No. 24-1063

In the Supreme Court of the United States

MUNSON P. HUNTER, III,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the only permissible exceptions to a general appeal waiver are for claims of ineffective assistance of counsel or that the sentence exceeds the statutory maximum.

2. Whether an appeal waiver applies when the sentencing judge advises the defendant that he has a right to appeal and the government does not object.

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-3a) is unreported but available at 2024 WL 5003582. The district court's oral judgment of conviction and sentence (Pet.App.18a-37a) and written judgment of conviction and sentence (Pet.App.38a-49a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on December 6, 2024. On February 13, 2025, Justice Alito extended the deadline to file a petition for a writ of certiorari to and including April 5, 2025. The petition was filed on April 4, 2025, and granted on October 10, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be … deprived of life, liberty, or property, without due process of law…."

STATEMENT

"[P]lea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009). The defendant agrees to give up his right to contest the government's charges at trial. The government agrees to forgo bringing additional charges. Both sides benefit. The defendant gets a measure of certainty on his punishment, and the government avoids the costs and unpredictability of trial.

In many cases, however, the government demands that the defendant give up more than just the right to a jury of his peers. It requires the defendant to agree to an appeal waiver—"that is, an agreement forgoing certain, but not all, possible appellate claims." *Garza v. Idaho*, 586 U.S. 232, 235 (2019). Despite their name and their often-broad terms, "no appeal waiver serves as an absolute bar to all appellate claims." *Id.* at 238. While defendants who sign appeal waivers may "giv[e] up some, many, or even most appellate claims, some claims nevertheless remain." *Id.* at 239.

The Fifth Circuit recognizes two—and "only two"—claims that can overcome an appeal waiver: (1) "ineffective assistance of counsel," and (2) "a sentence exceeding the statutory maximum." *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020); *accord United States v. Jones*, 134 F.4th 831, 840 (5th Cir. 2025). And the Fifth Circuit defines "statutory maximum" narrowly; it is "the upper limit of punishment that Congress has legislatively

specified for violations of a statute." *United States v. West*, 137 F.4th 395, 399 (5th Cir. 2025) (cleaned up).

According to the Fifth Circuit, if a waiver is otherwise knowing and voluntary, no other injustice at sentencing is appealable—no matter how unfathomable, unforeseeable, or incompatible with the parties' deal. A judge expressly doubles the sentence because a defendant is Black? No appeal. A judge forbids a defendant from attending his chosen church while on supervised release? No appeal. A judge requires a defendant to go to church? No appeal. A judge orders that a defendant follow her doctor's recommendations regarding abortions, hormones, or electroshock therapy? No appeal, no appeal, no appeal. Even the government has called the Fifth Circuit's rule "draconian."[1] About that, the parties are in radical agreement.

The Fifth Circuit defends its test with an appeal to the sanctity of contract, but the premise betrays the conclusion. Under contract law, parties have defenses to enforcement in multiple circumstances when an otherwise categorical promise leads to results that the promisor could never have reasonably expected. Contract law has also long recognized that heightened protections are necessary when contracts implicate important public concerns. And few interests are more pivotal or more delicate than the integrity of the criminal process.

Moreover, under ordinary contract law, as under constitutional law, some interests are so fundamental that they cannot be waived, no matter how knowing and how voluntary the waiver is. If a defendant "stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some

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[1] Arg. of U.S. at 36:30, *United States v. Atherton*, No. 21-30266 (9th Cir. Sept. 9, 2025) (en banc), https://tinyurl.com/3989xj76.

minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) (Posner, J.).

Despite all this, the Fifth Circuit has for decades refused to even consider whether contract law might excuse an appeal waiver, no matter how extreme, with only two narrow exceptions. In this regard, the Fifth Circuit is an outlier. Every other circuit recognizes more exceptions than does the Fifth Circuit. Those circuits nonetheless consistently enforce appeal waivers while recognizing appropriate, limited carveouts for wholly unforeseeable sentences and identifiable miscarriages of justice. Yet their dockets have not been inundated with meritless appeals. Unsurprisingly so, given that analogous contract-law defenses have existed for centuries and contract terms are still reliably enforced.

This case demonstrates the poverty of the Fifth Circuit's two-exception rule. Munson Hunter pleaded guilty to a *financial* crime. With no evaluation by a medical professional, no judicial findings, and no connection to Hunter's crime or the goals of sentencing, the district court ordered that Hunter, while on supervised release, take *any* medication of *any* kind prescribed by his physician, notwithstanding his consistent and principled objections to taking medication. Hunter never had a chance to make the argument that this wholly unexpected, mandatory condition justified an exception to his appeal waiver, because the Fifth Circuit categorically does not recognize exceptions in these circumstances. The Court should answer "no" to the first question presented, hold that appeal waivers may be unenforceable in more than the two circumstances recognized by the Fifth Circuit, and remand so that Hunter can make his case under the proper framework.

The Fifth Circuit separately erred by applying yet another categorical rule, this one barring any challenge to the enforceability of an appeal waiver based on a sentencing court's assurance to the defendant and government that he *does* have a right to appeal. The Fifth Circuit applies that rule even when the government affirmatively acquiesces to the sentencing court's representation. The Fifth Circuit adheres to this approach even though it is beyond dispute, under both contract and litigation principles, that the government can waive its right to enforce an appeal waiver.

The government did just that here. The sentencing court explained to Hunter that he has the right to appeal his sentence. The court then asked the government whether it had anything to say, and the government, surely aware of the appeal waiver, said it did not. Basic principles of forfeiture, waiver, and fairness counsel in favor of permitting criminal defendants in Hunter's shoes to rely on a court's representations—especially when, as here, the court's understanding that its sentence will be reviewed by an appellate court may have colored the sentence it imposed.

On both questions presented, the Fifth Circuit is wrong. On either of those questions, this Court should vacate the judgment below and remand for further proceedings so that Hunter can pursue an appeal. Public confidence in our criminal justice system demands some sort of safety value, lest we look like a nation unconcerned with the rule of law or decency.

A. Hunter's Plea and Sentencing

The appeal waiver in this case was entered into when petitioner Munson P. Hunter, III pleaded guilty to one count of aiding and abetting wire fraud in the U.S. District Court for the Southern District of Texas. *See* Pet.App.4a-

17a (plea agreement); J.A. 1-16. Hunter's appeal waiver provided that Hunter would "waive[] the right to appeal or 'collaterally attack' the conviction and sentence," except "to raise a claim of ineffective assistance of counsel." Pet.App.6a-7a.[2]

After Hunter entered into the plea agreement, the Probation Office prepared the presentence investigation report (PSR). To assist in the preparation of the PSR, Hunter provided information to a probation officer, including information about his childhood "mental health diagnoses." *United States v. Hunter*, No. 4:23-cr-85 (S.D. Tex. Apr. 23, 2024), Dkt. 125 at 19, 24. In particular, the PSR noted that Hunter, who was by then nearly 50, reported being diagnosed as "slightly autistic" in preschool and diagnosed with "anxiety and depression" when he was "10 years old," which "increased" after he "was sexually assaulted at the age of 14." *Id.* at 19. Based on those "self-reported" childhood mental health diagnoses, the PSR recommended that the district court require as a special condition of supervised release that Hunter take "all mental-health medications that are prescribed by [his] treating physician." *Id.* at 24 (emphasis added). The PSR suggested that this condition would "assist the probation officer in providing services to the defendant while on supervision." *Id.* There was no further explanation, including how Hunter's mental health could be disruptive

[2] The ineffective-assistance exception appears to be a standard exception included by the Department of Justice in plea agreements because the Department of Justice "no longer seek[s] in plea agreements to have a defendant waive claims of ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal." *In re Sealed Case*, 901 F.3d 397, 404 (D.C. Cir. 2018) (quoting U.S. Dep't of Justice, *Department Policy on Waivers of Claims of Ineffective Assistance of Counsel* (Oct. 14, 2014)).

or dangerous or how the condition would assist probation officers.

At sentencing, Hunter objected to the proposed mandatory-medication condition of supervised release. Pet.App.24; Pet.App.35a. Hunter explained to the court:

> I want to take mental health programs, but I don't want to take any medication. I don't drink. I don't use drugs. I don't even curse. I don't want to have to be forced to medicate.

Pet.App.24a. The court noted Hunter's objection and explained to Hunter that "[i]f there's a dispute, you can address it to the probation officer. If the probation officer can't resolve the dispute, you can address it to me." Pet.App.24a.

At the conclusion of the sentencing hearing, the court sentenced Hunter to 51 months in prison, 3 years of supervised release, and restitution of $235,438.83. *See* Pet.App.35a; Pet.App.45a-Pet.App.46a. The Court also imposed the mandatory-medication condition of supervised release, to which Hunter again objected. *See* Pet.App.35a; Pet.App.45a. In imposing the condition, the district court made no factual findings or explanation regarding the need for the condition. *See* Pet.App.18a-Pet.App.37a.

