No. 24-1073

IN THE

Supreme Court of the United States

GHISLAINE MAXWELL,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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

SARA ELIZABETH KROPF
Counsel of Record
KROPF MOSELEY SCHMITT PLLC
1100 H Street NW
Suite 1220
Washington, DC 20005
(202) 627-6900
sara@kmlawfirm.com
Counsel for Amicus Curiae

120443

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Page

Cited Authorities

Page

Other Authorities:

INTEREST OF AMICI[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defendants to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of thousands of direct members and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Given their prevalence, the interpretation of plea agreements is a question of great importance to NACDL and the clients its members represent. NACDL is well positioned to provide additional insight into the implications of this issue for criminal defendants across the country.

---

1. Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, amicus curiae provided notice to the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants in criminal cases rely on the promises made by the Department of Justice when deciding whether to plead guilty and face the life-altering consequences of doing so. The government's promises, made in return for demanding the defendant's waiver of constitutional rights, should be rigorously enforced. Yet the lower court permitted the government to escape its promises and incorrectly limited the scope of the non-prosecution and plea agreement (NPA) well beyond its plain language.

The intentionally broad scope of this NPA may be surprising in retrospect but that does not change the words on the page. Indeed, a survey of plea agreements from across the country shows that the Department of Justice knows how to limit a plea agreement's reach to a single prosecutorial district rather than making it a nationwide restriction against future prosecution. Where, as here, the "United States . . . agrees that it will not institute any criminal charges against any potential co-conspirators" (App. 31a), without imposing any geographic limitation, no part of the Department of Justice may institute criminal charges against any co-conspirator in any district.

The Department of Justice directs prosecutors to be careful when exercising their authority to bind the entire Department but there is no question that prosecutors have the authority to do so. That they rarely exercise this authority is not a ground for invalidating it, quite the opposite.

Amicus NACDL urges the Court to grant this petition and resolve the conflict among the circuits to ensure that the government keeps its promises.

ARGUMENT

The Department of Justice (the "Department") routinely limits the scope of its plea agreements to the specific United States Attorney's Office (USAO) that is a party to the agreement. Prosecutors in other districts and other parts of the Department could therefore later charge the defendant for the same or related conduct. Where, as here, the government chooses not to adopt limiting language, a court should not negate its bargained-for promise to the defendant and instead enforce the language as written. Amicus urges the Court to grant the petition to resolve the split among the circuits and ensure that defendants and their counsel can rely on the promises made by the United States in its written agreements.

1. Defendants should be able to rely on the government's promises and courts should not hesitate to enforce them.

Like any party to any contract, defendants in criminal cases rely on the promises made by the Department. And defendants give up a lot in return. A defendant entering into a plea agreement forgoes his constitutional right to a trial by jury and right to appeal, faces the near certainty of a prison sentence and loss of freedom, agrees to pay financial penalties through fines and forfeiture, and faces the myriad collateral effects of a criminal conviction after serving the sentence.

"The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). That responsibility, borne by NACDL's members, requires defense counsel to explain the benefits and drawbacks of a plea agreement to their clients.

As a practical matter, every criminal defendant hopes that a plea agreement will end their exposure to future prosecution for the same or related conduct. Defense counsel must explain to their clients that while a plea agreement ensures that the client is not charged for the same or related conduct in that district, most plea agreements expose the client to prosecution in other districts. It creates an impossible situation if defense counsel must now explain to their clients that the court may later excuse the Department from its promises.

Guilty pleas must be knowing and voluntary. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). As the Court has explained, "[i]t is precisely because the plea was knowing and voluntary . . . that the Government is obligated to uphold its side of the bargain." *Puckett v. United States*, 556 U.S. 129, 137–38 (2009). A "guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970). A plea "is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional

rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* A defendant, however, cannot have "sufficient awareness of the relevant circumstances and likely consequences" of a plea agreement if the United States can change the plain language of the agreement down the road without the defendant's consent.

Likewise, a court cannot discharge its crucial role in the plea process if it does not know whether to trust United States' words. The court is not a rubber stamp in the plea process. Rather, the Rule 11(b)-mandated plea colloquy "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy*, 394 U.S. at 465. The court, through this colloquy, must personally interrogate the defendant on the record to ensure that a plea is voluntary in part by establishing that the plea agreement contains all promises made to the defendant in return for his consent to plead guilty. *See* Fed. R. Crim. P. 11(b)(2) ("Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).").

This case involves an unusually broad non-prosecution agreement. But nothing in the law permits the United States to break its promises simply because the promise is an atypical one.

During plea negotiations, the Department wields extraordinary leverage as compared to a criminal

defendant. Even the most ably represented defendant cannot overcome this unequal balance of power. The government's substantial "advantage in bargaining power" means that ambiguities like this one must be construed against the government. *United States v. Gebbie*, 294 F.3d 540, 552 (3d Cir. 2002).

