NO. _____

In the Supreme Court of the United States

JONATHON OWEN SHROYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prison sentence imposed as a result of the consideration of protected speech as "relevant offense conduct" violates the First Amendment and is substantively unreasonable?

2. Whether an appeal waiver is enforceable when a defendant's First Amendment rights are violated at sentencing?

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant-Appellant below

- Jonathon Owen Shroyer

Respondent and Plaintiff-Appellee

- United States of America

RULE 29.6 STATEMENT

Petitioner is not a nongovernment corporation. Consequently, Petitioner does not have a parent corporation or shares held by a publicly traded company.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the D.C. Circuit

No. 23-3152

United States of America, *Appellee,* v.
Jonathon Owen Shroyer, also known as Jonathan Owen Shroyer, *Appellant*

Date of Per Curiam Order: February 1, 2024

U.S. District Court for the District of Columbia

No. 21-CR-542 (TJK)

United States of America, v.
Jonathon Owen Shroyer

Date of Judgment: September 13, 2023

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PETITION FOR WRIT OF CERTIORARI

Jonathon Owen Shroyer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Order of Dismissal of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals" or "D.C. Circuit"), dated February 1, 2024, is included in the Appendix that is filed with this Petition (hereinafter "App.") at 1a-2a. The Judgment of the U.S. District Court, District of Columbia (the "District Court') is included at App.17a-25a. The Order Denying Stay Pending Appeal of the District Court is included at App.3a-16a. These opinions and orders were not designated for publications.

JURISDICTION

The Court of Appeals entered its Order on February 1, 2024. App.1a-12a. It issued the Mandate on March 26, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

18 U.S.C. § 3553(a)

> (a) Factors to be considered in imposing a sentence - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (i) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (ii) the need for the sentence imposed— . . .
>
> (iii) the kinds of sentences available;
>
> (iv) the kinds of sentence and the sentencing range established for—
>
> (1) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> a) issued by the Sentencing Commission pursuant to section 994(a)(1)

of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

b) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(2) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(v) any pertinent policy statement—

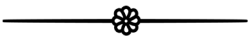
(1) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to

be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(2) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

(vi) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(vii) the need to provide restitution to any victims of the offense.



STATEMENT OF THE CASE

This case presents the most explicit example of the criminalization of protected speech that we have seen in recent history. The decisions of the lower courts present a direct threat to the First Amendment, insofar that they allow defendants to be incarcerated as a direct result of their protected speech, yielding a chilling effect on speech and a method of quashing political dissent.

Petitioner Jonathon Owen Shroyer ("Petitioner" or "Mr. Shroyer") is a journalist, reporter and show host who was charged for his presence at the United States Capitol on January 6, 2021, and ultimately incarcerated for his protected speech regarding the event and the 2020 presidential election.

On January 6, 2021, Petitioner was present in the U.S. Capitol among thousands of people who were

there to exercise their First Amendment rights of speech, peaceable assembly, and petition their government for a redress of grievances. Petitioner attended the January 6th event as a journalist who had been covering and discussing the 2020 presidential election for months prior, and who held the legitimate belief that the 2020 presidential election was fraudulent.

Unlike almost any other of the one thousand or so people arrested for their participation in the riot on January 6, 2021, Mr. Shroyer was, at the time of his arrest, and he remains, a journalist. He hosts a daily afternoon talk show broadcast nationwide to millions via INFOWARS, a media platform founded by Alex Jones and based in Austin, Texas. Mr. Shroyer, together with Mr. Jones and an entourage of supporters attended the "Stop the Steal" rally at the Capitol on January 6, 2021. Mr. Shroyer also attended earlier rallies in the lead-up to January 6, 2021, including events at several state capitals and two larger events in Washington D.C. events in November and December of 2020. All of these prior events were overwhelmingly peaceful and patriotic.

I. Proceedings In the District Court Below

In September 2021, Petitioner was arrested by way of a criminal complaint. App.26a-27a. He pleaded not guilty and waived a grand jury indictment on October 15, 2021. Petitioner demonstrated overwhelming cooperation as the case unfolded, as the District Court has conceded. App.111a-112a; On June 23, 2023, he pleaded guilty to Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. Section 1752(a)(1). As part of the plea agreement, Petitioner waived his right to appeal "insofar as such waiver is permitted by law". App.39a-40a.

