No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EUGENE RUSH, JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Plea agreements are governed by traditional contract principles—but unlike ordinary contracts, they involve the waiver of fundamental constitutional rights and demand heightened scrutiny. One such principle is the requirement of consideration. While all circuits agree that plea agreements must be supported by consideration, they are divided on what that means in practice: Must the government's promises actually confer a benefit the defendant could not otherwise receive, or is it enough that the government makes nominal promises, even if those promises have no practical value? The Second Circuit has held that an appeal waiver is unenforceable when the plea agreement offers the defendant no actual benefit. The Sixth, Tenth, and Eleventh Circuits take a different approach, enforcing appeal waivers even when the government's promises do not provide anything the defendant could not have received by pleading guilty without an agreement. This entrenched split has significant implications for due process and the integrity of the plea-bargaining system, which resolves the vast majority of federal criminal cases.

The question presented is:

Whether an appeal-waiver provision in a plea agreement is enforceable when the agreement provides no actual benefit to the defendant beyond what he would have received by pleading guilty without it.

RELATED PROCEEDINGS

United States District Court (E.D. Tenn.)

United States v. Rush, Case No. 3:21-cr-125.

United States Court of Appeals (6th Cir.)

United States v. Rush, No. 23-5533.

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PETITION FOR A WRIT OF CERTIORARI

David Eugene Rush, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

ORDER AND OPINION BELOW

The district court's judgment is provided in Appendix A, and the Sixth Circuit's order dismissing Mr. Rush's appeal appears in Appendix B.

JURISDICTION

The Sixth Circuit entered its judgment on December 9, 2024. Justice Kavanaugh granted Mr. Weaver's application to extend the time to file this certiorari petition until May 8, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment's Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. Mr. Rush was charged with possessing a firearm as a convicted felon after police found nineteen firearms in his home. (Indictment, R. 3 at 1–2.) He signed a plea agreement admitting guilt and agreeing to waive most of his appellate rights. (Plea Agreement, R. 23 at 8.) In exchange, the government agreed to recommend that Mr. Rush be held responsible for only 3 to 7 firearms—rather than the full 19—which would result in a two-level, not four-level, enhancement under the Sentencing Guidelines. (*Id.* at 3.) The plea agreement made clear, however, that the court was not bound by the government's recommendation, and Mr. Rush could not withdraw his plea if the court rejected it. (*Id.* at 3–4; *see also* Fed. R. Crim. P. 11(c)(1)(B), (c)(3)(B).)

2. In the presentence report, the Probation Office recommended applying the four-level enhancement based on all nineteen firearms, which yielded a guideline range of 70 to 87 months. (PSR, R. 29 at 7.) The government initially adopted that position and sought a sentence of 87 months. (Gov't Notice of No Objection, R. 30 at 1; Gov't Sent'g Mem., R. 33 at 1.) It later filed an amended sentencing memorandum recommending the two-level enhancement, consistent with the plea

agreement, and a sentence of 71 months. (Gov't Am. Sent'g Mem., R. 49 at 1–2.)

At sentencing, the district court rejected the government's revised recommendation and adopted the guideline calculation proposed by Probation. (Sent'g Hr'g Tr., R. 61, at 22–27.) It imposed a sentence of 70 months' imprisonment, followed by three years of supervised release. App. 2a–3a.

3. Mr. Rush filed a notice of appeal following sentencing. In his initial brief, he challenged the district court's refusal to credit him for time served on his related state sentence and objected to a special condition of supervised release. Initial Br. at 12–30. The government responded by moving to dismiss the appeal based on the appellate waiver in the plea agreement. Gov't Mot. to Dismiss at 3–4. Mr. Rush opposed the motion, arguing that the waiver was unenforceable for lack of consideration because the plea agreement conferred no actual benefit. Resp. to Mot. to Dismiss at 4–11.