Defense counsel confront their clients' unequal bargaining power every time they attempt to obtain a resolution that is in the best interest of their client while mollifying a prosecutor who has little institutional incentive to be lenient. Judge Charles Breyer accurately described the process:

> It is no answer to say that [the defendant] is striking a deal with the Government, and could reject this term if he wanted to, because that statement does not reflect the reality of the bargaining table. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010). As to terms such as this one, plea agreements are contracts of adhesion. The Government offers the defendant a deal, and the defendant can take it or leave it. *Id*. ("American prosecutors . . . choose whether to engage in plea negotiations and the terms of an acceptable agreement."). If he leaves it, he does so at his peril. And the peril is real, because on the other side of the offer is the enormous power of the United States Attorney to investigate, to order arrests, to bring a case or to dismiss it, to recommend a sentence or the conditions of supervised release, and on

> and on. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18, 18 (1940).

United States v. Osorto, 445 F. Supp. 3d 103, 109 (N.D. Cal. 2020).

To permit the United States to escape the plain language of its agreement in this case would work a detriment on the entire plea system. This is of particular concern given that the criminal justice system "is for the most part a system of pleas, not a system of trials." *Missouri v. Frye*, 566 U.S. at 143–44. For the plea system to work in practice, defense counsel and defendants must be able to rely on the written promises made by the government and trust that courts will honor and enforce those promises down the road, even when it means that the Department must forego a meritorious prosecution.

Consider a situation where a defendant agrees to plead guilty to a violent felony that will bring substantial prison time. He agrees to plead only because the "United States" promises in writing that it will not charge any co-conspirators in the offense, including the defendant's brother, and because the plea agreement contains no geographic or other limitation on that promise. The defendant should be able to rely on the government's bargained-for promise that he alone will suffer incarceration. And a prosecutor in a different district must not be permitted to charge his brother with conspiracy to commit the same offense.

2. The Department of Justice knows how to draft plea agreements to bind only part of the Department in future prosecutions.

As the trial court correctly noted, "[s]ingle district plea agreements are the norm." (App. 56a) A survey of plea agreements from districts across the county reveals that the Department of Justice routinely drafts plea agreements with this limited single-district scope.

Here are examples from districts across the country:

Middle District of Alabama: "The defendant understands that this agreement binds only the Office of the United States Attorney for the Middle District of Alabama and that the agreement does not bind any other component of the United States Department of Justice, nor does it bind any state or local prosecuting authority." *United States v. McIntyre*, No. 1:24-cr-00211, ECF No. 33 (Dec. 19, 2024), at 14.

Northern District of Alabama: "The Defendant understands and agrees that this Agreement does not bind any other United States Attorney in any other district, or any other state or local authority." *United States v. Giaquinto*, No. 2:22-cr-00035-MHH-GMB, ECF No. 326 (Nov. 18, 2024), at 13.

Eastern District of California: "This plea agreement is limited to the United States Attorney's Office for the Eastern District of California and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities." *United States v. Amani Investments*, No. 2:23-cr-00014-JAM, ECF No. 8 (E.D. Cal. Feb. 7, 2023), at 1.

Central District of California: "This agreement is limited to the [Central District of California] USAO and cannot bind any other federal, state, local, or foreign prosecuting, enforcement, administrative, or regulatory authorities." *United States v. Koo*, No. 2:23-cr-00568-DSF-1, ECF No. 8 (Nov. 20, 2023), at 1.

District of Colorado: "This agreement binds only the Criminal Division of the United States Attorney's Office for the District of Colorado and the defendant." *United States v. Chuong*, No. 1:21-cr-00164, ECF No. 67 (July 7, 2022), at 1.

District of Columbia: "Your client further understands that this Agreement is binding only upon the Criminal and Superior Court Divisions of the United States Attorney's Office for the District of Columbia as well as the Criminal Division's Public Integrity Section. This Agreement does not bind the Civil Division of this Office or any other United States Attorney's Office, nor does it bind any other state, local, or federal prosecutor." *United States v. Patel*, No. 1:19-cr-00081-RDM, ECF No. 4 (April 4, 2019), at 11–12.

Northern District of Georgia: "The United States Attorney's Office for the Northern District of Georgia agrees not to bring further criminal charges against the Defendant related to the charges to which he is pleading guilty. The Defendant understands that this provision does not bar prosecution by any other federal, state, or local jurisdiction." *United States v. Woods*, No. 1:23-cr-00064, ECF No. 8-1 (Mar. 3, 2023), at 4.