Prior to sentencing, the parties filed their respective sentencing memoranda. The recommendation of the pretrial service officer was merely a period of probation, which is customary for misdemeanors of this nature. App.125a. Petitioner asked that the Court impose no time. Respondent asked for a sentence of 120 days, seemingly as part of its much broader effort to send a message of general deterrence to the nation at large and to punish Petitioner for his rhetoric on the 2020 presidential election. App.50a.

In its sentencing memorandum, Respondent cited two principal reasons for a sentence of incarceration on this misdemeanor trespass. App.49a-88a. First, it claimed Mr. Shroyer had not completed a period of community service required under the terms of a diversionary program on a prior offense, a charge that Petitioner conclusively demonstrated to the District Court was simply factually untrue. App.54a.

The only additional justification for incarceration provided by Respondent was Petitioner's protected speech. App.49a-88a. Respondent portrayed as relevant offense conduct Petitioner's statements on air as a journalist, accusing him of spreading "disinformation" about the 2020 election in the weeks preceding January 6, 2021. It also accused him of engaging in incendiary speech on the day of the event, citing Petitioner's statements such as "1776" and "death to tyrants", which is quite literally an English translation of the motto located on the Virginia Seal, "*Sic semper tyrannis*," as justification for incarceration.[1] Finally, Respondents accused Petitioner of being unrepentant

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[1] Shorter version from original *sic semper evello mortem tyrannis* ("thus always death will come to tyrants").

in his speech about January 6, 2021, after the event, purely because Petitioner refused to change his opinion about the legitimacy of the 2020 presidential election. App.74a.

Respondent cited speech that was uttered over a span of months, from weeks prior to the 2020 presidential election, to nearly a year after the events of January 6, 2021, which gave rise to Petitioner's charges. App.49a-88a. Respondent made clear in its sentencing memorandum that it sought to punish Petitioner for more than mere trespass, the only charge to which Petitioner pleaded guilty and for which he was being sentenced. *Id.*

Petitioner objected in his opposition to Respondent's memorandum that none of this speech was prohibited, and that it was improper for the Court to consider protected political speech in the context of a political protest event as "relevant offense conduct."

On September 12, 2023, the District Court held a sentencing hearing. It was clear from the District Court's discussion at the hearing that it substantially considered Petitioner's protected speech when imposing Petitioner's sentence. The District Court cited in its sentencing remarks Petitioner's speech acts on Capitol grounds and his lack of remorse thereafter as expressed in his commentary on January 6, 2021, as a journalist as justifications for the imposition of a custodial sentence.

The Court began its sentencing remarks by noting the need to consider Petitioner's involvement in "the event": an event the Court characterized as "threaten-[ing] the peaceful transfer of power from one president to another . . . the nature and circumstances of the

offense were quite serious." App.121a-122a. In explaining its reasoning, the District Court stated three reasons for the sentence. One reason was that the sentence was driven in part by the fact that "Mr. Shroyer was not merely a trespasser that day, although that was the nature of what he pled guilty to, but that he did play a role in amping up the crowd on the capitol steps by leading chants that day, and I think that's something I can and should consider . . . " App.126a. The Court here admits that Petitioner's speech on January 6, 2021, including chants such as "1776" and "death to tyrants," the motto on the Virginia state seal, contributed to Petitioner's prison sentence. App.126a.

Furthermore, the Court stated that the sentence was imposed in part because Petitioner refused to "disavow[] in general . . . what happened on January 6th", considering "the statements the government has brought to [the Court's] attention". App.126a-127a. The Court clearly considered Petitioner's protected speech, not just on January 6, 2021, but in the months following, as a highly relevant factor in Petitioner's incarceration.

The District Court refused to acknowledge Petitioner's unique role as a journalist, despite the fact that Petitioner has been covering political events for nearly a decade. As part of his long career, it is customary for Mr. Shroyer to provide coverage of rallies, protests, and riots of all types, not only via commentary on his show, but with on-the-ground live reporting. He has covered events, including the Ferguson Riots in 2014, Black Lives Matter protests in 2020, the Women's March in Washington DC, the March for Life in Washington D.C., and many, many more. So it would come to no surprise to any of his audience that Petitioner was present on January 6, 2021, at the U.S. Capitol,

when one of the largest and most significant gatherings and exercises of the First Amendment took place—to protest and cover the protest as a journalist and political commentator.

Despite Petitioner's First Amendment objections to the justification for the sentence raised by counsel at the time of the hearing, the Court ultimately imposed a sentence of sixty (60) days, along with twelve (12) months of supervised release and a monetary penalty of $500—not the period of probation recommended by the pretrial services office. App.17a-25a.