4. The court of appeals granted the government's motion to dismiss. App. 8a. It rejected Mr. Rush's argument that the plea agreement lacked adequate consideration. App. 9a. The court

concluded that the agreement was supported by consideration because the government agreed not to oppose a two-level reduction under U.S.S.G. § 3E1.1(a) and to move for an additional one-level reduction under § 3E1.1(b). *Id.* The court explained:

> Rush first argues that his appeal waiver is unenforceable because the plea agreement was not supported by adequate consideration. He received adequate consideration, however, given that the government agreed not to oppose a two-level reduction for acceptance of responsibility under USSG § 3E1.1(a) and to move for an additional one-level reduction under § 3E1.1(b). *See United States v. Schuhe*, 688 F. App'x 337, 339 (6th Cir. 2017) (per curiam) (concluding that a plea agreement in which the government recommended the one-level reduction under § 3E1.1(b) was supported by adequate consideration); *United States v. Winnick*, 490 F. App'x 718, 721 (6th Cir. 2012) (concluding that the government's agreement to recommend the full three-level reduction for acceptance of responsibility was sufficient consideration).

Id.

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question at the intersection of contract law and due process: Can courts enforce an appeal-waiver provision in a plea agreement that provides the defendant with no actual benefit? The lower courts are divided on this issue, which arises frequently in federal prosecutions where defendants waive appellate

rights in exchange for terms that offer nothing beyond what they could have received by pleading guilty without an agreement. The question is recurring, important, and outcome-determinative here. This Court should grant certiorari to resolve the split and clarify whether a waiver of constitutional rights can stand when supported by a promise that yields no actual benefit to the defendant.

I. Courts treat plea agreements like contracts—but due process sets the outer bounds.

Plea agreements are not ordinary contracts—but courts treat them *like* contracts. They apply traditional contract principles to interpret and enforce them. *See United States v. Robinson*, 924 F.2d 612, 613–14 (6th Cir. 1991); *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980); *see also Puckett v. United States*, 556 U.S. 129, 137 (2009) ("Plea bargains are essentially contracts.").

One of those principles is consideration: the defendant must receive something of value in return for waiving constitutional rights. *See United States v. Brunetti*, 376 F.3d 93, 95 (2d Cir. 2004). And when a plea agreement lacks that consideration, its appeal-waiver provision is unenforceable on direct appeal. *See United States v. Smith*, 134 F.4th 248, 260 (4th Cir. 2025); *United States v. Bushert*, 997 F.2d 1343, 1353

(11th Cir. 1993).

But plea agreements don't live in a vacuum. They exist at the intersection of contract law and constitutional protections. So courts don't just ask whether there was consideration. They also ask whether the process was fair—especially given the government's overwhelming leverage. *See United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011); *United States v. Lajeunesse*, 85 F.4th 679, 692 (2d Cir. 2023). When contract rules would lead to fundamental unfairness, courts put due process first

II. The circuits are split on whether a plea agreement can provide sufficient consideration to enforce an appeal waiver when it offers the defendant no actual benefit.

Although courts agree that plea agreements are governed by traditional contract principles, they are split on whether an agreement that offers the defendant no actual benefit—like the one here—can be supported by adequate consideration. Some circuits say no. *United States v. Lutchman*, 910 F.3d 33, 37–38 (2d Cir. 2018). Others have upheld appeal waivers based on promises that provide no actual benefit to the defendant. *United States v. Hernandez*, 134 F.3d 1435, 1437–38 (10th Cir. 1998); *United States v. Paquette*, No. 21-11365, at 5–6 (11th

Cir. May 6, 2022) (order dismissing appeal in part); App. 9a. This case squarely presents that conflict and offers the Court an ideal opportunity to resolve it.

A. In the Second Circuit, an appeal waiver is unenforceable if the defendant receives no actual benefit from the plea agreement.

The Second Circuit first tackled this issue in *United States v. Lutchman*. There, the defendant pled guilty to conspiring to support a terrorist organization and received the maximum sentence: 240 months. 910 F.3d at 35. On appeal, he challenged the sentence as both procedurally and substantively unreasonable. *Id.* The government sought to dismiss his appeal because his written plea agreement had an appeal waiver. But the defendant pushed back—arguing that the waiver was unenforceable because the plea agreement gave him nothing in return. *Id.* at 37.

