No. 24-1063

IN THE
Supreme Court of the United States

MUNSON P. HUNTER, III,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The National Association of Federal Defenders (NAFD) submits this brief as *amicus curiae* in support of Petitioner.[1]

NAFD was founded in 1995 as a nationwide, volunteer organization of attorneys who work for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A. A guiding principle of NAFD is to promote the fair administration of justice in federal courts by appearing as amicus curiae in litigation relating to issues affecting indigent criminal

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

defendants. Every year, federal defenders represent tens of thousands of indigent criminal defendants in federal courts—including many defendants impacted by broad waivers of their appellate rights and the strict enforcement of those waivers. Accordingly, NAFD members have particular expertise and interest in the subject matter of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. This Court should carefully consider the realities of the criminal justice system when deciding this case.

The American criminal justice system is a system of pleas, not trials. That reliance on negotiated deals to resolve criminal prosecutions has only increased in recent years. And today, nearly every federal conviction is the result of a guilty plea.

That should be unsurprising. Structural aspects of the criminal justice system combine to make it difficult for defendants to reject any proposed deal. Broad and overlapping criminal statutes with severe mandatory minimum sentences provide prosecutors with tremendous leverage and create extreme bargaining disparities in the plea-bargaining process. And defendants who choose to go to trial automatically face longer sentences due to loss of the Sentencing Guidelines' reductions applicable only to those defendants who plead guilty.

Moreover, in some districts, prosecutors rely on rigid, one-size-fits-all plea agreements that treat all terms—including the waiver of appellate rights—as non-negotiable. Thus, in practice, appeal waivers are

fixed features of most every case, rather than a part of a bargained for exchange.

These practical realities—the near exclusive use of plea agreements to resolve criminal cases, the structural incentives to plead guilty, and the fact that plea agreement terms are often not subject to negotiation—should inform the Court's analysis in this case. That context undermines the view that the broadly worded waivers in plea agreements are truly intelligent and voluntary. And for that reason, broadly worded waivers in plea agreements should not categorically insulate unconstitutional convictions or egregious sentencing errors from appellate review. At the very least, there must be judicially recognized exceptions to the enforcement of broad and blind appellate waivers to address instances where their enforcement would result in a miscarriage of justice.

II. Preserving a narrow path to direct appellate review maximizes judicial economy.

Ruling for the petitioner will not lead to a flood of new appeals. The four courts of appeals that have already embraced Petitioner's requested rule have not been overrun with additional litigation. In the last ten years, those courts have resolved the merits of only four additional cases falling within the narrow exception for appeals raising serious questions about the government's power to convict or punish. Of those four cases, the defendant prevailed in three of them; and in the fourth, the court noted that the defendant's challenge would have been successful but for fine distinctions in unsettled circuit precedent. The limited number of cases, and the defendants' success rate in those cases, illustrates that the courts of appeals are

able to judiciously administer the requested exception.

If anything, ruling for Petitioner would *reduce* the strain on judicial resources because defendants will be more comfortable agreeing to plead guilty when they have assurances that there is an avenue for remedying egregious sentencing errors. Allowing direct appeals in a narrow class of cases would also promote the swift resolution of consequential legal questions.

The federal courts' experience with other, similar legal doctrines also suggests that Petitioner's requested rule is judicially manageable and will not lead to a significant increase in litigation. Similar exceptions—like those applied in the habeas context and with regard to the preservation of appellate arguments—have proven workable through the years. A rule for Petitioner would be no different.

This Court should reverse the judgment of the Fifth Circuit.

ARGUMENT

I. STRUCTURAL ASPECTS OF THE CRIMINAL ADJUDICATION PROCESS MAKE APPELLATE WAIVERS MORE LIKELY.

The rights of the defendant "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012). Structural aspects of the criminal adjudication system make guilty pleas near inevitable. And waivers of appellate rights are increasingly common in plea agreements. Because the waiver of appellate rights as part of a plea agreement is more the product

of a prosecutor's immense bargaining power than of a negotiated deal, guilty pleas and accompanying waivers should not be viewed as conclusive bars to substantive error correction in every case.