The court then told Hunter: "You have a right to appeal. If you wish to appeal, [your trial counsel] will continue to represent you." Pet.App.36a. Immediately after informing Hunter of his "right to appeal," the court asked counsel if they "wish[ed] to say anything else." Pet.App.36a. Counsel for the government—who had drafted the plea agreement, including the appeal waiver—responded: "Your Honor, I believe—well, no. I—no." Pet.App.36a.

B. Hunter's Appeal

Hunter appealed to the Fifth Circuit. He challenged the mandatory-medication condition, arguing that it "infringes on [his] fundamental due process liberty interest in being free of unwanted mental health medication" and is unsupported by the record. *United States v. Hunter*, No. 24-20211 (5th Cir. Aug. 8, 2024), Dkt. 19 at 9. Hunter noted that although courts can order discretionary conditions of supervised release, 18 U.S.C. § 3583(d)(3) (incorporating by reference 18 U.S.C. § 3563(b)(9)), any imposed condition must be "reasonably related" to the sentencing guideline factors in 18 U.S.C. § 3553 and must "involve[] no greater deprivation of liberty than is reasonably necessary," 18 U.S.C. § 3583(d)(1)-(2). *Id.* at 10-12. The court had made no such finding during sentencing.

Hunter acknowledged that his appeal waiver foreclosed this challenge under Fifth Circuit precedent, which recognizes only "two exceptions" to a general appeal waiver: for (1) claims for ineffective assistance of counsel when signing the plea agreement and (2) sentences exceeding the statutory maximum. *Barnes*, 953 F.3d at 388-89. He nonetheless argued that other circuits would have assessed the merits of Hunter's claims, given that the mandatory-medication condition violated his due process rights and the sentencing court had expressly advised Hunter that he had the "right to appeal." *Hunter*, No. 24-20211, Dkt. 19 at 6-9.

The government moved to dismiss Hunter's appeal, contending that his appeal waiver "barred" review. *Hunter*, No. 24-20211 (5th Cir. Sept. 12, 2024), Dkt. 29 at 22.

The Fifth Circuit dismissed the appeal, invoking Hunter's "waiver." Pet.App.2a-3a. The court "rejected Hunter's suggestion" that his appeal waiver did not bar

his due process challenge. Pet.App.2a (citing *Barnes*, 953 F.3d at 389). The court relied on circuit precedent, *id.*, which has "recognized only two exceptions to the general rule that knowing and voluntary appellate … waivers are enforceable," *Barnes*, 953 F.3d at 388-89 (citation omitted). The court also held that, under its precedent, "the district court's statement at the sentencing hearing that Hunter had a right to appeal did not impact the validity of the appeal waiver." Pet.App.2a (citing *United States v. Gonzalez*, 259 F.3d 355, 358 (5th Cir. 2001)).

SUMMARY OF ARGUMENT

I. The Fifth Circuit is wrong to limit the grounds for nonenforcement of an appeal waiver to two—and "only two"—scenarios: (1) "ineffective assistance of counsel," and (2) "a sentence exceeding the statutory maximum," *Barnes*, 953 F.3d at 388-89.

A. The Fifth Circuit's two-exceptions-only rule collapses on its own logic, as well as centuries of contract law. The Fifth Circuit, like this Court and every other court of appeals, understands that appeal waivers—as with all contractual provisions—are not absolute. Both of the Fifth Circuit's exceptions are grounded in contract law. For instance, sentences above the statutory maximum are appealable because such sentences are unforeseeable and frustrate the bargain, given that defendants enter plea agreements presuming that sentencing courts lack discretion to exceed what the statute authorizes for punishment.

But that principle equally holds when a court imposes a condition of supervised release that exceeds what Congress or the Constitution authorizes. After all, contract law's protection of the parties' reasonable expectations has "many concrete applications"—not just two. 1 A. Corbin, Corbin on Contracts § 1:1 (2025) (cleaned up). A

defendant who enters into an appeal waiver when pleading guilty to catching impermissibly large fish has no reason to think he may be required to undergo unwanted medical procedures for the duration of his supervised release. Likewise here, Hunter had no reason to think that pleading guilty to a financial crime could result in him being forced to take all medication a physician might recommend, simply because he reported that he was diagnosed with anxiety and depression as a child. That sentence violates the supervised release statute as well as the Constitution.

B. As the government recently told the en banc Ninth Circuit, the Fifth Circuit's outlier rule is "draconian."[3] Under the Fifth Circuit's rule, a defendant who pleads guilty to underpaying his taxes could be ordered to remain sedated for the duration of supervised release; to pray for repentance ten hours a day while on release; or to submit to thumbscrews whenever his probation officer suspects he is not being forthcoming—all without any possibility of appellate review. Indeed, the Fifth Circuit would permit no appeal even if a sentencing judge simply refused to hold any sentencing hearing at all; expressly sentenced a defendant based on his race, religion, or political affiliation; or imposed as a condition of supervised release that a defendant give up his jury, confrontation, and Eighth Amendment rights as to any future charge the government brings against him during supervised release.

This harsh rule is entirely unnecessary. As experience in the other courts of appeals demonstrates, recognizing other exceptions to appeal waivers does not

[3] Arg. of U.S. at 36:30, *United States v. Atherton*, No. 21-30266 (9th Cir. Sept. 9, 2025) (en banc), https://tinyurl.com/3989xj76.

open the floodgates. Defendants in those courts of appeals still cannot appeal garden variety sentencing errors. Traditional contract defenses have not rendered bargains illusory in the thousands of other types of agreements those defenses have been applied to. There is no reason to think the result would be different here.

C. The government apparently cannot justify the Fifth Circuit's rule. Instead, the government seems to take the extreme view that knowing and voluntary waivers of rights are *always* enforceable. But contract law of course recognizes defenses to the enforcement of contract terms, even where entered into knowingly and voluntarily. Indeed, the government elsewhere has recently advocated for a "manifest injustice" exception to enforcing appeal waivers by pointing to traditional contract doctrines.

D. At a minimum, the Court should hold that at least some safety valve permits sentencing appeals in extraordinary circumstances beyond the two the Fifth Circuit recognizes. As this Court "ha[s] repeatedly stressed," it is "importan[t]" to the "Judiciary and the public" for courts to "correct[] grossly prejudicial errors of law that undermine confidence in our legal system." *Greenlaw v. United States*, 554 U.S. 237, 262 (2008) (Alito, J., dissenting). Especially so with plea agreements. Rather than reflecting a standard two-party contract, the judiciary is intimately involved in forming plea agreements. And the primary unknown left to the parties after entering into the agreement is the sentencing court's selection and imposition of a sentence including the terms of supervised release. If the judiciary inflicts a manifest and egregious injustice, the judiciary should permit the aggrieved party to ask the judiciary to correct the error. Such sentencing errors do not merely injure the individual defendant. Serious separation of powers concerns attend sentences

unauthorized by Congress or the Constitution, given that the legislature, not the judiciary, authorizes punishment. Finally, plea agreements' stakes demand some sort of safety valve. Unfair surprises at sentencing do not simply require the faster delivery of widgets; they threaten defendants' liberty and undermine public confidence in our criminal justice system.

II. In determining whether to enforce an appeal waiver, the Fifth Circuit is also wrong to categorically disregard all statements made by sentencing judges advising criminal defendants of a "right to appeal," even where the government fails to object to such a statement. *See United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992).

A. The Fifth Circuit ignores that appeal waivers in plea agreements can be waived and modified. To start, parties' contractual obligations "may be waived by the other party." 13 R. Lord, Williston on Contracts § 39:14 (4th ed.). The government's acquiescence to a sentencing judge's "right to appeal" statement can constitute such a waiver. Even putting aside contract law, under ordinary litigation principles, "even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver"—which is precisely what happens when the government acquiesces to a sentencing judge's "right to appeal" statement; the government relinquishes its appeal-waiver argument. *Cf. Garza*, 586 U.S. at 238-39.

Finally, a judge's statement that a defendant has a "right to appeal," combined with the government's failure to object, may also constitute a modification of the plea agreement to allow for appeals of at least particular aspects of a sentence. Here, for example, the record indicates that the district court orally modified the plea agreement specifically to permit Hunter to challenge the controversial mandatory-medication condition. And even

were the district court simply under the mistaken impression that Hunter could appeal, Hunter and the government's acquiescence in the court's apparent modification of the plea makes it valid. Hunter relied on the modification by filing an appeal, and the government's silence prejudiced Hunter by depriving the district court of an opportunity to clarify its intent. At a minimum, then, this Court should vacate and remand to permit the district court to potentially adjust its sentence and remove the mandatory-medication condition in light of the government's belated objection to the court's oral authorization of Hunter's appeal.