After sentencing, Petitioner asked for release pending appeal pursuant to 18 U.S.C. Section 3143(b) on September 19, 2023, laying out his detailed argument of the First Amendment violations of his imposed sentence. Respondent opposed, and the Court denied the motion. App.3a-16a.

On October 24, 2023, Petitioner Jonathon Owen Shroyer reported to federal prison for his 60-day sentence. He served forty-six (46) days, more than half of which Petitioner was forced to spend in solitary confinement or the Special Housing Unit.

II. Proceedings in the Court of Appeals Below

On September 19, 2023, Petitioner filed a timely notice of appeal, seeking review by the D.C. Circuit Court of Appeals (the "D.C. Circuit") of the District Court's sentence. In his opening brief, Petitioner requested that the D.C. Circuit declare the sentence imposed to be unlawful and remand the case for resentencing with direction to the trial court to disregard his protected speech as relevant offense conduct.

On February 1, 2024, the D.C. Circuit entered its unpublished opinion dismissing Petitioner's appeal (the "D.C. Circuit Opinion"). App.1a-2a. The basis for the D.C. Circuit's dismissal was that Appellant "waived his right to appeal his sentence and 'the manner in which [his] sentence was determined, except to the extent the Court sentence[d] [him] above the statutory maximum or guidelines range determined by the Court,' [] and the district court imposed a within-Guidelines sentence." App.1a-2a. On March 26, 2024, the D.C. Circuit issued a mandate in the matter (the "Mandate").

REASONS FOR GRANTING THE PETITION

Review on writ of certiorari may be granted for compelling reasons, which include that a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, . . . ". Rule 10(c)[2] This case asks a critical question: can protected speech be considered relevant conduct and used as substantial reasoning to impose a heightened, or any, prison sentence? The lower courts answered a resounding "yes". Is that the law? Is the United States truly a country that will allow citizens, and particularly journalists, to be incarcerated for their speech?

Furthermore, the Court of Appeals has declined to review this case on the grounds that Petitioner is precluded from bringing this challenge because of the

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[2] "Rule" refers herein to the Rules of the Supreme Court of the United States.

appeal waiver in his plea agreement. According to the Court of Appeals, a defendant who is incarcerated for his speech has no ability for redress, no power to appeal, and no recourse for an infringement of his First Amendment rights. However, this decision directly conflicts with exceptions recognized in a number of Circuits which provide that appeal waivers are unenforceable when Constitutional rights have been violated.

The decisions by the lower courts in this case create an Orwellian legal landscape where speech can be criminalized, "speech criminals" can be incarcerated, and victims of political persecution have no path for restitution.

I. THE CONSTITUTIONALITY OF CONSIDERING PROTECTED SPEECH AS A RELEVANT FACTOR AT SENTENCING IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT ONLY THIS COURT CAN RESOLVE.

The First Amendment requires that Congress shall make no law "abridging the freedom of speech." U.S. Const. Amend. § I.[3] As such, Congress cannot make

[3] The violation of Petitioner's fundamental rights under the First Amendment also implicates an overlapping question of substantive due process. *See* U.S. Const. amend. V and amend. XIV. Substantive due process serves as the source of an array of constitutional rights, safeguarding individual rights listed in the Bill of Rights, including freedom of speech and a variety of criminal procedure protections. *See also Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

speech a crime. And yet, this is precisely what Respondent has done here, and what the Court of Appeals has erroneously declined to remedy.

In this case, a journalist's political commentary and personal opinions were used as justification for incarceration. The First Amendment safeguards are critical for protecting the civil liberties of Americans, and particularly journalists.

The Supreme Court has carved out very rare and specific exceptions where speech is outside the protection of the First Amendment. These categories of speech "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942). Petitioner's speech does not rise to the level of any of these very narrow exceptions. As a result, all of Petitioner's speech qualifies as protected under the First Amendment and cannot be criminalized. Despite this, the District Court regarded Petitioner's protected speech as a substantial relevant factor when imposing its sentence. App.121a-127a. Indeed, the District Court considered speech that was wholly unrelated to a trespass misdemeanor, the crime for which Petitioner pleaded guilty. *Id*.

While speech conduct that is related to the crime at hand may be considered in sentencing evaluations under certain circumstances, Courts have yet to discuss what limits must be placed on the use of such speech in the case of a political protest—including a journalist's presence and coverage of it—when protected speech is used to vilify and incarcerate.