A. Criminal Defendants Almost Always Plead Guilty.

Criminal prosecution in America is "for the most part a system of pleas"—"not a system of trials." *Lafler*, 566 U.S. at 170. Indeed, today, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri* v. *Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1912 (1992)). It is thus "the negotiation of a plea bargain"—"rather than the unfolding of a trial"—that determines who will be adjudged guilty. *Id.*

That reliance on pleas has increased in recent years. When this Court decided *Brady* v. *United States*, it noted that "well over three-fourths of the criminal convictions in this country rest[ed] on pleas of guilty." 397 U.S. 742, 752 (1970). And just fifty years later, it is now true that more than 97% of federal criminal convictions are the product of guilty pleas. *See* United States Sentencing Commission, 2024 Sourcebook of Federal Sentencing Statistics, Table 11, https://perma.cc/P4AZ-FUCX; *see also* Letter from William P. Barr, Former U.S. Att'y Gen., et al. to Harry Reid, Majority Leader, U.S. Senate, and Mitch McConnell, Minority Leader, U.S. Senate (May 12, 2014), https://perma.cc/R376-XYMF (noting that "[plea] bargaining is overwhelmingly the way federal

cases are resolved"). And the same has been true for the last ten years.[2]

B. Appeal Waivers Are A Common Feature Of Modern Plea Bargains.

The terms of plea agreements are typically "boilerplate," meaning it is rare for a defendant to succeed in altering standard terms like an appeal waiver. *See* Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 75 (2015). Across districts, prosecutors often—and, in some districts, always—present plea offers as take-it-or-leave-it propositions. That is, prosecutors "may decide early on in the case that only a certain penalty is appropriate and refuse to negotiate it." Cynthia Alkon, *Hard Bargaining in Plea Bargaining*, 17 Nev. L. J. 401, 411 (2017); *see also* G. Nicholas Herman, *Plea Bargaining* 75-87 (2012) (listing "common" plea bargaining tactics, including hard bargaining tactics such as take-it-or-leave-it plea offers).

"Increasingly," that boilerplate language requires "many criminal defendants . . . to waive their right to appeal as a condition of the plea bargain." Note, *An Unjust Bargain: Plea Bargains and Waiver of the*

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[2] *See* 2024 Sourcebook of Federal Sentencing Statistics, *supra*, Table 11 (FY 2024); 2023 Sourcebook of Federal Sentencing Statistics, Table 11 (FY 2023); 2018 Sourcebook of Federal Sentencing Statistics, Table 11 (FY 2022); 2021 Sourcebook of Federal Sentencing Statistics, Table 11 (FY 2021); 2020 Sourcebook of Federal Sentencing Statistics, Table 11 (FY 2020); U.S. Sentencing Comm'n, 2019 Sourcebook of Federal Sentencing Statistics, Table 11 (FY 2019); 2018 Sourcebook of Federal Sentencing Statistics, Table 11 (FY 2018); 2017 Sourcebook of Federal Sentencing Statistics, Figure C (FYs 2013-17). Archived reports are available at https://tinyurl.com/3j3tf5kt.

Right to Appeal, 51 B.C. L. Rev. 871, 873 (2010) (collecting cases).

This phenomenon is new. Appeal waivers were not regularly included in plea agreements until just a few decades ago. *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 128-129 & nn.7-8 (1995) (stating that appeal waivers "emerged" in 1990s and citing decisions from 1982 and 1986 that called these waivers "uncommon" and "not a widespread practice"); *see also United States* v. *Gomez-Perez*, 215 F.3d 315, 318 (2d Cir. 2000) (noting that appellate waivers "are a relatively recent phenomenon").

But in that short time, the use of appeal waivers has exploded. In 1999, the Federal Rules of Criminal Procedure were "amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights." Advisory Committee's Notes on 1999 Amendment to Fed. R. Crim. P. 11 (discussing introduction of a requirement that defendants be advised on the "terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence"). By the mid-2000s, appeal waivers appeared in "nearly two-thirds of the cases settled by plea agreement" in federal court. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005). And as of 2013, appeal waivers have become a boilerplate term in the "standard" plea agreements used by prosecutors in 88 of the 94 federal districts. Klein, et al., *Waiving the Criminal Justice System*, *supra*, at 122 (Appendix H).