The Second Circuit agreed: the appeal waiver was unenforceable because it wasn't supported by consideration. *Id.* The defendant got nothing he wouldn't have gotten by pleading guilty without a written agreement. *Id.* Even the government's promise not to oppose a reduction for acceptance of responsibility didn't count—the court noted

that he qualified for that reduction regardless. *Id.*[1] And because he pled guilty to the only charge in the indictment, with no other charges identified or threatened, the government gave up nothing. *Id.* at 38. With no actual benefit on the table, the court refused to enforce the waiver. *Id.*

B. The Tenth, Eleventh, and Sixth Circuits enforce appeal waivers even when the plea deal provides no actual benefit.

The Tenth, Eleventh, and Sixth Circuits have taken the opposite approach, holding that plea agreements are supported by sufficient consideration—and that appeal waivers are enforceable—even when the defendant receives no actual benefit beyond what he likely would have received by pleading guilty.

The Tenth Circuit addressed the issue in *Hernandez*. There, the defendant pled guilty to bank robbery and later challenged his guidelines

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[1] While not central to its holding, the Second Circuit also noted that the acceptance-of-responsibility reduction made no practical difference in *Lutchman*. The defendant's guideline minimum already matched the statutory maximum, and the government had only promised to recommend a sentence within the range. 910 F.3d at 37–38. But the key was this: a defendant can receive that reduction without signing a written plea agreement. That promise, standing alone, didn't supply adequate consideration.

calculation on appeal. 134 F.3d at 1436. The government invoked the waiver provision, and the defendant argued the plea agreement lacked consideration. *Id.* at 1436–37. The court disagreed, pointing to the government's promise to recommend a reduction for acceptance of responsibility and not to pursue other related offenses. *Id.* at 1437–38. That, the court held, was enough to enforce the waiver.

The Eleventh Circuit has taken the same approach. In *Paquette*, the defendant pled guilty to failing to register as a sex offense. No. 21-11365, at 2. On appeal, he argued—among other things—that the district court mistakenly believed it had to imposed at least five years of supervised release. *Id.* The government moved to partially dismiss the appeal based on an appeal waiver in the plea agreement. *Id.* at 5–6. The defendant pushed back, arguing that the waiver was unenforceable because the plea agreement lacked adequate consideration. *Id.* The Eleventh Circuit disagreed. Citing Florida law, it held that consideration exists when a party does something they're not legally required to do, even if the benefit is only marginal. *Id.* The government's promise to recommend a reduction for acceptance of responsibility, the court concluded, was enough. *Id.*; *see also United*

States v. Coney, No. 21-13736, 2022 WL 4489155, at *1–2 (11th Cir. Sept. 28, 2022).[2]

Finally, in this case, the Sixth Circuit followed the same path. Mr. Rush pled guilty to possessing a firearm as a felon and later challenged his guidelines range and a condition of supervised release. App. 8a. The government moved to dismiss based on the appeal waiver, and Mr. Rush countered that it was unenforceable because the plea agreement gave him not actual benefit and thus lacked adequate consideration. App. 9a. The Sixth Circuit disagreed. It held that the government's promise to recommend reductions for acceptance of responsibility was enough to count as consideration, even though Mr. Rush would have received those reductions anyway. *Id.*

In short, unlike the Second Circuit, the Sixth, Tenth, and Eleventh Circuits have enforced appeal waivers so long as the government agrees to recommend acceptance-of-responsibility reductions—regardless of whether the promise provides any actual benefit.