B. The Fifth Circuit's rule also flouts the fundamental principle that "criminal defendants should be entitled to take the statements of district court judges" for their "plain meaning." *United States v. Godoy*, 706 F.3d 493, 495 (D.C. Cir. 2013). Throughout the criminal process—from pleas to sentencing—district judges are expected to accurately explain proceedings to criminal defendants, and criminal defendants are allowed to trust and rely on those explanations. That principle holds even when the judge's statement is inconsistent with the text of a written plea agreement.

C. The Fifth Circuit's precedent holding otherwise is erroneous. The Fifth Circuit focuses on the fact that a district judge's misstatement at the time of sentencing cannot have affected the defendant's understanding when entering into the plea agreement months before. But that says nothing about whether the government forfeited or waived its right to enforce the appeal waiver, whether the plea agreement was modified, or whether defendants are entitled to rely on judges' post-plea statements about the defendant's rights. For its part, the government in its brief in opposition criticized only a "mechanistic rule that

vitiates every appeal waiver in the face of any judicial misstatement that goes uncorrected." Br. in Opp. 14-15. That is not responsive to Hunter's argument that courts should conduct a case-specific inquiry.

The Court should vacate and remand under either question presented so that Hunter can pursue his arguments with the Fifth Circuit's categorical bars cleared away.

ARGUMENT

I. The Fifth Circuit's "Two Exceptions Only" Approach to Appeal Waivers Is Wrong

The Fifth Circuit admits that established contract principles mean "a defendant may always avoid a waiver on … limited grounds." *United States v. Kelly*, 915 F.3d 344, 349 (5th Cir. 2019); *see also United States v. West*, 138 F.4th 357, 362 (5th Cir. 2025) (Oldham, J., dissenting from denial of rehearing en banc) (explaining that "appeal waivers always contain exceptions"). But in the Fifth Circuit, the only grounds for setting aside an appeal waiver are (1) ineffective assistance of counsel, and (2) a sentence that exceeds the statutory maximum. That ultra-restrictive approach is wrong. Under foundational contract doctrine, no principled reason exists to circumscribe appeal waiver exceptions so dramatically. An array of well-established contract principles bear on the enforceability of an appeal waiver, and they compel exceptions in at least some circumstances beyond those recognized by the Fifth Circuit.

Even setting aside contract-law principles, the Fifth Circuit errs in failing to recognize an extreme-circumstances exception. "[P]lea agreements are not ordinary contracts." *United States v. Lajeunesse*, 85 F.4th 679, 692 (2d Cir. 2023). They "demand[] the utmost solicitude of which courts are capable" in protecting the rights of the

accused. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). Multiple courts of appeals thus recognize that appeal waivers cannot preclude review of the most egregious sentencing errors. At a minimum, this Court should vacate and remand to allow Hunter to argue that his case fits such an exception.

A. The Fifth Circuit's Approach Is Illogical and Inconsistent with Basic Contract Principles

The Fifth Circuit cannot justify applying contract principles to the enforcement of appeal waivers in two circumstances, but no others.

1. As this Court has recognized, "no appeal waiver serves as an absolute bar to all appellate claims." *Garza*, 586 U.S. at 238 & n.6. That conclusion "follows from the fact that, '[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts.'" *Id.* at 238 (quoting *Puckett*, 556 U.S. at 137); *see also* Br. in Opp. 8. Like other contracts, a plea agreement is a "bargained-for exchange" between parties—here, the prosecution and the defendant. *Ricketts v. Adamson*, 483 U.S. 1, 9 n.5 (1987). And like other contracts, a plea agreement "can be set aside by a court on the grounds of fraud, mistake, duress, 'or on some ground that is sufficient for setting aside other contracts.'" *Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1977) (quoting 3 A. Corbin, Contracts § 578, p. 403 (2d ed. 1960)).[4]

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[4] *See also Puckett*, 556 U.S. at 137-38 (exploring "rescission" as a "possible remedy" for breach of plea agreement); *United States v. Hyde*, 520 U.S. 670, 678, (1997) ("binding contractual duty" of plea agreement "may be extinguished by the nonoccurrence of a condition subsequent") (citing J. Calamari & J. Perillo, Law of Contracts § 11-7, p. 441 (3d ed.1987) and 3A A. Corbin, Corbin on Contracts § 628, p. 17 (1960); *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995)

Consistent with these principles, the Fifth Circuit has recognized two exceptions to the enforceability of an appeal waiver, both rooted in contract law. First, the Fifth Circuit permits appeals concerning the ineffective assistance of counsel when entering into the appeal waiver—an issue which goes to contract formation. Knowledge and voluntariness are the bedrock requirements for the formation of a contract, including an appeal waiver. *Cf. United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005) ("A defendant may waive his statutory right to appeal his sentence if the waiver is knowing and voluntary."). But "a waiver of appeal may not be enforced" when "ineffective assistance of counsel rendered *that waiver* unknowing or involuntary." *United States v. White*, 307 F.3d 336, 341 (5th Cir. 2002). The Fifth Circuit therefore permits ineffective assistance of counsel appeals, which "challenge whether the waiver itself is valid and enforceable," *Garza*, 586 U.S. at 239 regardless of whether the appeal waiver contains such an exception. *White*, 307 F.3d at 339.

The Fifth Circuit's second exception—for sentences above the statutory maximum—is likewise grounded in core contract principles. "[T]he main purpose of contract law is the realization of" parties' "reasonable expectations." 1 Corbin, *supra*, § 1:1 (cleaned up). Accordingly, contract law has long recognized a variety of defenses to

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(Plea agreements are "subject to the … constraints that bear upon the enforcement of other kinds of contracts."); *Hurlow v. United States*, 726 F.3d 958, 964 (7th Cir. 2013) ("[B]ecause a plea agreement is a contract and generally governed by ordinary contract law principles, waivers contained in the agreements are unenforceable in certain circumstances akin to those in which a contract would be unenforceable."); *United States v. Hahn*, 359 F.3d 1315, 1330 (10th Cir. 2004) (en banc) (Lucero, J., concurring) ("We have carved out exceptions to the enforceability of appeal waivers primarily because their use in sentencing cannot be reasonably supported by contract principles." (cleaned up)).

enforcement when a party's reasonable expectations are unfairly subverted. *See* Restatement (Second) of Contracts § 205 cmt. a; *id.* ch. 11 introductory note; 7 Corbin, *supra*, § 29.4 (citing U.C.C. § 2-302); *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152-53 (D.C. Cir. 1984) (Scalia, J.).[5] These well-established contract defenses limit the "literal" scope of contract language or "excuse[]" performance to avoid fundamentally unforeseeable or unjust results. 1 Corbin, *supra*, § 1:1; *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.); *Daniel v. Frazer*, 40 Miss. 507, 515 (1866).

Applied to plea agreements, this "reasonable expectations" principle means that courts will not enforce a waiver where one party has been deprived of a benefit he reasonably expected to receive when he entered into a bargain—like a sentence within statutory limits. *See Bond*, 414 F.3d at 545 ("Everyone knows that a judge must not impose a sentence in excess of the maximum that is statutorily specified for a crime."); *see also United States v. Bunner*, 134 F.3d 1000, 1004 (10th Cir. 1998); *United States v. Grandinetti*, 564 F.2d 723, 727 (5th Cir. 1977). As Judge Oldham explained in justifying the statutory-maximum exception:

> If a defendant agrees to plead guilty to one count of Felony *X* that carries a 20-year statutory maximum, he should be able to rely on the fact that his downside sentencing risk is limited to 20 years. If, for whatever reason, the district court errs and sentences the defendant to 30 years, the

[5] *See also, e.g.,* Farnsworth on Contracts § 9.04 (4th ed.) (contract can be voidable on ground of mutual mistake); *id.* § 9.06 (courts recognize "limited right of avoidance for unilateral mistake"); *id.* § 9.07 (impossibility can excuse a contract); *id.* § 9.10 (frustration of purpose and impracticability can also excuse a contract); U.C.C. § 2-615 (excuse by failure of presupposed conditions).

> appeal waiver should not bar the defendant from bringing an appeal to get the benefit of his bargain.

West, 138 F.4th at 362 (Oldham, J., dissenting from the denial of rehearing en banc). When district courts violate that assumption, the defendant no longer receives the benefit that "induced him to enter into the contract in the first place," *Bunner*, 134 F.3d at 1004, and the Fifth Circuit will not enforce the waiver.

2. Based on the above principles, there is no logical reason to permit contract-based defenses to appeal waivers in two circumstances and no others. Leading treatises, precedent, and common sense show that the concept of protecting the reasonable expectations of the contracting parties has "many concrete applications"—not just two. 1 Corbin, *supra*, § 1:1; *see also supra* pp. 16-17 and n. 5. A few doctrines are particularly relevant.