C. Structural Aspects Of The Plea Process Pressure Defendants To Trade Away Their Rights.

The criminal code and the sentencing guidelines, coupled with the gravity of the decision to plead, combine to make it overwhelmingly difficult for a defendant to believe he would be better served by taking his case to trial. The plea process is thus, by its nature, exploitative of a defendant's lack of bargaining power when deciding whether to exercise his trial rights or exchange them for some benefit during the penalty phase of his proceedings. And because, as explained above, any such exchange usually includes forfeiting one's right to seek appellate review of any error, including egregious mistakes of law—most of which have yet to occur but can nonetheless result in years-long extensions of a defendant's prison term—the broad waiver of direct appeal can never truly be knowing or voluntary. That reality must inform this Court's analysis of their enforcement.

1. Broad, Overlapping Criminal Statutes And The Sentencing Guidelines Are Calibrated To Entice Pleas.

a. Flexibilities in the criminal code allow prosecutors to craft indictments in a way that incentivizes pleas. Because "a single episode may fall within the definition of several criminal offenses," prosecutors are able to anchor the plea negotiation through the charging decisions they make. Scott & Stuntz, *Plea Bargaining as Contract*, *supra*, at 1962. This means indictments that charge for all available offenses will necessarily include many overlapping crimes, some of which might carry a mandatory minimum sentence which provide additional leverage. *See Bordenkircher*

v. *Hayes*, 434 U.S. 357 (1978). For the most part, "longer sentences exist on the books largely for bargaining purposes." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006).

Take one particularly stark example: The federal criminal code imposes a five-year mandatory minimum sentence for defendants convicted of "receiving" unlawful images of children, but "possessing" those same images carries no mandatory minimum sentence. *Compare* 18 U.S.C. 2252(a)(2) (receipt), *with* 18 U.S.C. 2252(a)(4) (possession). The problem is that it is impossible to "receive" illicit material without "possessing" it; and save for the rare defendant who is responsible for creation, every person who "possesses" such material at some point had to "receive" it. *See United States* v. *Richardson*, 238 F.3d 837, 839 (7th Cir. 2001) (Posner, J.) (discussing this "puzzle"). For that reason—even in a case where a prosecutor believes the mandatory minimum sentence would be inappropriate—that prosecutor may charge a defendant with "receipt" before ultimately offering an agreement where the defendant would be convicted only for the virtually identical crime of "possession." Whether they wanted to or not, defendants would have every reason to accept that offer. *See* Stephen L. Bacon, *A Distinction Without a Difference: "Receipt" and "Possession" of Child Pornography and the Double Jeopardy Problem*, 65 U. Miami L. Rev. 1027, 1035 (2011) (discussing legislative history materials raising the same concern).

Given as much, pleading guilty almost always means a shorter sentence: The average term of imprisonment for defendants who were convicted at trial is

almost three times longer than the term imposed on defendants convicted after a guilty plea. *See* U.S. Dep't of Justice, *2004 Compendium of Federal Justice Statistics* 70 & Table 5.3 (2006), https://perma.cc/JJP6-XE69 (the Department's most recent discussion of the relationship between sentence imposed and mode of conviction); Brian Johnson, *Plea-Trial Difference in Federal Punishment*, 31 Fed. Sent. Rep. 256, 257 (2019) (discussing the widely acknowledged "trial penalty").

b. The Sentencing Guidelines, too, add to the pressure on defendants to relieve the government of its trial burden by pleading guilty. One provision allows prosecutors to incentivize quick pleas by providing for a discretionary decrease of a defendant's offense level where the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1. And defendants are further incentivized to cooperate with the government because doing so increases the chance the government will agree to a sentence lower than the recommended range. *See* U.S.S.G. § 5K1.1 (providing for reduction when defendants provide substantial assistance in the investigation or prosecution of another person—but making the full benefit of that provision available only "[u]pon motion of the government").