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[2] Although not the focus of this petition, the Eleventh Circuit's reliance on state law is hard to defend. As the Sixth Circuit rightly observed, plea agreements can't turn on state-specific rules—otherwise, identical agreements would mean different things in different places. *See United States v. Herrera*, 928 F.2d 769, 773 (6th Cir. 1991)

III. The Sixth Circuit got it wrong.

The Sixth Circuit reasoning doesn't hold up. It held that the government's promise to recommend a reduction for acceptance of responsibility counted as adequate consideration. App. 9a. But that promise had no real value. A defendant who pleads guilty is already eligible for the same reduction—whether he signs a plea agreement or not. *See Lutchman*, 910 F.3d at 37–38. The government didn't give up anything, and Mr. Rush didn't gain anything. That's not a bargain—it's boilerplate.

Even if that kind of promise could count as consideration in a hypertechnical sense, the Due Process Clause demands more. Courts don't enforce plea agreements based on contract principles alone. They must also ask whether the deal was fair—especially given the stakes and the government's overwhelming leverage. *See Riggi*, 649 F.3d at 147. When the defendant waives fundamental constitutional rights, due process requires that he get something real in return.

That didn't happen here. The government made no meaningful concession. It didn't drop charges. It didn't cap exposure. And the one promise it did make—that it would recommend a two-level

reduction—was nonbinding and explicitly conditional. The court could accept it or reject it, and Mr. Rush couldn't back out either way. That's not a fair exchange. It's a promise in form only, not in substance.

If courts treat these kinds of empty promises as sufficient consideration, plea agreements risk becoming hollow documents—tools for securing waivers without delivering anything in return. That undermines not only the fairness of individual cases, but the legitimacy of the plea-bargaining system as a whole. The Sixth Circuit's conclusion to the contrary should not stand

IV. The question presented is extremely important.

Roughly 90% of federal defendants plead guilty.[3] In most of those cases, plea agreements govern the outcome—and many of those agreements contain appeal waivers. Once signed, those waivers often shut the courthouse doors to any claim within their scope, even claims of blatant error.

[3] *See* John Gramlich, Fewer than 1% of federal criminal defendants were acquitted in 2022, Pew Rsch. Ctr. (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/.

The question presented here—whether an appeal waiver is enforceable when the plea agreement gives the defendant no actual benefit—has enormous practical consequences. It affects not only the scope of constitutional protections during plea bargaining, but also whether thousands of individuals each year will have any access to appellate review. With the circuits divided and the stakes high, this Court's guidance is urgently needed.

Left unresolved, the current split encouraged one-sided plea agreements and asks defendants to give up everything while receiving nothing in return. That undermines the fairness of the process and tilts an already lopsided system even further. It also shields government mistakes from being reviewed, making it more likely that sentencing errors slip through the cracks—especially in the kinds of lower-profile cases where appellate oversight matters most.

And because broad waivers block courts from reaching recurring legal issues, they stifle the development of important areas of law. Doctrines remain underdeveloped. Circuit splits linger unresolved. This case offers a clean vehicle for the Court to restore balance and clarify the limits of appeal waivers.

V. This case is an excellent vehicle to resolve the conflict.

This case offers an ideal opportunity to resolve the entrenched split over whether an appeal waiver is enforceable when the plea agreement provides no actual benefit. The issue was fully litigated in the court of appeals, and the Sixth Circuit clearly decided it. There are no disputed facts or procedural wrinkles to get in the way. The question presented is legal, clean, and squarely implicated by the record.

Unlike cases that turn on unusual facts or contested findings, this one is straightforward. The question was preserved, thoroughly briefed, and decided head-on. And if this Court adopts the Second Circuit's approach, Mr. Rush may be entitled to relief.

With plea agreements resolving the vast majority of federal criminal cases, the answer to this question matters. The lower courts remain divided on whether an appeal waiver is enforceable when the underlying plea agreement offers no actual benefit. Review is urgently needed—not just to resolve the split, but to bring clarity and consistency to a process that governs nearly every federal criminal case. Without this Court's guidance, defendants will keep signing away appellate rights in agreements that give them nothing in return—undermining both

fairness and confidence in the criminal justice system.

CONCLUSION

For the above reasons, Mr. Rush respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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