

No. _____

In The
Supreme Court of the United States

JAMAL MOHAMMAD ELEIDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the district court in sentencing a United States citizen imposes deportation as a supervised release condition, and 18 U.S.C. § 3583(d) expressly limits deportation to “an alien defendant,” does an appeal waiver provision in a plea agreement preclude appellate review of the illegal sentence?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Jamal Mohammad Eleidy. Respondent, who was the Plaintiff-Appellee below, is the United States of America.

TABLE OF CONTENTS

	Page:
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
CITATION OF PRIOR OPINION	1
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE.....	2
Mr. Eleidy's guilty plea.....	2
Original sentencing hearing	4
First appeal	4
Resentencing	5
Second appeal.....	6
MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW	7
REASONS FOR GRANTING THE WRIT	7
DISCUSSION.....	7
I. MR. ELEIDY'S APPEAL WAIVER DOES NOT BAR REVIEW OF A SENTENCE IN EXCESS OF A STATUTORY LIMITATION	7
A. An Appeal Waiver Is Not An Absolute Bar To All Kinds Of Claims.....	7
B. This Court Recognizes Exceptions To Waiver Rules To Protect Valuable Rights.....	9

C. An Appeal Waiver Does Not Bar Review Of A Sentence Imposed In Excess Of A Statutory Limit	9
D. The District Court Imposed An Illegal Sentence When It Imposed A Supervised Release Condition Applicable Only To An “Alien Defendant.”	11
E. Issuing A Writ Of Certiorari To Review The Fourth Circuit’s Dismissal Of Mr. Eleidy’s Appeal Will Confirm The Right To Appeal An Illegal Sentence	12
CONCLUSION.....	13
APPENDIX	
Opinion	
U.S. Court of Appeals For the Fourth Circuit	
filed May 14, 2024	Appendix A
Judgment	
U.S. Court of Appeals for the Fourth Circuit	
filed May 14, 2024	Appendix B

TABLE OF AUTHORITIES

	Page(s):
Cases:	
<i>Class v. United States</i> , 583 U.S. 174 (2018)	9, 13
<i>DeRoo v. United States</i> , 223 F.3d 919 (8th Cir. 2000)	11, 12
<i>Fay v. Noia</i> , 372 U.S. 391 (1963)	12
<i>Garza v. Idaho</i> , 586 U.S. 232 (2019)	7, 8
<i>Mont v. United States</i> , 587 U.S. 514 (2019)	11
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	8
<i>Town of Newton v. Rumery</i> , 480 U.S. 386 (1987)	9, 12-13
<i>United States v. Archie</i> , 771 F.3d 217 (4th Cir. 2014)	8, 10, 12
<i>United States v. Blick</i> , 408 F.3d 162 (4th Cir. 2005)	10
<i>United States v. Braverman</i> , 373 U.S. 405 (1963)	11
<i>United States v. Broce</i> , 488 U.S. 563 (1989)	9
<i>United States v. Broughton-Jones</i> , 71 F.3d 1143 (4th Cir. 1995)	10
<i>United States v. Eleidy</i> , No. 21-4140, 2023 WL 2300393 (4th Cir. Mar. 1, 2023)	4, 5
<i>United States v. Eleidy</i> , No. 23-4478 (4th Cir. 2024)	6, 7

<i>United States v. Goodall,</i> 21 F.4th 555 (9th Cir. 2021)	10, 11, 12
<i>United States v. Greatwalker,</i> 285 F.3d 727 (8th Cir. 2002)	11
<i>United States v. Johnson,</i> 988 F.2d 941 (9th Cir. 1993)	11
<i>United States v. Marin,</i> 961 F.2d 493 (4th Cir. 1992)	6, 10
<i>United States v. McLeod,</i> 972 F.3d 637 (4th Cir. 2020)	10, 12
<i>United States v. Olano,</i> 507 U.S. 725 (1993)	9
<i>United States v. Sims,</i> 410 F. App'x 666 (4th Cir. 2011).....	10, 12
<i>United States v. Singletary,</i> 75 F.4th 416 (4th Cir. 2023)	10
<i>United States v. Thornsberry,</i> 670 F.3d 532 (4th Cir. 2012)	10
<i>United States v. Xiang,</i> 77 F.3d 771 (4th Cir. 1996)	11
<i>Wainwright v. Sykes,</i> 433 U.S. 72 (1977)	12
Statutes:	
8 U.S.C. § 1101.....	5, 12
18 U.S.C. § 1015.....	2
18 U.S.C. § 1344.....	2
18 U.S.C. § 1349.....	2
18 U.S.C. § 1425.....	2
18 U.S.C. § 3583.....	1, 6, 11