Those incentives are more than theoretical. In practice, a prosecutor's choice to make defendant-friendly sentencing recommendations to the judge is generally reserved for cases where plea agreements were entered. In the absence of such agreements, the government rarely moves for downward departures from the Guidelines-recommended sentence. *See* 2024 Sourcebook of Federal Sentencing Statistics, *supra*, Table 33

(showing that less than one-quarter of government-made requests for a downward departure were made in the absence of a plea agreement).

Those premiums on pleading and a prosecutor's unilateral ability to place them on the table (or pull them off it) add to the pressure on defendants to accept an offered agreement.

2. The Pressure To Plead Forces Defendants To Assume The Risk Of Future Sentencing Errors.

Because of the pressures to sign a plea agreement and because those plea agreements often require the waivers of appellate rights, defendants are put to an impossibly difficult choice. They can either go to trial—and risk a longer sentence (because the criminal code and federal sentencing law place a premium on not pleading). Or they can take the prosecutor's deal—and risk a longer sentence (because the judge might go on to make an unreviewable sentencing error after the plea is entered).

True enough, most defendants take the second path. That is because we assume sentencing judges will impose only sentences that comport with constitutional guarantees, statutory limits, and the guardrails supplied by the Sentencing Guidelines. But "[i]n sentencing, as in other areas," district judges can "make mistakes." *Rita* v. *United States*, 551 U.S. 338, 354 (2007). And when they do so in cases where no circuit court is on standby to "correct such mistakes," *id.*, the consequences are severe.

Look no further than this case. As Petitioner explains, it blinks reality to suggest that he contemplated the asserted constitutional violation before he waived his right to challenge it. Of course, when he

signed the plea agreement, he had no reason to predict that, at his sentencing months later, he would be "forced to take all medication a physician might recommend." Hunter Br. 10. A condition requiring him to "undertake unwanted medical treatment or procedures" was not only unexpected, it was also unlawful. *Id.* at 23. And as explained in Petitioner's brief, there is no end in sight as to what other due process violations would be insulated from appellate review under the Fifth Circuit's rule. *See id.* at 26-28 (listing concerning examples). *But see United States* v. *Del Valle-Cruz*, 785 F.3d 48, 51-52 (1st Cir. 2015) (avoiding appeal waiver when judge imposed due-process offending condition of supervised release); *United States* v. *Cabrera-Rivera*, 893 F.3d 14, 18 (1st Cir. 2018) (same).

There is also another class of appellate claims that warrant protection from broad waivers: sentencing errors so outside the bounds of established procedures that the parties could not have possibly negotiated the plea agreement with the risk of those errors in mind. For example, in *United States* v. *Garcia*, the court of appeals enforced an appeal waiver even though the sentence imposed was unambiguously based on a sentencing consideration that both Congress and this Court have found improper. *Compare* 18 U.S.C. § 3582(a) (instructing courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation"), *and Tapia* v. *United States*, 564 U.S. 319, 330 (2011) ("Each actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender"), *with United States* v. *Garcia*, No. 22-2561, 2023 WL 7986442, at *1 (2d Cir. Nov. 17, 2023) (enforcing appeal waiver after discussing the

district judge's belief that a longer sentence was "very desirable" because the defendant could devote time to substance abuse treatment, education, and mental health treatment). Or take *United States* v. *Toebbe*, where the court enforced an appeal waiver despite the district judge's imposition of a sentence more than seven times longer than the one agreed to in the plea agreement and requested by the government. *See* 85 F.4th 190, 204-206 (4th Cir. 2023).

The treatment of such cases is all-the-more troubling in the Fifth Circuit. Consider the facts set out in a pending petition for certiorari. *See Devin Chaney* v. *United States*, No. 24-6543 (filed Feb. 6, 2025). Devin Chaney entered an agreement to plead guilty to committing federal robbery. Prior to sentencing, the U.S. Probation Office calculated Chaney's Sentencing Guidelines range, concluding that he qualified as a "career offender" under U.S.S.G. § 4B1.1(a). That assessment was based, in relevant part, on Probation's determination that Chaney had a prior "controlled substance offense"—specifically, his prior Louisiana state conviction for marijuana distribution. At the time, however, at least two courts of appeal held that violations of state marijuana laws did not qualify as "controlled-substance offenses" when the state defined marijuana to include hemp at the time the defendant was convicted of the supposed predicate. That was true of Chaney's Louisianna conviction.