Public Policy. "Plea agreements are subject to the public policy constraints that bear upon the enforcement of other kinds of contracts." *United States v. Ready*, 82 F.3d 551 (2d Cir. 1996) (citation omitted). "From early times Anglo-American courts have refused to enforce … contracts … that are 'opposed to public policy,'" including when "the contract was merely shocking to the sense of justice and of the fitness of things." Walter Gellhorn, *Contracts and Public Policy*, 35 Colum. L. Rev. 679, 679 (1935); *see also* 3 W. Blackstone, Commentaries on the Laws of England 92-98 (1768). The public policy defense makes a contract "term … unenforceable" if, among other things, "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement, *supra*, § 178. And the positive law need not specifically prohibit a particular contract term for it to be unenforceable. The doctrine invites a "careful" judicial "balancing … of the

interest in the enforcement of the particular promise against the policy against the enforcement of such terms." *Id.* cmt. b.

This Court has already recognized and applied the public policy defense in the analogous context of release-dismissal agreements. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). In *Rumery*, a criminal defendant gave up his right to file a section 1983 suit in exchange for dismissal of pending criminal charges. *Id.* at 389. Citing the Restatement and the "well established" public policy defense, this Court held that such agreements were not "*per se* … invalid[]," because they could serve salutary public ends. *Id.* at 392. Still, the Court "agree[d] that in *some cases* these agreements may infringe interests of the criminal defendant and of society as a whole." *Id.* (emphasis added).

The same principle holds for appeal waivers. Indeed, *Rumery* noted that guilty pleas are in some ways comparable to release-dismissal agreements. *Rumery*, 480 U.S. at 393 & n.3. So as with release-dismissal agreements, courts should resolve the enforceability of an appeal waiver "by reference to traditional common law principles," including the rule that a "promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 392 & n.2.[6]

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[6] This Court has applied the public policy defense (or its equivalent) in other contexts too. For instance, "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). And the Court held

Just three months ago, the United States conceded this point before the en banc Ninth Circuit. In debating the circumstances in which an appeal waiver was unenforceable, the United States took the position that there should be a "manifest injustice" exception to otherwise categorical appeal waivers. Arg. of U.S. at 35:34-36:33, *United States v. Atherton*, No. 21-30266 (9th Cir. Sept. 9, 2025) (en banc), https://tinyurl.com/3989xj76; *see infra* pp. 34-37 (discussing manifest injustice exception). The government even criticized the Fifth Circuit for not recognizing such an exception, explaining that the "public policy doctrine" is "a *perfect corollary*" to the manifest injustice exception applied by other courts. *Id.* at 36:20-33, 40:09-25. Just so.

Unconscionability. Although "parties who make a contract are" generally "bound to it," even if the result is harsh, "courts of equity have often refused to enforce some agreements when, in their sound discretion, the agreements have been deemed unconscionable." 8 Williston, *supra*, § 18:1. "[T]he purpose of the doctrine is to prevent two evils: *oppression* and *unfair surprise*." 7 Corbin, *supra*, § 29.4 (citing U.C.C. § 2-302). Importantly, the entire contract need not be unconscionable for the defense to apply; courts can decline to enforce an unconscionable clause, or "limit the application of any unconscionable clause as to avoid any unconscionable result." U.C.C. § 2-302. This doctrine, too, has a long tradition. Courts have refused to enforce unconscionable contracts since before the Founding. *See, e.g.*, 1 Joseph Story, Commentaries on Equity Jurisprudence § 188 (12th ed. 1877) (citing *Earl of Chesterfield v. Janssen*, 28

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that "an employee's rights under Title VII are not susceptible of prospective waiver." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). There is no reason to treat plea agreements worse than other kinds of contracts.

Eng. Rep. 82, 100 (1750)); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917, 923 (1974) (explaining that at the Founding both courts of law and equity could refuse to enforce contracts on grounds of unfairness).

There is no reason to think this doctrine is categorically inapplicable to plea agreements, particularly when a judge imposes an egregious sentence that no party could have reasonably anticipated. Indeed, appeal waivers are a type of contract term recognized to sometimes pose unconscionability concerns: a "limitation of remedies." *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995). A criminal defendant enters into an agreement by which he is deprived of liberty and property, to a degree that is not fully known at the time of contracting. But if the trial court commits an unforeseeable error, the appeal waiver on its face prevents any appeal or collateral review whatsoever. Under longstanding contract rules, the "court of conscience" has equitable discretion to determine whether the lack of appeal under the circumstances constitutes a miscarriage of justice. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

Implied Duty of Good Faith. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement, *supra*, § 205. The duty of "good faith" emphasizes "fairness," 5 Corbin, *supra*, § 24.22, and "consistency with the justified expectations of the other party," Restatement, *supra*, § 205 cmt. a. "Good faith is simply another embodiment of the basic principle of contract law—the protection of reasonable expectations." Jay M. Feinman, *Good Faith and Reasonable Expectations*, 67 Ark. L. Rev. 525, 526 (2014); *see also Tymshare,* 727 F.2d at 1152 (Scalia, J.). "[B]ad faith" by contrast involves not malicious mens rea, but any conduct that violates "community

standards of decency, fairness or reasonableness." Restatement, *supra*, § 205 cmt. a. Thus, when a contract confers on a party "discretion to act as to a certain subject," there is an "implied covenant" to use that discretion "reasonably." *Oxbow Carbon & Mins. Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 504 n.93 (Del. 2019) (cleaned up).[7]

The implied duty to act reasonably is not limited to the contracting parties. When a contract delegates decision-making authority to a third party, courts have long held that the third party is also bound to exercise the authority in good faith—even when the delegation is otherwise intended to be absolute. For example, when a building contract categorically authorizes an engineer to make practical judgments about the construction's execution, the engineer's decisions are "final and conclusive," unless of course he committed "such mistakes as … would imply bad faith." *Martinsburg & P.R. Co. v. March*, 114 U.S. 549, 554 (1885). The law always "presumes" the parties "did not intend to waive" an objection in such circumstances, which would exceed a party's justifiable expectations. *Id.*; *accord Chicago, S.F. & C.R. Co. v. Price*, 138 U.S. 185, 193 (1891). That rule has been "universally applied by the authorities" for over a century. *George S. Chatfield Co. v. O'Neill*, 93 A. 133, 133 (Conn. 1915); *see also Boettler v. Tendick*, 11 S.W. 497, 498-500

[7] *See also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 437 (Del. 2005) (implied covenant of good faith and fair dealing does not require actual "bad faith"); *Jones v. Miss. Inst. of Higher Learning*, 264 So.3d 9, 26 (Miss. 2018) ("breach of duty of good faith may be proven without proof of malice" (cleaned up)); Judicial Council of California Civil Jury Instructions § 2330 (implied obligation of good faith and fair dealing does not require "the insurer to *intend* to deprive the insured of the benefits of the policy" (emphasis added)).

(Tex. 1889) (satisfaction of architect); *City Street Imp. Co. v. Marysville*, 101 P. 308, 313 (Cal. 1909) (same).

Similarly, when performance of a contract hinges on the determination by some government official, there is an implicit requirement that the official act reasonably. In *Kihlberg v. United States*, 97 U.S. 398 (1878), for example, a government contract "designat[ed] a particular" New Mexico official "with power not simply to ascertain, but to fix, the distances which should govern in the settlement of the contractor's accounts for transportation." *Id.* at 401. Under those terms, this Court recognized that the determination of the official was "conclusive." *Id.* at 402. Still, that determination would not bind if the official made "such gross mistake as would necessarily imply bad faith." *Id.*; *accord Sweeney v. United States*, 109 U.S. 618, 620 (1883).

This principle has obvious application to appeal waivers. Plea agreements recognize that the trial court will make a discretionary sentencing determination. In this case, for example, the judge had "sole discretion" to choose a sentence. Pet.App.10a. The appeal waiver purports to make that determination conclusive. Pet.App.6a. At the same time, under ordinary contract principles, "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). If the judge exercises his sentencing discretion in a way that unreasonably shatters the parties' justifiable expectations—for instance, by unexpectedly and unlawfully requiring a defendant who plead guilty to a financial crime to undertake unwanted medical treatment or procedures—an appeal challenging that unreasonable decision may properly follow.

Supervening Frustration of Purpose. Courts will also excuse a party from performing its obligations under a contract if, after a contract is made, "the hopes, purposes, or objects of the entire contract or one of the parties have been frustrated by supervening events." 14 Corbin, *supra*, § 77.1. There are generally three requirements for the doctrine to apply: (1) "[t]he object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense," (2) "[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract," and (3) "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." Restatement § 265 cmt. a. "The rationale behind the doctrine[]" is "that there is an 'implied term' of the contract that such extraordinary circumstances will not occur." *Id.* ch. 11 introductory note.