18 U.S.C. § 3583(d)	8, 11
18 U.S.C. § 3663.....	6
18 U.S.C. § 3663(A).....	6
18 U.S.C. § 3742.....	3
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2255.....	3

Rules:

S. Ct. R. 10(c)	7
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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by granting the Government's motion to dismiss appeal in an order issued on 14 May 2024. The order is included in Appendix A.

JURISDICTIONAL STATEMENT

This petition seeks review of an order dismissing petitioner's appeal of his sentence following a guilty plea to conspiracy to commit bank fraud. The petition is being filed within the time permitted by the Rules of this Court. This Court has jurisdiction to review the Fourth Circuit's order pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3583 of Title 18 provides, in relevant part:

(a) In General.—

The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

* * *

(c) Factors To Be Considered in Including a Term of Supervised Release.—

The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663

and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. . . . The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. . . .

STATEMENT OF THE CASE

Jamal Mohammad Eleidy is a United Stats citizen. JA284. He was charged by indictment with conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349; six counts of bank fraud, in violation of 18 U.S.C. § 1344; procuring citizenship unlawfully, in violation of 18 U.S.C. § 1425; and making false statements relating to naturalization, in violation of 18 U.S.C. § 1015. JA4, JA16-28.

Mr. Eleidy's guilty plea

Mr. Eleidy initially pleaded not guilty. JA9. Later, at a change of plea hearing, Mr. Eleidy pleaded guilty to the conspiracy to commit bank fraud charge pursuant to a written plea agreement. JA29-64, JA327-332. The plea agreement included an appeal waiver provision:

To waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742, and further to waive any right to contest the conviction or the sentence in any post-conviction proceeding, including any proceeding under 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

JA327. At the change of plea hearing, the court questioned Mr. Eleidy regarding the appeal waiver provision:

THE COURT: You understand that by entering into this plea agreement and entering a plea of guilty, that you will have waived or given up your right to appeal or to collaterally attack all or part of your sentence?

THE DEFENDANT: Yes, Your Honor.

JA47.

The court found that Mr. Eleidy was fully competent and capable of entering an informed plea; that his plea was knowing and voluntary; and that the plea was supported by an independent factual basis. JA61. The court accepted Mr. Eleidy's plea and adjudged him guilty of Count 1. JA62. Before the proceedings concluded, the Assistant United States Attorney read the appeal waiver provision into the record. JA62-63. In response to the court's questions, Mr. Eleidy again confirmed that he understood the terms of his plea agreement. JA63-64.

Original sentencing hearing

The district court held a sentencing hearing on 19 March 2021. JA66-184. Overruling Mr. Eleidy's objections, JA155, JA158-160, the court sentenced Mr. Eleidy to 109 months' imprisonment and five years of supervised release. JA179, JA200-205, JA212-217. The court entered its judgment, JA200-209, JA333-336; the court later entered an amended judgment to reflect the court's forfeiture order, which the court had left open at conclusion of the sentencing hearing, JA181-182, JA212-220.

Mr. Eleidy timely filed a notice of appeal from the court's judgment, JA210-211, and timely filed a notice of appeal from the amended judgment, JA221-222.