Although Chaney objected to the presentence report and fully presented the issue, the district court refused to hold argument and summarily overruled Chaney's objection before going on to impose a sentence that was six years too long. Shortly after that sentencing, the Fifth Circuit decided a different case

where it embraced the hemp-related predicate argument Chaney presented to the district court in his case.

When Chaney sought to reraise his undeniably correct argument about his defective predicate, however, his appeal was dismissed on the grounds that he waived his right to lodge it. In many circuits outside of the Fifth Circuit, Chaney's challenge would have been aired on appeal.

These cases (and others like them) lay bare the need for a sensible safety valve that allows for the ventilation of claims challenging clear, significant errors that go far beyond the garden-variety challenges that all agree are fairly foreclosed by the waiver of appellate rights. *Cf.* Hunter Br. 29-30; *see also, e.g.*, *United States* v. *Simmons*, No. 22-1400, 2024 WL 137333, at *1 (2d Cir. Jan. 12, 2024) (rightly noting that the defendant's challenge to the substantive reasonableness of his sentence was "barred by his appeal waiver").

II. APPELLATE CHALLENGES TO PLEA AGREEMENTS WILL NOT IMPAIR THE ADMINISTRATION OF JUSTICE.

A. Petitioner's Requested Exception Is Narrow And Will Not Lead To A Deluge Of Meritless Appeals.

1. Courts of appeals that have crafted meaningful exceptions that avoid rote enforcement of sweeping appeal waivers have done so judiciously. The First Circuit, for example, has adopted a narrow miscarriage-of-justice exception to be applied only in "egregious cases" where the challenged sentencing condition is "so lacking in rationality or so wholly unrelated to legitimate sentencing purposes as to necessitate

invalidating the waiver of appeal." *United States* v. *Boudreau*, 58 F.4th 26, 33 (1st Cir. 2023) (citation omitted); *see also*, *e.g.*, *United States* v. *Morillo*, 910 F.3d 1, 4 (1st Cir. 2018). The Second Circuit presumes that appeal waivers are enforceable and displaces that presumption only for an "extremely narrow" set of exceptions that "occupy a very circumscribed area of [that court's] jurisprudence." *United States* v. *Johnson*, 347 F.3d 412, 415 (2d Cir. 2003) (first quote); *United States* v. *Borden*, 16 F.4th 351, 354-355 (2d Cir. 2021) (second quote). The Fourth Circuit applies appeal waivers to all but a "narrow class of claims." *United States* v. *Singletary*, 75 F.4th 416, 422-423 (4th Cir. 2023); *see also*, *e.g.*, *United States* v. *Moran*, 70 F.4th 797, 802 n.3 (4th Cir. 2023) (collecting cases). And the Ninth Circuit's exception is similarly "limited." *United States* v. *Wells*, 29 F.4th 580, 587 (9th Cir. 2022); *see also*, *e.g.*, *United States* v. *Goodall*, 21 F.4th 555, 563 (9th Cir. 2021). [3]

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[3] Suggestions that the floodgates will open are further undercut by the fact that several states allow defendants who have pleaded guilty to nonetheless raise constitutional challenges to their convictions or sentences. *See*, *e.g.*, *Weeks* v. *State*, 362 P.3d 650, 654 (Okla. Crim. App. 2015) ("We have recognized that following a plea of guilty or *nolo contendere*, the certiorari review process permits a petitioner to raise a facial challenge to the constitutionality of the statute upon which their conviction rests."); *State* v. *Andrews*, 730 N.W.2d 416, 419 (S.D. 2007) ("[W]hile a guilty plea waives a claim that a statute is unconstitutional as applied, it does not waive a claim that a statute is facially unconstitutional."); *Rutti* v. *State*, 100 P.3d 394, 400-401 (Wyo. 2004) ("[C]hallenging the constitutionality of the statute under which the criminal defendant was charged does qualify as a jurisdictional defense," and therefore is not inherently waived by pleading guilty); *Courtney* v. *State*, 904 S.W.2d 907, 910 (Tex. Ct. App.