This contract defense too has an obvious application to appeal waivers. Defendants often plead guilty in exchange for some certainty in outcome and to avoid the risk of some higher penalty or sentence. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1974-75 (1992). And criminal defendants rightfully assume that although the court retains sentencing discretion after accepting the plea, the court will impose a sentence within the outer bounds of the law. If, however, "through no fault of either party," the judge imposes an unexpected, unlawful sentence, that supervening event "destroy[s] the basis of the contract." *Bunner*, 134 F.3d at 1004. The defendant is therefore "discharged from performing" the obligation of the appeal waiver. *Id.*

3. Centuries of experience prove that the narrow defenses discussed above further rather than frustrate the

purposes of contract law. They ensure that terms are reliably enforceable, while also assuring parties that they can enter agreements without fear that they will remain bound to the mast if the ship sinks. The Fifth Circuit correctly recognizes such reasonable-expectations-based defenses to appeal waivers in some circumstances. But as the preceding discussion makes clear, contract law does not favor one type of unfair surprise to the exclusion of all others. Recognizing expectations-based defenses to appeal waivers in some circumstances compels recognizing the same defenses in at least some other circumstances as well.

The Fifth Circuit's decision to apply reasonable expectations principles to sentences above the statutory maximum, but not to other kinds of unfairly surprising sentences, is particularly odd. Yes, defendants enter plea agreements with the justified expectation that they will receive a sentence within statutory bounds, so a sentence above that maximum is appealable notwithstanding broad appeal waivers. But other sentences can defy defendants' reasonable expectations just a surely. Defendants are plainly justified in "rely[ing] on the fact," *West*, 138 F.4th at 362 (Oldham, J., dissenting), that a district court will not sentence them based on their race, unconstitutionally limit their speech or religious rights, or otherwise impose conditions of supervised release that exceed the bounds of what Congress and the Constitution permit, *see Yemitan*, 70 F.3d at 748; *United States v. Hahn*, 359 F.3d 1315, 1330-31 (10th Cir. 2004) (en banc) (Lucero, J., concurring). Such sentences can upset law-backed expectations as much as (if not more than) a sentence of 15 years and a day for a 15-year crime. Yet the Fifth Circuit recognizes only the latter exception. There is no logical reason for that outcome.

B. The Fifth Circuit's Approach Is Unfair and Unnecessary

The Fifth Circuit's decision to recognize only two exceptions to appeal waivers unnecessarily greenlights absurd and oppressive results that would never be permissible under ordinary contract law.

1. As the government recently told the en banc Ninth Circuit, the Fifth Circuit's rule is "draconian."[8] The Fifth Circuit's artificial bar on raising other traditional contract defenses would leave unchecked sentences that patently exceed judicial authority and any justifiable expectation of the contracting parties:

- A judge could require a defendant to submit to public flogging by his probation officer as a condition of supervised release. *Cf. United States v. Keele*, 755 F.3d 752, 756-57 (5th Cir. 2014) (holding that even sentences that violate the Eighth Amendment are unappealable).
- A judge could announce that he imposed a particular sentence or condition of release based on the defendant's race, religion, or national origin. *Cf. United States v. Jacobson*, 15 F.3d 19, 22-23 (2d Cir. 1994).
- A judge could restrict a defendant's ability to attend religious services. *See United States v. Hernandez*, 209 F. Supp. 3d 542 (E.D.N.Y. 2016) (finding violative of First Amendment condition imposed by magistrate judge that prevented defendant from attending his church of choice); *People v. Peck*, 52 Cal. App. 4th 351, 361 (1996) (imposing a probation term preventing the defendant,

[8] Arg. of U.S. at 36:30, *United States v. Atherton*, No. 21-30266 (9th Cir. Sept. 9, 2025) (en banc), https://tinyurl.com/3989xj76.

who was a member of a church that practiced smoking marijuana, from associating with users of marijuana).

- A judge could deem a particular church, synagogue, or mosque to be a good influence and require the defendant to attend for the duration of supervised release. *Cf. In re Richter*, 409 N.Y.S.2d 1013, 1018 (Ct. Judiciary 1977) (describing order that the defendant "attend … a church," but not "a certain named church," and to "report to the court on the sermons, and also to do certain reading").
- A judge could require a defendant to undergo anti-bias training while on supervised release. *Cf. Carter v. Local 556, Trans. Workers Union of Am.*, 156 F.4th 459, 504 (5th Cir. 2025).
- A judge could require, as a condition of supervised release, that the defendant "submit [him]self to castration by chemical means" based on the "research and treatment" by a particular medical institution. *See People v. Gauntlett*, 352 N.W.2d 310, 313-14 (Mich. Ct. App. 1984) (per curiam), modified, 353 N.W.2d 463 (Mich. 1984).
- A judge could order a woman not to get pregnant as a condition of probation. *People v. Zaring*, 10 Cal. Rptr. 2d 263, 267, 270-71 (Ct. App. 1992).
- A judge could order a man not to "cause the conception of another child other than to his wife, unless he can demonstrate he is fully providing support to" his current children. *United States v. Smith*, 972 F.2d 960, 961 (8th Cir. 1992) (cleaned up).
- A judge could require that as a condition of supervised release, the defendant contribute money to

favored charities or interest groups. *Cf. In re Davis*, 946 P.2d 1033, 1045 (Nev. 1997).

Or consider the facts of this case. The right to be free from coerced medical treatment is fundamental—in fact, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (citation omitted). When Hunter pleaded guilty to aiding and abetting wire fraud, he had absolutely no reason to believe that doing so would waive that "sacred" right to bodily integrity and subject him to mandatory medication. Indeed, no reasonable person in Hunter's circumstance would expect that pleading guilty to a financial crime could result in him having to follow a district court's preferred regimen for dealing with a decades-old, self-reported childhood mental health concerns. Yet the Fifth Circuit's categorical rule precludes defendants like Hunter from even *arguing* that their appeal waivers do not bar review of such sentences.

And that is true no matter what medical treatment a district court orders. Here, the court followed probation's recommendation, which justified forced medication on the belief that treatment would "assist the probation officer in providing services to the defendant while on supervision." *United States v. Hunter*, No. 4:23-cr-85 (S.D. Tex. Apr. 23, 2024), Dkt. 125, at 24. But that belief would justify sentencing a defendant to anything a probation officer deems helpful in combatting depression or anxiety. Regular exercise or yoga during supervised release? Get a goldendoodle? Ozempic to lose some weight? Talk therapy because the judge suspects the defendant's mental illness stems from issues of gender and sexuality? Electroconvulsive therapy and ketamine? *See* Mayo Clinic,

Treatment-Resistant Depression (Apr. 2021), https://tinyurl.com/2twwrd6k. None of these sentences would be appealable under the Fifth Circuit's approach. Nor would terms of supervised release forbidding Tylenol during pregnancy or mandating sterilization for a disabled defendant, because "[t]hree generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927).

2. The Fifth Circuit's rule is also unnecessary. Contract-law defenses are narrow and always applied with a view to contract law's fundamental principle that "[p]arties have a right to enter into good and bad contracts" and contract law "enforces both." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). Faithfully applying contract law to appeal waivers would therefore give appeal waivers bite in all but the most extreme circumstances.

Experience bears this out. Every circuit with criminal jurisdiction recognizes at least some additional exceptions beyond the two identified by the Fifth Circuit. Pet. 7-13. The sky has not fallen. To the contrary, appeal waiver defenses "occupy a very circumscribed area of [the lower courts'] jurisprudence." *Lajeunesse*, 85 F.4th at 692 (cleaned up). Outside the Fifth Circuit, a garden-variety "allegation that the sentencing judge misapplied the Sentencing Guidelines or abused his or her discretion is not subject to appeal." *United States v. Adams*, 780 F.3d 1182, 1184 (D.C. Cir. 2015) (citing *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003)); *accord United States v. Boudreau*, 58 F.4th 26, 33 (1st Cir. 2023). After all, in entering an appeal waiver, the defendant plainly "agree[s] to forgo" such run of the mill "procedural and substantive challenges." *See Adams*, 780 F.3d at 1184. While no defendant expects that his financial conviction will unlawfully result in forced medication, regularly complained-of guidelines and discretion-based sentencing

errors comprise "precisely the risk [the defendant] assume[s] by agreeing to the waiver in the first place." *See United States v. Guttierrez*, 133 F.4th 999, 1010 (10th Cir. 2025).