Southern District of Indiana: "This document and the addendum constitute the complete and only Plea

Agreement between the Defendant, the United States Attorney for the Southern District of Indiana, and the Civil Rights Division and is binding only on the parties to the agreement, supersede all prior understandings, if any, whether written or oral, and cannot be modified except in writing, signed by all parties and filed with the Court, or on the record in open court." *United States v. Gibson*, No. 1:20-cr-00094, ECF No. 148 (Mar. 30, 2022), at 17.

Eastern District of Michigan: "The Defendant understands and agrees that this Agreement is between the Fraud Section and the Defendant and does not bind any other division or section of the Department of Justice or any other federal, state, or local prosecuting, administrative, or regulatory authority." *United States v. Sterling Bancorp, Inc.*, No. 2:23-cr-20174-LVP-DRG, ECF No. 12 (May 18, 2023), at 4.

District of Minnesota: "This Plea Agreement binds only the Defendant and the Antitrust Division of the United States Department of Justice. . . . This Plea Agreement does not bind any other state or federal agency." *United States v. Detloff Marketing and Asset Management, Inc.*, No. 18-cr-00197-PAM-HB, ECF No. 96 (July 25, 2019), at 1.

Eastern District of Missouri: "This agreement does not, and is not intended to, bind any governmental office or agency other than the United States Attorney for the Eastern District of Missouri." *United States v. Malik*, No. 4:24-cr-00010-HEA, ECF No. 127 (Apr. 4, 2023), at 1.

Eastern District of New York: "The Defendants understand and agree that this Agreement is among

the Office [Eastern District of New York USAO], the NSD [National Security Division of the United States Department of Justice], and the Defendants, and does not bind any other division or section of the Department of Justice or any other federal, state, local or foreign prosecuting, administrative or regulatory authority." *United States v. Lafarge S.A.*, No. 1:22-cr-00444-WFK, ECF No. 10 (Oct. 18, 2022), at 3.

District of New Jersey: "This agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local authorities." *United States v. Goldfield*, No. 1:16-cr-00513-JBS, ECF No. 39 (Dec. 22, 2016), at 4.

Southern District of New York: "This Agreement does not bind any federal, state, or local prosecuting authority other than this Office." *United States v. Ellison*, No. 22-CR-673 (RA), at 4 (Dec. 18, 2022), at 4.[2]

Middle District of Pennsylvania: "Nothing in this Agreement shall bind any other United States Attorney's Office, state prosecutor's office, or federal, state or local law enforcement agency." *United States v. Coccagna*, No. 1:22-cr-00407-YK, ECF No. 3-1 (Dec. 2, 2022), at 29.

Northern District of Texas. "This agreement is limited to the United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Northern District of Texas, and

2. Available at https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2022/12/21/1671676065196-Caroline_Ellison_Plea_Agreement.pdf (accessed May 5, 2025).

does not bind any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against the defendant or any property." *United States v. Barnes*, No. 3:19-cr-00112-K, ECF No. 355 (Apr. 1, 2022), at 7.

3. The consistent practice of USAOs to limit the scope of plea agreements stands in stark contrast to the scope of the NPA here.

The trial court correctly noted that "[n]ationwide, unlimited agreements are the rare exception." (App. at 56a). The fact that this NPA is a "rare exception" to Department's general practice does not void the agreement's broad reach. In fact, the rarity of nationwide agreements is a persuasive reason to enforce it because there can be no question that the choice of language was intentional and a key part of the parties' bargain.

This situation is no different than a contractual provision that binds a corporate subsidiary and, by extension, the parent corporation. Unless the subsidiary plainly lacked authority to enter into the agreement, that provision is enforceable against the parent. Similarly, one USAO has the authority to bind the entire Department. "[T]he prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Recognizing that one prosecutor can bind all prosecutor, the Justice Manual instructs prosecutors that non-prosecution agreements should "be drawn in

terms that will not bind other federal prosecutors or agencies without their consent" and "the attorney for the government should explicitly limit the scope of his/her agreement to non-prosecution within his/her district." Justice Manual § 9-27.630.[3] Given this instruction, when Department attorneys choose to draft a broad agreement, the court should enforce it as written. The NPA's broad language served the government's strategy at the time of the agreement. The Court should not permit the government to escape that language, even if that strategy may seem unwise or unintelligible with the benefit of hindsight.

CONCLUSION

The Court should grant review in this case to resolve the conflict among the circuits identified by petitioner and hold the Department of Justice to its word.

Respectfully submitted,

Jeffrey T. Green
Co-Chair Amicus Committee
National Association of Criminal Defense Lawyers
1600 L Street NW
Washington, DC 20036

Sara Elizabeth Kropf
Counsel of Record
Kropf Moseley Schmitt PLLC
1100 H Street NW
Suite 1220
Washington, DC 20005
(202) 627-6900
sara@kmlawfirm.com
Counsel for Amicus Curiae

3. Available at https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.330 (accessed May 5, 2025).