First appeal

On appeal, the Fourth Circuit affirmed Mr. Eleidy's conviction, concluding that Mr. Eleidy's guilty plea was knowing and voluntary, and that he knowingly and intelligently waived his right to appeal. *United States v. Eleidy*, No. 21-4140, 2023 WL 2300393, at *1 (4th Cir. Mar. 1, 2023). The Fourth Circuit also concluded that the amended written judgment included multiple discretionary conditions of supervised release that were not announced by the district court at the sentencing hearing. *Id.* The Fourth Circuit held that the failure to announce conditions of supervised release that are later included in a written judgment was reversible error, and the court vacated Mr. Eleidy's sentence and remanded for resentencing. *Id.* at *1-*2. Because it was remanding for resentencing, the Fourth Circuit said it

would not consider any additional challenges to Mr. Eleidy’s sentence or whether such challenges would be barred by the appeal waiver. *Id.* at *2.

Resentencing

The district court held a resentencing hearing on 11 July 2023. JA14. Mr. Eleidy raised all of the arguments he raised at the time of his original sentencing hearing. JA341-342, JA361. The district court did not change any of its rulings as announced at the first sentencing hearing. JA362. The court reduced Mr. Eleidy’s sentence to 103 months’ imprisonment to reflect his post-sentencing rehabilitation efforts. JA383; *see* JA259. The court again imposed a five-year term of supervised release. JA393; *see* JA260. The court imposed supervised release conditions, including a requirement for Mr. Eleidy to be turned over to immigration authorities for deportation (the “deportation condition”):

If applicable, upon completion of the term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. § 1101. As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

JA262.¹

Mr. Eleidy timely filed a notice of appeal. JA14, JA266-267.

¹ The district court’s original judgment and amended judgment from the 2021 sentencing had included as a condition of supervised release that Mr. Eleidy be surrendered to immigration authorities for deportation upon completion of his term of imprisonment, but the court had not announced that supervised release condition during the 2021 sentencing hearing. JA66-184, JA205, JA217.

Second appeal

In his second appeal, Mr. Eleidy raised four issues in his opening brief. First, Mr. Eleidy argued that the district court committed procedural error when it erroneously determined the Guidelines sentencing range. Appellant's Br. 21-28, Dkt. No. 16, *United States v. Eleidy*, No. 23-4478. Second, Mr. Eleidy argued that the district court erred when it entered a restitution award that was not limited to the actual loss of the victims, as required by 18 U.S.C. §§ 3663, 3663A. *Id.* at 28-30. Third, Mr. Eleidy argued that the district court erroneously imposed the deportation condition on Mr. Eleidy, a United States citizen, when 18 U.S.C. § 3583 limits such a condition to an “alien defendant,” and the court improperly delegated authority to implement that condition. *Id.* at 30-36. Finally, Mr. Eleidy argued that the district court imposed a substantively unreasonable sentence. *Id.* at 36-43.

The Government moved to dismiss Mr. Eleidy’s appeal “on the ground that he expressly agreed, in his plea agreement, to waive his right to appeal.” Motion to Dismiss Appeal 1, Dkt. No. 19. The Government argued that Mr. Eleidy “presents no claim that falls outside the scope of the waiver.” *Id.* at 2. Mr. Eleidy filed a Response in Opposition to Motion to Dismiss. Dkt. No. 22. Mr. Eleidy argued that under applicable Fourth Circuit precedent, an appeal waiver does not preclude a defendant from challenging “a sentence imposed in excess of the maximum penalty provided by statute.” *Id.* at 8 (citing *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992)). Mr. Eleidy specifically argued that the deportation condition

falls outside the district court’s statutory sentencing authority and, therefore, is not barred by the appeal waiver. *Id.* at 13-18.

The Fourth Circuit granted the Government’s Motion to Dismiss. Order, Dkt. No. 29. The Fourth Circuit held that Mr. Eleidy “knowingly and voluntarily waived his right to appeal and that the issues [Mr.] Eleidy seeks to raise on appeal fall squarely within the scope of his waiver of appellate rights.” *Id.* at 1.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed below in connection with the motion to dismiss Mr. Eleidy’s appeal. Mr. Eleidy’s claim is appropriate for this Court’s consideration.