C. The Government's Quasi-Defense of the Fifth Circuit's Rule Is Unpersuasive

1. The government does not attempt to justify the Fifth Circuit's recognition of only two exceptions to appeal waivers or its selective application of contract doctrines. Instead, the government appears to take the extreme view that knowing and voluntary waivers of rights are *always* enforceable. Br. in. Opp. 10. That position, which sweeps well beyond even the Fifth Circuit's onerous rule, does not withstand scrutiny.

As explained, it is well established that even clear and otherwise enforceable contract terms are subject to defenses in certain circumstances. *See supra* pp. 18-25. The government is unsurprisingly unable to find any contract-law authority for its view that "unfair surprise" and "oppress[ion]" are categorically irrelevant in the context of plea agreements. *See* Br. in Opp. 10 (citation omitted). The government relies on a Ninth Circuit case, claiming that it supports the proposition that a knowing and voluntary appeal waiver "giv[es] up all appeals, no matter what unforeseen events may happen." Br. in Opp. 10 (quoting *United States v. Goodall*, 21 F.4th 555, 562 (9th Cir. 2021)). But the Ninth Circuit, like every court of appeals, recognizes that there are situations in which a knowing and voluntary appeal waiver is nonetheless unenforceable. Indeed, *Goodall* specifically recognized that an appeal waiver does not foreclose an appeal of some "illegal sentence[s]," given "the inherent uncertainty in sentencing." 21 F.4th at 563.

The government's no-exceptions position would apparently countenance results that not even the Fifth Circuit's rule can stomach. With no statutory-maximum exception, a knowing and voluntary appeal waiver would bind even a defendant who is sentenced to death after pleading guilty to federal-land trespass or a securities infraction.

The government's argument is especially surprising given its statements elsewhere. The government recently urged the Ninth Circuit to adopt a "manifest injustice" exception because, under traditional contract doctrine, appeal waivers are not categorically enforceable. Arg. of U.S. at 44:38-45:04, 45:28-45:58, *United States v. Atherton*, No. 21-30266 (9th Cir. Sept. 9, 2025) (en banc), https://tinyurl.com/3989xj76. This is not a new position. For example, when advising its attorneys regarding plea agreements, the Department instructs that an appeal waiver "does not waive all claims on appeal," and that, "[f]or example," courts will review a defendant's claim that he "was sentenced on the basis of race." U.S. Dep't of Just., Crim. Resource Manual § 626. Such a claim would not be cognizable under the Fifth Circuit's rule or the government's new apparent position.

2. The government's remaining arguments are equally lacking in merit.

The government emphasizes that the right to appeal a criminal sentence is generally statutory, rather than constitutional. *See* Br. in Opp. 9-10. But the source of the right is irrelevant. There is no constitutional right to get a refund for widgets with latent defects, or to obtain a second opinion on hail damage appraisals. Yet provisions waiving those non-constitutional rights may still be unenforceable in certain circumstances. *See supra* pp. 18-25. Similarly, there is no unwaivable right to bring suit in a particular forum. Yet this Court held that forum selection

clauses, while "prima facie valid," are not enforceable if the resisting party can "clearly show that enforcement would be unreasonable and unjust." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972); *see* 7 Williston, *supra*, § 15:17.

The same reasoning applies here. Everyone agrees that a defendant can generally waive his right to appeal his sentence. And everyone (including the Fifth Circuit) agrees that a defendant's waiver can be unenforceable in some circumstances. The question is whether, given that agreement, the Fifth Circuit is correct to artificially narrow the range of those circumstances. The source of the right to appeal does not bear on the answer.

In any event, contract law takes account of legislative choices. "In assessing public policy as grounds to invalidate contractual provisions," courts look to "statutory enactments" as well as the "[C]onstitution." *See* 5 Williston, *supra*, § 12:1. Congress' decision to provide a right to appellate review of sentences reflects a public policy choice that impacts the analysis of whether to enforce a waiver of that right under unforeseen or egregious circumstances. At a minimum, it reflects Congress' judgment that sentences sometimes require a second look. Exceptions to appeal waivers reflect that judgment.

The government also implies that permitting exceptions to appeal waivers would be unfair where the government has given up something in exchange for the plea (here, the ability to pursue certain additional charges). In fact, as the Fifth Circuit has recognized, applying contract doctrines in the context of plea agreements can benefit the government. For example, in *United States v. Moulder*, 141 F.3d 568 (5th Cir. 1998), the court held that a basic assumption of a plea agreement was that a defendant's conduct constituted a violation of the offense to which he pleaded guilty. *Id.* at 572. But the

conviction was vacated on collateral review because the defendant could not have been guilty under the statute. *Id.* The Fifth Circuit held that under those circumstances, the government's fundamental assumption was subverted, and it was therefore excused from its obligations under the plea agreement not to recharge the defendant, including for previously uncharged conduct. *Id.*; *accord Bunner*, 134 F.3d at 1004. And as the saying goes, what is sauce for the goose is sauce for the gander. If upended assumptions justify releasing the government from the terms of a plea, the same doctrine should excuse a defendant from his obligation not to appeal when a fundamental assumption—that the district court would not egregiously exceed the legal limits of sentencing—is proven wrong.

Finally, turning to the facts of this case, the government contends that it was not "at all unforeseeable" that the district court would order mandatory unwanted medical treatment. Br. in Opp. 11. Not so. While Congress permits district courts to impose medication requirements in special circumstances, it must be "reasonably related" to the sentencing factors laid out in § 3553(a)(1) and (2), and the court may order "only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2)." 18 U.S.C. § 3563(b). The district court made no such findings to support its forced medication condition. And it did not attempt to demonstrate that forcible medication was reasonably related to the "the nature and circumstances of the offense and the history and characteristics of the defendant" or "the need for the sentence imposed." *Id.* § 3553(a)(1), (2). Nor could it have. No medical professional evaluated Hunter for mental health difficulties. No one suggested that absent medication, Hunter posed a threat to himself or his community. The district court merely adopted the forced medication recommendation

from the probation office, Pet.App.25a, which came from Hunter's "*self-reported* history of mental health diagnoses" that he received at *age ten*. *United States v. Hunter*, No. 4:23-cr-85 (S.D. Tex. Apr. 23, 2024), Dkt. 125 at 19, 24 (emphasis added).

D. The Court Should Hold That Appeal Waivers Generally Do Not Preclude Appellate Review of Egregiously Unjust Sentences

At a minimum, the Court should hold that courts must permit review in the most unforeseen and extreme circumstances, such as when a sentence or sentencing condition is "so lacking in rationality or so wholly unrelated to legitimate sentencing purposes" as to constitute a "miscarriage of justice." *United States v. Rivera-Lopez*, 736 F.3d 633, 636 (1st Cir. 2013). If the Court treats an appeal waiver like a standard contract, such an exception would flow from the application of traditional contract defenses, *see supra* pp. 18-20. But regardless whether contract defenses apply to plea waivers in the usual way, the majority of circuits recognize a safety valve for at least the most extreme cases. *See supra* pp. 29-30. They are correct to do so, for several reasons.

First, as this Court "ha[s] repeatedly stressed," it is "important[t]" to the "Judiciary and the public" for courts to "correct[] grossly prejudicial errors of law that undermine confidence in our legal system." *Greenlaw v. United States*, 554 U.S. 237, 262 (2008) (Alito, J., dissenting). Waivers of rights in the criminal context therefore have limits. For instance, although parties can waive many pivotal objections at trial, "[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts." *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (cleaned up).

The same principle applies to plea agreements. After all, "a federal court is more than a recorder of contracts from whom the parties can purchase relief." *Price v. U.S. Dep't of Just.*, 865 F.3d 676, 689-90 (D.C. Cir. 2017) (Brown, J., dissenting) (cleaned up). "When the nature of the right at issue is one that, if waived, would put the justice system's integrity at stake, no waiver—not even a knowing, voluntary, and intelligent one—is acceptable." *Id.*

Second, plea agreements are not standard two-party agreements; the judiciary is intimately involved in forming and giving legal effect to the contract. The judiciary must review and sanction every plea agreement and in doing so gives it effect. Fed. R. Crim. P. 11(c)(3). With the power to approve and enact plea agreements comes a heightened responsibility to ensure that the judiciary has not contributed to patently unjust outcomes. A similar principle is recognized when it comes to consent decrees. Notwithstanding the parties' consent and the imprimatur of the court, a consent judgment can be modified at least upon a "clear showing of grievous wrong." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (Cardozo, J.); *see also Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 240, 246-48 (1991) (holding that even that standard is not always required).