The issue of protected speech as "relevant offense conduct" appears to be one of first impression. The Supreme Court's clarification of the role of speech in sentencing will be a decision of great national significance and precedential value. This case raises a novel legal issue: can protected, free speech be used as almost exclusive justification for imprisonment, particularly when that speech has virtually nothing to do with the crime for which the defendant is being sentenced? The Constitution demands that the answer is no.

A. The District Court's Application of The Sentencing Guidelines Conflicts with This Court's Strong Protections Afforded to the First Amendment.

Neither the relevant statutes nor the sentencing guidelines imposed by the Sentencing Commission explicitly address the scope that protected speech may be used at sentencing.

18 U.S.C. § 3553(a) lays out the factors that may be considered by a court in imposing a criminal sentence. In addition, the judge may consider a variety of aggravating or mitigating factors when imposing a sentence. Aggravating factors typically considered by the judge include heinousness of the crime, whether it was a violent offense, the seriousness of the offense, lack of remorse, prior convictions, and whether the defendant has committed similar crimes. The lower courts have stretched the scope of "relevant conduct" to such an extent that speech even months after the events for which a defendant is charged can be used as justification for an increased sentence.

However, this Court has made clear the broad protections afforded to speech in all contexts. A defendant can challenge a sentence imposed on grounds that the sentence violates the First Amendment. *Dawson v. Delaware*, 503 U.S. 159, 163 (1992). "[T]he Constitution does not prevent a sentencing court from considering an individual's First Amendment-protected 'beliefs and associations' in fixing a sentence, when those beliefs and associations are relevant to determining an appropriate sentence. *United States v. Williamson*, 903 F.3d 124, 136 (D.C. Cir. 2018) (citing *Dawson v. Delaware,* 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). But courts are not free to consider mere "abstract beliefs." "The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Dawson* at 167-168.

For protected speech to be relevant and material at sentencing some nexus to the crime must be shown, otherwise the evidence might unlawfully burden otherwise constitutionally protected speech and beliefs. Protected speech and activity must bear some relationship to the offense conduct. *Barclay v. Florida*, 463 U.S. 939, 970 (1983) (The defendant's membership in the Black Liberation Army and his desire to start a race war were "related to" the murder of a white hitchhiker.) *Id.*, pp.942-44.

"Given the kaleidoscopic array of factors ordinarily in play at sentencing, *see* 18 U.S.C. § 3553(a), protected conduct may be relevant in a multiplicity of ways . . . But any such connection to a relevant factor must be established, not merely assumed, in the context of the particular case." *United States v. Alvarez-Nunez*, 828 F.3d 52, 55 (1st Cir. 2016). "Where protected conduct

has no bearing on either the crime committed or on any of the relevant sentencing factors, consideration of that conduct infringes a defendant's First Amendment rights." *Id.* at 56 (1st Cir. 2016); *see Dawson*, 503 U.S. at 168, 112 S.Ct. 1093.

Applying *Dawson*, a sentencing court may consider activity related to the offense conduct in determining a suitable sentence. In *Williamson,* the trial court found "that a defendant's communications established a pattern of disturbing conduct that worsened over time, bearing on both the seriousness of his offense and on the need to protect the public generally (and [a federal agent specifically] from harm. The court did not violate the First Amendment in doing so." *United States v. Williamson*, 903 F.3d 124, 136 (2018). What is not permitted is using a party's abstract political beliefs as a sentencing factor.

As the *Dawson* Court noted, the First Amendment:

> prevents the State from criminalizing certain conduct in the first instance. But it goes further than that. It prohibits a State from denying admission to the bar on the grounds of previous membership in the Communist Party, when there is no connection between that membership and the "good moral character" required by the State to practice law. *Schware v. Board of Bar Examiners of N. M.*, 353 U.S. 232, 1 L. Ed.2d 796, 77 S. Ct. 752 (1957). It prohibits the State from requiring information from an organization that would impinge on First Amendment associational rights if there is no connection between the information sought and the State's interest. *Bates v. Little Rock*,361 U.S. 516, 4 L. Ed. 2d

> 480, 80 S. Ct. 412 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). We think that it similarly prevents Delaware here from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried.

Dawson v. Delaware, 503 U.S. 159, 168 (1992).