REASONS FOR GRANTING THE WRIT

Mr. Eleidy respectfully contends that by dismissing his appeal, the Fourth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. *See* S. Ct. R. 10(c). This petition presents the Court with the opportunity to decide whether an appeal waiver provision in a plea agreement precludes an appeal challenging an illegal sentence.

DISCUSSION

I. MR. ELEIDY’S APPEAL WAIVER DOES NOT BAR REVIEW OF A SENTENCE IN EXCESS OF A STATUTORY LIMITATION.

A. An Appeal Waiver Is Not An Absolute Bar To All Kinds Of Claims.

This Court confirmed in *Garza v. Idaho* that “no appeal waiver serves as an absolute bar to all appellate claims.” 586 U.S. 232, 238 (2019). The *Garza* Court

recognized that two separate principles support courts' conclusions that an appeal waiver did not foreclose an appeal. First, because "plea bargains are essentially contracts," *Puckett v. United States*, 556 U.S. 129, 137 (2009), courts generally agree that an appeal waiver only precludes appellate claims that fall within the scope of the waiver. *Garza*, 586 U.S. at 238. Second, "all jurisdictions appear to treat at least some claims as unwaivable." *Id.* at 239. The *Garza* Court found that "[m]ost fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable." *Id.* The Court accepted that lower courts "have also applied exceptions for other kinds of claims," but made "no statement [] on what particular exceptions may be required." *Id.* n.6.

Mr. Eleidy respectfully contends that an appeal waiver does not preclude an appeal where, as here, the district court sentences the defendant beyond a statutory limit. The Fourth Circuit will not enforce an appeal waiver "where the sentencing court violated a fundamental constitutional or statutory right that was firmly established at the time of sentencing," *United States v. Archie*, 771 F.3d 217, 223 (4th Cir. 2014). Recognizing the rule that an appeal waiver does not preclude an appeal where the district court sentences a defendant beyond a statutory limit is consistent with exceptions to waiver rules that this Court has accepted and applied to protect other valuable rights. Here, the district court sentenced Mr. Eleidy, a United States citizen, to a supervised release condition expressly and exclusively applicable only to an "alien defendant." 18 U.S.C. § 3583(d). Mr. Eleidy

respectfully urges the Court to hold that an appeal waiver cannot preclude the appeal of such an illegal sentence,

B. This Court Recognizes Exceptions To Waiver Rules To Protect Valuable Rights.

This Court recognizes that waiver rules are subject to exceptions necessary to protect valuable rights. “The relevant principle is well established: a promise [to waive a constitutional right] is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *see United States v. Olano*, 507 U.S. 725, 733 (1993) (“Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake.”).

Thus, this Court holds that “a guilty plea does implicitly waive some claims, including some constitutional claims,” but a guilty plea “does not bar a claim on appeal ‘where on the face of the record the court had no power to enter the conviction or impose the sentence.’” *Class v. United States*, 583 U.S. 174, 181, 182 (2018) (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989)).

C. An Appeal Waiver Does Not Bar Review Of A Sentence Imposed In Excess Of A Statutory Limit.

The Fourth Circuit and other circuits hold that an appeal waiver does not bar review of a sentence imposed in excess of a statutory limit.

In *United States v. Marin*, the Fourth Circuit held that “a defendant who waives his right to an appeal does not subject himself to being sentenced entirely at the whim of the district court.” 961 F.2d at 496. Specifically, an appeal waiver does not preclude a defendant from challenging “a sentence imposed in excess of the maximum penalty provided by statute.” *Id.* The Fourth Circuit uses “the term ‘illegal’ to describe sentences the appeal of which survive an appellate waiver, but [the court has] done so only where the sentence is alleged to have been beyond the authority of the district court to impose.” *United States v. Thornsberry*, 670 F.3d 532, 539 (4th Cir. 2012). In cases following *Marin*, the Fourth Circuit has consistently ruled that an appeal waiver provision does not preclude review of a claim that the district court imposed an illegal sentence. *See, e.g., United States v. Singletary*, 75 F.4th 416, 422 (4th Cir. 2023); *United States v. Archie*, 771 F.3d at 223; *United States v. Blick*, 408 F.3d 162, 168 (4th Cir. 2005) *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995); *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994). The Fourth Circuit recognizes that an appeal waiver provision will not preclude an appeal of a supervised release condition not authorized by statute. *See United States v. McLeod*, 972 F.3d 637, 640-41 (4th Cir. 2020); *United States v. Sims*, 410 F. App’x 666, 669-70 (4th Cir. 2011).