Across jurisdictions, those finely tuned limitations on the enforcement of appeal waivers have allowed courts to principally resist invitations to expand the exceptions to reach routine appellate challenges. *See Morillo*, 910 F.3d at 4. As one court has explained, the exception is not so broad as to sweep in any and all errors that might render a conviction or sentence legally infirm—"otherwise, the exception would swallow up [judicial] holdings enforcing waivers." *DiBiase* v. *United States*, No. 20-2475, 2023 WL 2376223, at *3 (2d Cir. Mar. 7, 2023). "Relief under the miscarriage of justice exception" is—for better or worse—"often sought but seldom meted out." *Del Valle-Cruz*, 785 F.3d at 56.

To counsel's knowledge, the First, Fourth, and Ninth Circuits have refused to enforce otherwise valid appeal waivers a total of four times in the last ten years—and the Second Circuit has not applied its exception at all. *See Del Valle-Cruz*, 785 F.3d at 51; *Cabrera-Rivera*, 893 F.3d at 18; *Singletary,* 75 F.4th at 419; *United States* v. *Schopp*, 938 F.3d 1053, 1056 (9th Cir. 2019).

1995) ("[W]e now hold that a claim is jurisdictional . . . when it goes to the very power of the State to bring the defendant into court to answer the charge against him. This includes claims of . . . facial unconstitutionality of the statute prescribing the offense alleged," and thus the claim of facial unconstitutionality is not waived by a guilty plea.); *People* v. *Gertz*, 586 N.Y.S.2d 463, 467 (N.Y. Sup. Ct. 1992) (challenging the constitutionality of the statute the defendant is charged with violating presents a "jurisdictional issue[] which preclude[s] waiver"); *State* v. *Olson*, 380 N.W.2d 375, 379 (Wis. Ct. App. 1985) ("A challenge to the facial validity of a statute raises a jurisdictional defense which survives a guilty plea.").

Even if those four cases had not been spread across a decade, they make up a negligible portion of even one year's worth of federal criminal appeals: about five-tenths of one percent. *See* Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics 2025*, https://perma.cc/CX2F-Z6QX (reporting approximately 11,000 criminal appeals in the most recent 12-month period ending March 31 and similar figures for preceding years). And the floodgate arguments do not get much stronger when one considers unsuccessful attempts to invoke the carveouts for miscarriage of justice. A Westlaw search for all opinions where "appeal waiver" and "exception" were used in the same paragraph returned less than 50 decisions published by the Petitioner-favored circuits within the last ten years. Calculated generously, those cases still account for less than half a percent of criminal appeals federal courts see in one year.

2. Nor are the defendants who successfully navigate around their appeal waivers doing so in vain. Appeals that depend on the carveout for challenges to the government's power to convict or punish tend to be successful. Of the four times courts have avoided the unaltered terms of a plea agreement, defendants have succeeded on the merits of three of them.

For example, the First Circuit's decision in *Cabrera-Rivera* underscores why universal enforcement of broad appeal waivers is undesirable. *See* 893 F.3d at 14. There, the defendant asserted that, despite the nature of his conviction, the sentencing court's unexplained imposition of a supervisory condition that prohibited him from contacting his own children constituted a serious deprivation of liberty and contravened clear, on-point precedent from this Court. *Id.* at 27

(citing *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978) (recognizing that "the relationship between parent and child is constitutionally protected")). The only problem was that the plea agreement the defendant signed "included a Waiver of Appeal provision, in which [he] gave up his right to appeal his conviction and sentence." *Id.* at 19 (quotation marks omitted). But recognizing that blind enforcement of that term would work an injustice on the defendant, the court disregarded the waiver, noting that the defendant had met the stringent requirements for avoiding that otherwise proper agreement. *Id.* at 27-28. The court went on to issue a decision in favor of the defendant, striking the offending condition and remanding for resentencing. *Id.* at 34.

Other cases follow a similar pattern: A defendant asserts a meritorious claim; the government invokes a blanket appeal waiver; and the court excuses that waiver in order to avoid an unjust result. *See Del Valle-Cruz*, 785 F.3d 48 (1st Circuit: imposition of unconstitutional condition at sentencing); *Schopp*, 938 F.3d 1053 (9th Circuit: actual innocence).