Third, plea agreements and appeal waivers implicate fundamental separation of powers concerns. The Constitution vests the authority to set the punishment for crimes in Congress and Congress alone. *See, e.g.*, *Whalen v. United States*, 445 U.S. 684, 688-89 (1980). Judges can neither set new rules of conduct nor establish new punishments for crimes—to do so would be to act as a legislature. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). By providing a statutory right to appeal sentences, Congress provided a mechanism to police any

transgression of that separation-of-powers line. So there are limits to parties' ability to waive their way around that mechanism. Because neither judges, nor prosecutors, nor defendants—nor all in collusion together—can create punishments, Judge Bibas has explained that "a defendant cannot waive his right to appeal a sentence unauthorized by Congress." *United States v. Yung*, 37 F.4th 70, 82 (3d Cir. 2022) (permitting appeal of restitution order). Enforcing waiver in that circumstance would be tantamount to the judiciary "crafting [its] own punishment and thus intruding into areas committed to another branch." *Id.* (cleaned up).

Finally, the stakes and context of plea agreements demand at least some safety valves. It is one thing to bind a person to delivering widgets by a particular date. Here, though, "[t]he stakes are not goods or money, but liberty and justice." *United States v. Cruz*, 95 F.4th 106, 110 (3d Cir. 2024) (Bibas, J.). A sentencing court's surprises can result in years of extra imprisonment or subjection to unconscionable conditions of release.

On top of that, the government enjoys "awesome advantages in bargaining power" in negotiating plea agreements. *Lajeunesse*, 85 F.4th at 692 (citation omitted). Prosecutors can "inflate the quantity of charges the defendant faces" by threatening "overlapping, largely duplicative offenses," and they can "inflat[e] the substance of the charges," by threatening charges that the "law, the evidence, or the equities of the case" may not support. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1303, 1313-14 (2018). Often, only the prosecution knows how strong their evidence is, creating "information deficits" that are "much greater … than in civil settlement negotiations." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117

Harv. L. Rev. 2463, 2495 (2004). "Prosecutors can discourage defendants in strong cases from pleading guilty by refusing to make any concessions, while they can make irresistible offers in weak cases." *Id.* at 2473. Indeed, "[p]rosecutorial bluffing is likely to work particularly well against innocent defendants," *id.*, who will begrudgingly accept a "certain (but low) punishment in a plea bargain" rather than risk a life-altering jury verdict, Easterbrook, *Plea Bargaining*, *supra*, at 1969.

Given these asymmetries, courts of appeals uniformly, and correctly, "construe waivers narrowly and against the Government." *See United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014); Edmund A. Costikyan, *Bargaining Life Away: Appellate Rights Waivers and the Death Penalty*, 53 Colum. J.L. & Soc. Probs. 365, 376-77 & n.55 (2020) (collecting cases). For similar reasons, courts should at a minimum read appeal waivers "against the Government and in favor of a defendant's appellate rights" in the most egregious cases. *United States v. Bell*, 915 F.3d 574, 576 (8th Cir. 2019) (citation omitted).

* * *

If "plea bargains are essentially contracts," *Puckett*, 556 U.S. at 137, then defenses drawn from the general law of contact apply. While these defenses are narrow, there is no basis in contract to apply them against appeal waivers only for instances of ineffective assistance of counsel in entering the plea and sentences exceeding the statutory maximum. And even if the Court were to discount the relevance of the contract analogy, it should at least recognize that defendants can appeal manifestly unjust sentences notwithstanding an appeal waiver. Under either scenario, the Court should vacate and remand so that Hunter can argue that his appeal waiver cannot be enforced against his claims, despite his case not falling within the two exceptions recognized by the Fifth Circuit.

II. The Fifth Circuit's Refusal To Enforce Government Acquiescence to Sentencing Judges' Statements of Appellate Rights is Wrong

The Fifth Circuit deems categorically irrelevant all statements made by sentencing judges advising criminal defendants of a "right to appeal." *See United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992); *United States v. Gonzalez*, 259 F.3d 355, 358 (5th Cir. 2001). And it applies that rule even where the government does not object to such a statement. *See Melancon*, 972 F.2d at 568.

In doing so, the Fifth Circuit snubs the well-established rules that contractual provisions and legal arguments can be waived. The Fifth Circuit ignores that agreements can be modified. And the Fifth Circuit defies the fundamental notion that criminal defendants should be able to take district judges at their word. This Court should reject the Fifth Circuit's unconditional approach and remand for the Fifth Circuit to consider whether the district judge's statement and the government's acquiescence here allow Hunter's appeal to go forward.

A. Appeal Waivers in Plea Agreements Can Be Waived and Modified

There are at least three legal principles that bar the government from enforcing a plea agreement's appeal waiver where, as here, the sentencing judge advises the defendant he has a right to appeal.

Waiver. It is black-letter contract law that a party's contractual obligations "may be waived by the other party." 13 Williston, *supra*, § 39:14. A waiver need not be express; it "may be accomplished … impliedly through conduct." *Id.* A waiver can be implied where the waiving party "clearly manifest[s] an intention to waive the provision." *Id.* § 39:27. And a waiver can be implied where one party's conduct "reasonably induce[s] the nonwaiving

party to rely on an apparent waiver of the term or provision to its detriment." *Id.*; *McElroy v. B.F. Goodrich Co.*, 73 F.3d 722, 724 (7th Cir. 1996). Both may be implicated where a district judge advises a criminal defendant of his right to appeal.

To start, it can be clearly inferred from the circumstances that the government waived its right to enforce an appeal waiver. Here, for instance, after the district judge informed Hunter he had "a right to appeal," it asked the very same prosecutor who drafted the plea agreement if he wished to "say anything else." Pet.App.36a. The prosecutor responded: "Your Honor, I believe – well, no. I – no." Pet.App.36a. That decision to say nothing of substance in response to the judge's statement, even when prompted by the judge, "clearly manifested an intention to waive the provision" barring appeals. 13 Williston, *supra*, § 39:27.

Moreover, the government's silence—or express disclaimer of an objection—can cause defendants like Hunter to "rely on an apparent waiver … to [their] detriment." 13 Williston, *supra*, § 39:27. Defendants in Hunter's situation may reasonably choose to file an appeal rather than seek clarification from the district court—"Your Honor, did you *really* mean I could appeal?"—within "14 days after sentencing." *See* Fed. R. Crim. P. 35(a). By the time the government changes its tune by seeking to enforce the appeal waiver, it is too late for a defendant to reverse course. *See id.*

In the worst-case scenario, a defendant who reasonably relies on the district court's statement and government's acquiescence to pursue an appeal may find the government arguing that the defendant's district-court-sanctioned appeal breached the plea agreement. *See United States v. Hare*, 269 F.3d 859, 862 (7th Cir. 2001); *see also United States v. Poindexter*, 492 F.3d 263,

271 (4th Cir. 2007); *United States v. Erwin*, 765 F.3d 219, 234-35 (3d Cir. 2014). The government may argue, as it has before, and the appellate court may hold, as some have before, that the "prosecutor is not bound" by the plea agreement after the defendant appeals, such that the United States "is free to reinstate dismissed charges." *Hare*, 269 F.3d at 862; *see Erwin*, 765 F.3d at 234-35.

Acquiescence. Even putting aside contract law, as a matter of ordinary litigation principles, the government can waive or forfeit its ability to enforce an appeal waiver when it acquiesces to a sentencing judge's statement of appeal rights. "No procedural principle is more familiar to this Court than that a … right may be" forfeited or waived. *See Yakus v. United States*, 321 U.S. 414, 444 (1944). Forfeiture and waiver exist for "good reason." *Puckett*, 556 U.S. at 134. Their "limitation on appellate-court authority" incentivizes the "timely raising" of issues before the district court, which "is ordinarily in the best position" to resolve the issue. *Id.* And they prevent litigants from "sandbagging" the court by "remaining silent about [an] objection," or even "disavow[ing]" an objection, only to "belatedly rais[e]" the issue "if the case does not conclude in [the litigant's] favor." *Id.* (citation omitted); *see Wilkins v. United States*, 598 U.S. 152, 158 (2023).

Those principles apply no less to the government's assertion of an appeal waiver: "[E]ven a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver." *Garza*, 586 U.S. at 238-39. Where the government acquiesces to a district court's "right to appeal" statement, the government's actions may constitute forfeiture or even waiver, depending on the surrounding circumstances. *See Puckett*, 556 U.S. at 134.

Modification. A judge's statement that a defendant has a "right to appeal," combined with the government's failure to object, may also constitute a modification of the

plea agreement to allow for an appeal of at least particular aspects of the sentence.

"It is (literally) hornbook contract law that contracting parties are free to amend their agreements after the fact." *Pine Mountain Pres., LLLP v. Comm'r*, 978 F.3d 1200, 1210 (11th Cir. 2020). Such modifications can be binding even absent additional consideration. *See* 28 Williston, *supra*, § 70:154. First, modifications are enforceable absent additional consideration where the modification is "fair and equitable in view of circumstances not anticipated by the parties when the contract was made." Restatement, *supra*, § 89; 28 Williston, *supra*, § 70:154. Second, modifications are enforceable absent consideration where "justice requires enforcement" of the modification "in view of material change of position in reliance" on the modification. Restatement, *supra*, § 89; 28 Williston, *supra*, § 70:156.