Ninth Circuit precedent is in accord, holding that “an appellate waiver does not apply to an illegal sentence.” *United States v. Goodall*, 21 F.4th 555, 562 (9th Cir. 2021) (quotation omitted). “An illegal sentence is one ‘not authorized by the judgment of conviction, . . . in excess of the permissible statutory penalty for the

crime, or [that] is in violation of the Constitution.”” *Id.* at 563 (quoting *United States v. Johnson*, 988 F.2d 941, 943 (9th Cir. 1993)) (alterations in *Goodall*). Likewise in the Eighth Circuit, “defendants cannot waive their right to appeal an illegal sentence.” *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000). “A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.” *United States v. Greatwalker*, 285 F.3d 727, 729 (8th Cir. 2002).

D. The District Court Imposed An Illegal Sentence When It Imposed A Supervised Release Condition Applicable Only To An “Alien Defendant.”

“Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment as part of the same sentence.” *Mont v. United States*, 587 U.S. 514, 524 (2019) (citing 18 U.S.C. § 3583). Under 18 U.S.C. § 3583(d), a district court has authority to impose as a condition of supervised release for “an alien defendant” that “is subject to deportation” a requirement that the defendant be turned over to immigration authorities to “be deported and remain outside the United States.” See 18 U.S.C. § 3583(d); *United States v. Xiang*, 77 F.3d 771, 772-73 (4th Cir. 1996). The plain language of § 3583(d) limits deportation as a condition of supervised release to an “alien defendant,” and “criminal statutes should not by interpretation be expanded beyond their plain language.” *United States v. Braverman*, 373 U.S. 405, 408 (1963). A district court’s authority to impose a deportation condition is thus expressly limited to “an alien defendant.” See 18 U.S.C. § 3583(d).

Mr. Eleidy is a United States citizen. JA282. The district court, however, ordered that “[i]f applicable, upon completion of the term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. § 1101.” JA262. Mr. Eleidy has not found any case where a Court of Appeals approved a district court’s sentence that included a supervised release condition requiring deportation of a United States citizen. Where the district court lacked the power to impose this condition as part of Mr. Eleidy’s sentence, the appeal waiver provision in Mr. Eleidy’s plea agreement does not preclude his appeal challenging the deportation condition as an illegal sentence. *See, e.g., United States v. Goodall*, 21 F.4th at 562; *United States v. McLeod*, 972 F.3d at 640-41; *United States v. Archie*, 771 F.3d at 223; *United States v. Sims*, 410 F. App’x at 669-70; *DeRoo v. United States*, 223 F.3d at 923.

E. Issuing A Writ Of Certiorari To Review The Fourth Circuit’s Dismissal Of Mr. Eleidy’s Appeal Will Confirm The Right To Appeal An Illegal Sentence.

“[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.” *Fay v. Noia*, 372 U.S. 391, 424 (1963), *overruled in other part*, *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977). The Fourth Circuit’s dismissal of Mr. Eleidy’s appeal of an illegal sentence “impairs to an appreciable extent” the policies behind the statutory right to appeal. *See Town of Newton v. Rumery*, 480

U.S. at 392 n.2. Mr. Eleidy respectfully contends that an appeal waiver provision “does not bar a claim on appeal where on the face of the record the court had no power to . . . impose the sentence.” *Class v. United States*, 583 U.S. at 182.

CONCLUSION

For the foregoing reasons, Petitioner Jamal Mohammad Eleidy respectfully requests that the Court grant this petition and issue a writ of certiorari to review the opinion of the Fourth Circuit in this case.

This the 12th day of August, 2024.

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