That leaves the one case where a defendant won the waiver fight but lost on the merits. *See Singletary,* 75 F.4th 416. But, even there, the defendant's appellate arguments were not frivolous. Although it ultimately rejected the defendant's claim that the district judge acted with vindictive motives when resentencing him, the Fourth Circuit panel noted that the defendant's decision to challenge the sentence was justified: "From [the defendant's] perspective, before his appeal, he faced 13 years in prison for both his state and federal offenses; after vindicating his claim on appeal, he will serve more than an additional decade."

Id. at 427. And after acknowledging "some imprecision in the caselaw," *id.* at 424 n.6, the court explained that its rejection of the defendant's claim turned on "fine distinctions" that may have been difficult to appreciate when the challenge was brought, *id.* at 427.

Given that evidence, the risk is slim that courts would be overrun by frivolous claims in the event that this Court accepted Petitioner's proposed rule.

B. Exceptions To Appeal Waivers Generally Promote, Rather Than Undermine, Judicial Economy.

The government has suggested that universal enforcement of appeal waivers serves judicial economy "by enhancing the finality of judgments and sentences and discouraging meritless appeals." BIO at 8. Not so.

Universal enforcement, at times, *undercuts* judicial economy. The availability of direct appellate review, even where that review is limited to egregious errors, makes defendants more likely to enter a plea agreement and avoids additional strain on judicial resources. Direct appeal also allows for quick resolution of important questions related to the government's authority to convict and punish. And, contrary to the government's assertions, avoiding appeal waivers that would work an injustice would have no effect on the finality of criminal judgments.

1. Preserving A Narrow Path To Appellate Review Encourages More Defendants To Enter Into Plea Agreements.

In circuits (like the Fifth) where appeal waivers are strictly enforced, it is not uncommon for defendants who would otherwise plead guilty to take their case to trial—purely in an effort to avoid the non-negotiable

waiver provisions of standard plea agreements. *See* Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. Mich. J.L. Reform 347, 386 n.207 (2015) (noting that "some defendants reject the plea agreement and opt to plea open *or go to trial* in order to protect their right to appeal their sentence" (emphasis added)). And when that happens, the strain on judicial resources no doubt exceeds what would be expended if defendants had the limited opportunity to appeal serious errors that go to the government's ability to convict or punish him.

As the Court noted in *Lefkowitz* v. *Newsome*, permitting constitutional challenges on appeal post-guilty plea is more efficient than forcing a defendant to adopt roundabout procedural strategies in an effort to preserve such a challenge. *See* 420 U.S. 283, 289 (1975). In such a regime, "[t]he guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional claim is invalid." *Id.* at 289-290. That logic applies with full force here.

2. Preserving A Narrow Path To Appellate Review Permits The Expeditious Resolution Of Valid Claims.

Leaving a defendant to attack his conviction or sentence under 28 U.S.C. § 2255, rather than through direct appeal, does not promote judicial economy either. *Contra, e.g.*, *United States* v. *Jennings*, 662 F.3d 988, 992 (8th Cir. 2011) (enforcing appeal waiver despite colorable claim, in part, because that claim could be raised "by way of a § 2255 proceeding"). Instead of a straightforward direct appeal to a circuit court that

can resolve the legal dispute underlying the defendant's claim, federal habeas review can subject both litigants and courts to protracted journeys through a reticulated statutory scheme.

The (ostensible)[4] availability of a circuitous route to the same place is no reason to forgo review on direct appeal. There is no reason to make a defendant hope for an alternative avenue to ventilate his challenge to the propriety of his sentence or his conviction. Quite the contrary: Allowing immediate challenges raising consequential questions following guilty pleas permits courts to swiftly vindicate an individual's interest in not being convicted or punished in a way that exceeds the scope of government authority. Society, too, has an interest in the prompt reining in of such overreach. *See Welch* v. *United States*, 578 U.S. 120, 131 (2016) (noting that there "is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose").

