article III courts from reviewing constitutional violations in criminal sentences. The judicial power belongs to courts, not prosecutors, and no plea negotiation can constitutionally transfer that power from one branch to another.

The Court should grant the petition for a writ of certiorari. Given the related questions regarding appeal waiver enforceability in *McAlpin v. United States*, case number 24-1293, these cases may benefit from coordinated consideration.

Respectfully submitted,

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