The District Court argues that Petitioner's speech must be considered because he "amp[ed]" up the crowd on January 6, 2021. However, even if true, the law is clear that the First Amendment protects a speaker's right to utter incendiary speech. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1960) ("mere abstract teaching of the moral propriety or even necessity for resort to force and violence" protected); *Hess v. Indiana*, 414 U.S. 105 (1973); *Noto v. United States*, 367 U.S. 290 (1961); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); and *Counterman v. Colorado*, 600 U.S. 66 (2023).

In this case, Petitioner's speech, which on its face is permitted and protected, was not used as circumstantial evidence to prove the intent to commit a crime, which the courts and commentators have long recognized that such usage can be proper. Rather, it was presented as additional conduct, unrelated to the trespass charge to which Petitioner pled guilty, which the District Court intended to deter.

Although the sentence imposed in this case falls within the Sentencing Guidelines' range of zero to six months, the sentence is still nonetheless substantively unreasonable because it was imposed on unconstitutional grounds. First, the sentence recommended by

pretrial services called for a sentence of probation and was presumptively reasonable. Second, Respondent urged the Court to consider protected speech as relevant offense conduct, and, based on the Court's sentencing remarks, it did consider protected speech as a factor warranting incarceration. The use of protected political speech to jail a journalist—even a trespassing journalist—is chilling.

Relevant offense conduct has drawn criticism when used to permit so-called "acquitted offense conduct" as a consideration at the time of sentencing. The fundamental due process concerns that attend criticism of the use of acquitted offense conduct are present to an even greater extent in the context of a case where otherwise protected activity under the First Amendment is used by a sentencing authority to enhance a criminal penalty.

It was an egregious error for the sentencing Court to penalize Petitioner for his political ideas, unpopular though they may be in some quarters. At the time of the plea agreement, it was not foreseeable—indeed, it was unthinkable—that Respondent would seek to punish Petitioner on account of his protected speech.

The length of Petitioner's ultimate prison sentence is irrelevant. The fact that Petitioner was sentenced to a period less than the maximum allowed in the sentencing guidelines is not a barrier to this challenge. The relevant issue here is the conduct that was considered by the judge and making his determination.

This Court cautioned against the chilling effects of free speech infringements in *Counterman v. Colorado,* 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). The court stated in *Counterman,* that,

> Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is 'self-censorship' of speech that could not be proscribed—a 'cautious and restrictive exercise' of First Amendment freedoms.

Id. at 75 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

If the Court of Appeals' ruling is allowed to stand, then defendants must fear that any of their speech, whether related to the alleged criminal conduct or not, will be dragged into court and utilized to lock them up.

The D.C. Circuit ignores the protections that courts should afford Petitioner's speech and wholly neglects to address the Constitutional considerations at play in this case. The result has been a legal landscape in which speech may be criminalized and the offender imprisoned.

B. Clarification of This Issue Logically Follows Recent Amendments Enacted by the Sentencing Commission as Supported by This Court.

Furthermore, this is the perfect time for this Court to address issues surrounding what is and can be used as a relevant factor at sentencing. The slippery slope of the use of "relevant conduct" to adjust a sentence

has long been controversial. According to the federal Sentencing Guidelines, a judge may adjust the recommended range of an offense or the sentence itself based on a defendant's "relevant conduct." USSG § 1B1.3. Relevant conduct for sentencing purposes need only be proven to the judge by a preponderance of the evidence and often results in harsher penalties and increased prison sentencing when abused. The increasing breadth of "relevant conduct" has been a matter of significant controversy that has sparked reform in the Sentencing Guidelines in analogous contexts.

The Supreme Court has shown a remarkable interest in acquitted offense conduct as a sentencing factor, relisting several certiorari petitions raising the issue. For example, in *McClinton v. United States* (No. 21-1557), the Supreme Court denied certiorari, but did so under the anticipation that the Sentencing Commission, which is responsible for the Sentencing Guidelines, would resolve questions around acquitted conduct sentencing in the coming year. This Court stated, however, that the Court may need to take up the Constitutional issues presented if the Sentencing commission fails to act.

Indeed, on April 17, 2024, the United States Sentencing Commission voted unanimously to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the federal guidelines.[4]

If relying on acquitted conduct to enhance a defendant's sentence is antithetical to a fair sentencing system, then the entire concept of relevant conduct

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[4] https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2024

itself could be the next domino to fall. Mr. Shroyer contends that, just as in the case of acquitted offense conduct's invasion of the right to due process and the Fifth Amendment's presumption of innocence, so, too, the right to speak, to assemble, and to petition for redress of grievances arising under the First Amendment should preclude the use of otherwise protected speech at a federal sentencing.