Moreover, in certain circumstances, parties can manifest acceptance of a modification "by silence and inaction." Restatement, *supra*, § 69; 2 Williston, *supra*, § 6:67. In the context of a judicial proceeding where a district judge proposes a modification to the plea agreement, the government's acquiescence to the district court's appellate rights statement may be sufficient to constitute acceptance, as it is "reasonable that the [government] should notify the [defendant]" and the court "if [it] does not intend to accept." *See* Restatement, *supra*, § 69; 2 Williston, *supra*, § 6:67.

These principles hold true even where a plea agreement contains a provision purporting to prevent nonwritten modifications. *See* Pet.App.15a. "At common law, an oral agreement is sufficient to modify or rescind a written contract notwithstanding a provision in the written contract purporting to require that subsequent modifications be evidenced by a writing." *See* 10 Williston, *supra*,

§ 29:42. As then-Judge Cardozo put it, modification, "though oral, … acquits [a party] of a breach of contract" notwithstanding a "covenant that there shall be no waiver or amendment not evidenced by a writing." *Beatty v. Guggenheim Expl. Co.*, 122 N.E. 378, 387-88 (N.Y. 1919).

Hunter's case illustrates these principles. At his sentencing hearing, Hunter objected to the forced-medication condition of supervised release. Pet.App.24a. The district judge nevertheless included the condition in his sentence, but assured Hunter that "[i]f there's a dispute, you can address it to the probation officer," and "[i]f the probation officer can't resolve the dispute, you can address it to me." Pet.App.24a. The district judge subsequently informed Hunter that he "ha[d] a right to appeal." Pet.App.36a.

The district judge's statements were "unambiguous." *United States v. Hernandez-Vega*, 746 F. App'x 631, 631 (9th Cir. 2018); *see United States v. Arias-Espinosa*, 704 F.3d 616, 618-19 (9th Cir. 2012) (contrasting the unambiguous statement "[y]ou have the right to appeal" with the ambiguous statement "you may have a right to appeal"). And they strongly suggest that the district judge's sentence was premised on the notion that Hunter could appeal. After all, a district court may be more inclined to adopt contentious conditions of supervised release if the court believes the defendant has a right to challenge those conditions on appeal.

The record is equally clear that Hunter expressly manifested his acceptance of the judge's unambiguous modification. Pet.App.24a. And when the district judge invited the government to object, it expressly declined to do so. Pet.App.36a. The government's decision not to voice any concerns about the proposed modification, even when asked, similarly manifested its own acceptance. *See* Restatement, *supra*, § 69.

Moreover, even were the district court simply operating under the misimpression that Hunter could appeal, Hunter's reliance on the apparent modification also makes it valid. Oral modifications without consideration are enforceable "to the extent that justice requires enforcement in view of material change of position in reliance" on the modification. Restatement, *supra*, § 89; *see Billman v. V.I. Equities Corp.*, 743 F.2d 1021, 1024 (3d Cir. 1984). By choosing to appeal instead of filing a motion to "correct [the] sentence" within "14 days after sentencing," Fed. R. Crim. P. 35(a), Hunter relied on the district judge's statement, causing a "material change of position." Restatement, *supra*, § 89. And the government certainly cannot claim prejudice given its lack of contemporaneous objection. If anything, the government's failure to object prejudiced *Hunter*. The government's silence deprived the district court of an opportunity to either remove the mandatory-medication condition (if the district court incorrectly assumed Hunter had an appeal right) or require amendment of the plea agreement in writing (if the district court intended to modify the plea to permit appeal, and the government objected to the oral modification).

Thus, at a minimum, the Court should vacate and remand for clarification of the extent to which the district court's sentence was predicated on Hunter having a right to appeal. *See United States v. Liriano-Blanco*, 510 F.3d 168, 174 (2d Cir. 2007) (remanding to the district court because it was unknown whether its sentence may have been based on its "mistaken view that [the defendant] was entitled to appeal").

B. The Fifth Circuit's Rule Prevents Criminal Defendants from Taking Judges at their Word

In turning a blind eye to all statements made by sentencing judges advising criminal defendants of a "right to

appeal," the Fifth Circuit ignores the fundamental principle that "criminal defendants should be entitled to take the statements of district court judges" for their "plain meaning." *United States v. Godoy*, 706 F.3d 493, 495 (D.C. Cir. 2013); *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995).

Throughout the criminal process, the law requires district judges to accurately explain proceedings to criminal defendants and entitles criminal defendants to trust those explanations. As one example, before a court may "accept[] a plea of guilty," "the court must address the defendant personally in open court" and "inform the defendant of" various rights and the impact of a guilty plea on those rights, ensuring "that the defendant understands" each one. Fed. R. Crim. P. 11(b). Doing so is necessary to ensure the voluntariness of a plea: "Without adequate notice of the nature of the charge against him … the plea cannot be voluntary." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). Even where a district judge "mischaracterizes" a defendant's rights under the plea agreement, a defendant may "take [the] district court's oral pronouncement … at face value." *United States v. Hunt*, 843 F.3d 1022, 1028 (D.C. Cir. 2016).

As another example, criminal defendants have a right to rely on a district judge's oral sentencing pronouncement, even where it differs from the final written judgment. *See United States v. Diggles*, 957 F.3d 551, 557 (5th Cir. 2020) (en banc); *United States v. Villano*, 816 F.2d 1448, 1450 (10th Cir. 1987) (en banc); *United States v. Weathers*, 631 F.3d 560, 562 (D.C. Cir. 2011). That right is "part of" a "defendant's right to be present for sentencing." *Diggles*, 957 F.3d at 557; *see United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam). The rationale is straightforward: "It is incumbent upon a sentencing judge to choose his words carefully so that the

defendant is aware of his sentence when he leaves the courtroom." *Villano*, 816 F.2d at 1452-53.

What's more, criminal defendants "need to be able to trust the oral pronouncements of district court judges" especially where "the prosecution[] fail[s] to object." *Buchanan*, 59 F.3d at 918; *Godoy*, 706 F.3d at 495. In such a situation, a defendant has no reason to know that the district court's statements are in dispute. So where, as here, "the government made no objection and offered no clarification," the defendant should be allowed to take the "oral pronouncement … at face value" by appealing, even if the oral pronouncement "mischaracterizes the waiver, and even if the waiver is otherwise unambiguous." *Hunt*, 843 F.3d at 1028 (cleaned up).

C. The Fifth Circuit's Reasoning Misses the Mark

Below, the Fifth Circuit relied on circuit precedent to uphold "the validity of the appeal waiver" notwithstanding "the district court's statement at the sentencing hearing that Hunter had a right to appeal." Pet.App.2a (citing *Gonzalez*, 259 F.3d at 358). That line of precedent reasoned that "any confusion at [the] time" of sentencing "has no effect on the validity of the waiver." *Gonzalez*, 259 F.3d at 358.

It is true that "a statement made at the sentencing hearing, even if it was misleading, could not have informed (or misinformed) [Hunter's] decision to waive his right to appeal, which was made at the earlier plea hearing." *United States v. Lee*, 888 F.3d 503, 508 (D.C. Cir. 2018) (Kavanaugh, J.) (cleaned up). But that says nothing about whether the government has forfeited or waived its right to enforce the appeal waiver, whether the plea agreement was modified to eliminate the appeal waiver, or whether the sentencing judge's uncorrected understanding regarding appellate review may have influenced

the sentence. And it does not inform whether defendants should be entitled to rely on judges' post-plea statements about the defendant's rights.

Even the government, in its brief in opposition, did not defend the Fifth Circuit's reasoning. At most, the government argued against a "mechanistic rule that vitiates every appeal waiver in the face of any judicial misstatement that goes uncorrected." Br. in Opp. 14-15. But that is hardly a defense of the Fifth Circuit's own "mechanistic rule," under which a judge's oral authorization to appeal is never relevant. And it is not responsive to Hunter's actual argument, which is simply that courts should "conduct[] a case-specific examination," Br. in Opp. 15, to determine whether a district court's statement, and the government's failure to object, counsels against enforcing an appeal waiver.

* * *

The Fifth Circuit refuses to consider arguments that sentencing judges' "right to appeal" statements, along with governmental acquiescence, allow a criminal defendant to appeal. That absolute bar ignores well-established doctrines of waiver and contract modification. And it prevents criminal defendants from taking district judges at their word. This Court should vacate and remand so Hunter can argue that his appeal should proceed. At a minimum, however, the Court should direct the Fifth Circuit to remand to the district court for consideration whether Hunter's plea agreement was modified at sentencing and whether the sentence was premised upon Hunter having a right to appeal.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

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