Under Section 1B1.3, defendants often have their guidelines ranges enhanced by other types of relevant conduct, including uncharged or dismissed conduct. In some ways, increasing a defendant's sentence based on uncharged or dismissed conduct seems worse than doing so based on acquitted conduct. At least with acquitted conduct, the conduct was charged, and the defendant had the opportunity to rebut it at trial. But in the case of uncharged conduct, the allegations never even made it before a grand jury. Yet, the defendant is forced to challenge those allegations for the first time in front of a sentencing judge, with a much lower burden of proof facing the government.

C. Resolution of This Question Is of Great Public Importance & Precedential Value.

The Constitutional consequence of this case parallels the public impact of this case. The issue of the use of protected speech as relevant conduct in a federal sentencing for speech or expression at a political event is one of first impression.

This case cannot be viewed in isolation but must be evaluated in terms of the tyrannical overreach we have seen from our federal government in regard to policing speech, particularly of those who have a public platform such as Petitioner. We must also consider the

overwhelming context of government-assisted censorship that is occurring in this country.[5] For example, this Court recently heard oral arguments in the landmark free speech case *Murthy et al. v. Missouri et al.* (originally filed as *Missouri v. Biden*), in which the federal government is accused of colluding with social media companies to suppress the freedom of speech and censor particularly conservative speech. *Murthy et al. v. Missouri, et al.* No. 23-30445 (U.S. Sept. 14, 2023). The targeted speech ranged from rhetoric concerning COVID-19 and the inefficacy of the COVID-19 vaccine, to speech questioning the integrity of the 2020 presidential election. Petitioners argue in that case that the government has violated the First Amendment by engaging in censorship and undue influence on individuals and private companies.

Moreover, our own Department of Homeland Security has previously issued statements labeling Americans who question the veracity of the 2020 presidential election and believe in election fraud as potential terrorism threats.[6] Never before have we seen such an outright war on free speech and independent thought.

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[5] *See Murthy v. Missouri* (No. 23A243), *Brief of Amicus Curiae Michael Benz, Executive Director, Foundation for Freedom Online, in Support of Respondents and in Opposition to Stay Application*, https://tinyurl.com/5n78rerv; Mike Benz, Foundation for Freedom Online Report, *DHS Censorship Agency Had Strange First Mission: Banning Speech That Casts Doubt On 'Red Mirage, Blue Shift' Election Events* (Nov. 9, 2022), https://tinyurl.com/2k4cfbdz; Mike Benz, *Biden's National Science Foundation Has Pumped Nearly $40 Million Into Social Media Censorship Grants and Contracts* (Nov. 22, 2022), https://tinyurl.com/yc8zmxdh.

[6] *See* Committee on Homeland Security House of Representatives, *Censorship Laundering: How the U.S. Department of Homeland*

A sentencing system that gives trial judges the discretion to sentence within a specified range not only permits judicial fact finding that may increase a sentence, but such a system also gives individual judges the discretion to implement their own sentencing policies. *Gall v. United States*, 552 U.S. 38, 66, 128 S. Ct. 586, 606, 169 L. Ed. 2d 445 (2007). Unfettered judicial discretion as to what protected speech may or may not be considered as relevant conduct at sentencing allows defendants to be disproportionately and undeservedly punished for "undesirable" speech.

Finally, the Supreme Court's review of this case will have significant precedential value. Without this Court's intervention, this issue of using protected speech as a method of incarceration will continue to persist. Indeed, in the time since Petitioner's incarceration, other journalists, who questioned the 2020 presidential election and reported on January 6th, have been charged and/or sentenced pertaining to the events of

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Security Enables the Silencing of Dissent, Serial No. 118-11 (May 11, 2023) https://tinyurl.com/mryc6yet; *see also* Subcommittee on Oversight, Investigation, and Accountability Committee on Homeland Security United States House of Representatives May 11, 2023, https://tinyurl.com/3d9nhsay (including Written Statement Jonathan Turley, Shapiro Professor of Public Interest Law The George Washington University Law School, "Censorship Laundering: How the U.S. Department of Homeland Security Enables the Silencing of Dissent" Subcommittee on Oversight, Investigation, and Accountability Committee on Homeland Security United States House of Representatives May 11, 2023; Martin Kulldorf, "Censorship Can Be Deadly"; Statement for the Record Benjamin Weingarten Investigative Journalist & Columnist, "Censorship Laundering: How the U.S. Department of Homeland Security Enables the Silencing of Dissent")

January 6, 2021 and may face similar heightened sentences based on their protected speech if this issue is not addressed.[7]

No other mechanism will resolve this issue.

II. THE IMPACT OF CONSTITUTIONAL VIOLATIONS ON THE ENFORCEABILITY OF APPEAL WAIVERS IS UNSETTLED BY DECISIONS OF THIS COURT.

The D.C. Circuit dismissed Petitioner's appeal in part because it determined that Petitioner had waived his right to appeal pursuant to his plea agreement. App.1a-2a. However, there is a Circuit split that this Court must resolve as to whether an appeal waiver as part of a plea agreement is enforceable when a defendant seeks to appeal on the grounds that the sentence has violated his First Amendment rights.

Petitioner's plea agreement stated that he agrees to waive the right to appeal the conviction or sentence in this case, "insofar as such waiver is permitted by law". App.39a-40a. Petitioner argues that a waiver of First Amendment rights is invalid and by violating his First Amendment rights at sentencing, the appellate clause of his plea agreement is void.

The Circuits are split on the rules governing exceptions of enforcing an appeal waiver in a plea agreement. The Supreme Court has yet to specifically address the discrepancy between Circuit Court's approach to appellate waivers in light of Constitutional concerns. Clarity by this Court over this most important

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[7] On March 1, 2024, the FBI arrested journalist Steve Baker on charges related to January 6, 2021. Mr. Baker was present in Washington D.C. on January 6, 2021 as a journalist to cover the rallies and protests.

principle and its ramifications for an element of plea bargaining that affects a substantial portion of criminal defendants is thus crucial at this juncture. This Petition grants this Court the opportunity to do just that.

A. One Line of Decisions Holds That Appeal Waivers Will Not Be Enforced When It Would Result in a "Miscarriage of Justice".

A number of Circuits, including the First, Third, Eighth, and Tenth, decline to enforce appeal waivers if doing so would result in a "miscarriage of justice."

For example, in *United States v. Corso*, 549 F.3d 921 (3d Cir. 2008), the Third Circuit states that it will not enforce a defendant's appellate waiver when "enforcing the waiver would work a miscarriage of justice." *Id.* at 927; *see also United States v. Jackson*, 523 F.3d 234, 244 (3d Cir. 2008). The Third Circuit follows a First Circuit decision, *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001), which uses the broad miscarriage of justice exception. "Miscarriage of Justice" is not defined in *Teeter*.

In *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003), the Eighth Circuit "reaffirm[ed] that in this Circuit a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver." *Id.* at 892. The court explained that "[p]lea agreements are essentially contracts between the defendant and Government" that "are subject to special limitations given their unique nature." *Id.* at 890. Even assuming that a waiver has been entered into knowingly and voluntarily, the Eighth Circuit would "still refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice." *Id.*; *see DeRoo v. United States,* 223 F.3d 919, 923-924 (8th

Cir. 2000) (stating that a waiver of appellate rights does not prohibit the appeal of an illegal sentence or a sentence in violation of the terms of an agreement, or a claim asserting ineffective assistance of counsel); *United States v. Michelsen*, 141 F.3d 867, 872 n. 3 (8th Cir. 1998) (describing the right to appeal an illegal sentence). The Eighth Circuit has provided additional guidance on what constitutes an illegal sentence. In *United States v. Peltier*, 312 F.3d 938 (8th Cir. 2002), the court stated that a sentence is illegal when it is not authorized by law or "constitutionally invalid". *Id.* at 942.

Moreover, in *Margalli–Olvera v. INS,* 43 F.3d 345 (8th Cir. 1994), the court stated that "[a]pplication of these contract principles is tempered by the constitutional implications of a plea agreement." *Id.* at 351. The court in *Andis* emphasized the importance of the statement that "[w]here a plea agreement is ambiguous, the ambiguities are construed against the government." *Id.* at 353. Interpreting plea agreements in this manner reflects the fact that these agreements are normally drafted by the government and involve significant rights of a defendant.

Similarly, the Tenth Circuit considers three factors when deciding a motion to enforce an appeal waiver in a plea agreement: "(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice[.]" *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004)

The courts using a vague test—such as the First Circuit, the Third Circuit, and Eighth Circuit—do not

fully define the "miscarriage of justice" concept. This broad conception of miscarriage of justice makes the plea—bargaining system uncertain. What is problematic is that the two sides cannot weigh the benefits of the plea agreement if they are uncertain as to whether the plea agreement will be enforced.

The Tenth Circuit attempts to limit its miscarriage of justice exception "where the alleged error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings . . . " *Id.* at 747.

B. A Second Line of Decisions Holds That Appeal Waivers Will Not Be Enforced When It Would Result in an Illegal Sentence that Violates the Constitution.

Similarly, in *United States v. Watson*, 582 F.3d 974 (9th Cir. 2009), the Ninth Circuit held that "[a] waiver of the right to appeal does not bar a defendant from challenging an illegal sentence." *Id.* at 977 (emphasis added). The Ninth Circuit has held that a sentence is "illegal" if it "violates the Constitution." *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016), *quoting United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). Thus, an appeal waiver does not apply to a sentence "if it exceeds the permissible statutory penalty for the crime or violates the Constitution." *Bibler*, 495 F.3d at 624; *see also United States v. Wells*, 29 F.4th 580, 584 (9th Cir.), *cert. denied*, 143 S. Ct. 267, 214 L. Ed. 2d 115 (2022).

As noted above, the Eighth Circuit also applies this standard in tandem with that of a "miscarriage of justice". *DeRoo,* 223 F.3d at 923 (stating that "defendants cannot waive their right to appeal an illegal sentence")

C. A Third Line of Decisions Holds That Appeal Waivers Will Not Be Enforced When It Was Based on a Constitutionally Impermissible Factor.

A number of Circuits grant an exception to appellate waivers in plea agreements when a sentence is based on a "constitutionally impermissible factor." In the Second Circuit, "[a] violation of a fundamental right warrants voiding an appeal waiver." *United States v. Riggi,* 649 F.3d 143, 147 (2d Cir. 2011). "[A] waiver of the right not to be sentenced on the basis of a constitutionally impermissible factor may be invalid". *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994).

The Fourth Circuit concurs. *United States v. Marin,* 961 F.2d 493, 496 (4th Cir. 1992) ("a defendant could not be said to have waived his right to appellate review of a sentence . . . based on a constitutionally impermissible factor such as race").

The Seventh Circuit does not adopt a miscarriage-of-justice exception. In *United States v. Litos*, 847 F.3d 906, 910 (7th Cir. 2017), the Seventh Circuit stated that "there are exceptional situations in which waiver does not foreclose appellate review—for example if an appeal waiver is part of a plea agreement that was involuntary, or if the district court relied on a constitutionally impermissible factor, or if the defendant received ineffective assistance of counsel in regard to the negotiation of a plea agreement, or if the sentence exceeded the statutory maximum." *Id.* at 910.

The Eleventh Circuit has "carved out narrow substantive exceptions" to the waiver of appeal rule, *King v. United States*, 41 F.4th 1363, 1367 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 1771, 215 L. Ed. 2d 662 (2023),

and will review a sentence "based on a constitutionally impermissible factor such as race." *United States v. Bushert*, 997 F.2d 1343, 1350 n. 18 (11th Cir. 1993).

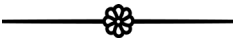
The D.C. Circuit, where Petitioner's appeal was filed, will not enforce an appeal waiver if (1) "the defendant makes a colorable claim he received ineffective assistance of counsel in agreeing to the waiver," (2) "the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice," or (3) the sentencing court rests the sentence on "a constitutionally impermissible factor, such as the defendant's race or religion." *United States v. Guillen*, 561 F.3d 527, 530-31 (D.C. Cir. 2009).

The D.C. Circuit thus diverted from the First Circuit, the Third Circuit, the Eighth Circuit, the Ninth Circuit, and the Tenth Circuit—reflecting a divide found in this Court's own conflicting direction on this fundamental issue.

D. A Determination That There Are Constitutional Exceptions to Appeal Waivers Is Consistent with This Court's Prior Rulings.

The Supreme Court has not yet clarified the scope of exceptions to appeal waivers as part of plea agreements. However, a resolution that appeal waivers as part of a plea agreement do not prevent further Constitutional challenges related to the case would be consistent with the rationale set forth by this Court in *Class v. United States,* 583 U.S. 174, 138 S. Ct. 798, 200 L. Ed. 2d 37 (2018), and reflect the deference given by this Court in the preservation to seek redress for

Constitutional violations. In this case, in which the Supreme Court held that a guilty plea does not bar a criminal defendant from later appealing his conviction on the grounds that the statute of conviction violates the Constitution.



CONCLUSION

For the reasons set forth above, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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