Direct appeals serve both goals, and—especially when taken in a case where factual guilt is admitted—provide courts with uniquely clean vehicles through which to settle purely legal disputes. For that reason, allowing direct appeals in the narrow class of cases where a sentencing court violates a fundamental constitutional or statutory right is important—for courts,

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[4] Often, this collateral review is not even available for defendants who sign plea agreements. In addition to appeal waivers, most federal plea agreements—including Petitioner's (Pet. App. 6a)—also include collateral-attack waivers in their boilerplate plea agreement. *See* Klein et al., *Waiving the Criminal Justice System*, *supra*, at 87 (noting that more than half of the boilerplate plea agreements include a collateral attack waiver).

defendants, and society, alike. *Cf. United States* v. *Carter*, 87 F.4th 217, 225-226 (4th Cir. 2023).

3. Preserving A Narrow Path To Appellate Review Would Have No Effect On The Finality Of Criminal Judgments.

Invocations of the institutional interest in finality are also overblown. *Contra* BIO at 8. Even the most sweeping waivers do not guarantee that a case will not find its way to the courts of appeal.

For example, federal prosecutors and courts have each acknowledged that certain claims cannot or should not be waived. Federal prosecutors do not require waivers of ineffective-assistance-of-counsel claims, even where circuit precedent does not preserve such claims. *See* U.S. Dep't of Justice, *Department Policy on Waivers of Claims of Ineffective Assistance of Counsel* (Oct. 14, 2014). And this Court has similarly recognized that "[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 discredit[ing] the federal courts." *United States* v. *Mezzanatto*, 513 U.S. 196, 204 (1995). Given those carveouts, judgments that follow waiver-containing plea agreements are regularly subject to reopening.

Moreover, many courts have construed appeal waivers to allow the government to appeal decisions that *it* does not agree with. *See*, *e.g.*, *United States* v. *Hammond*, 742 F.3d 880, 883 (9th Cir. 2014) (rejecting the argument that courts should imply waivers of the government's right to appeal because "nothing in the nature of plea agreements requires that each promise must be matched against a mutual and similar promise by the other side" (quotation marks omitted)). In

other words, the waivers at issue apply to the defendant alone. *See United States* v. *Bartoli*, 728 F. App'x 424, 427 (6th Cir. 2018) (concluding that the waiver "imposes various restrictions on [the defendant]'s right to appeal, but not the government's"); *see also* U.S. Dep't of Justice, Crim. Resource Manual § 626 ("The use of a sentencing appeal waiver in a plea agreement to bar an appeal by the defendant does not require the government to waive its right to appeal an adverse sentencing ruling.").

This partial finality is no finality at all. As the Fourth Circuit has explained, "[t]he finality of judgments and sentences imposed is no more preserved by appeals by the government than by appeals by the defendant," and to believe otherwise would be "one-sided." *United States* v. *Guevara*, 941 F.2d 1299, 1299-1300 (4th Cir. 1991).[5] Thus, "[a]ny suggestion that unilateral waivers of the right to appeal promote finality is"—in the words of at least one judge—"disingenuous." *United States* v. *Mutschler*, 152 F. Supp. 3d 1332, 1340 (W.D. Wash. 2016). After all, waivers "are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however

[5] Despite this decision requiring that generic appeal waivers be read to apply bilaterally, the state of play in the Fourth Circuit is largely identical to that in other circuits. Prosecutors in the Fourth Circuit have reworked the standard plea agreement to expressly preserve the government's right to appeal: "The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law." *Cf.*, *e.g.*, *United States* v. *Smith*, 134 F.4th 248, 252 (4th Cir. 2025) (quoting agreement).

harsh, unfair, or unforeseeable)." *United States* v. *Teeter*, 257 F.3d 14, 25 (1st Cir. 2001).

C. Providing For An Exception In This Context Is Consistent With Other Exceptions In Criminal Law.

The concern that preserving direct review for a narrow class of claims ignores that the criminal law already provides for injustice-avoiding exceptions like the one requested here. Those exceptions have proven workable, manageable, and essential to the fairness of the adjudication of criminal cases.

Start with the exceptions to procedural default. Although procedural default rules are strictly applied and generally designed to conserve federal judicial resources and to maintain the finality of state criminal judgments, courts recognize exceptions to those rules. Namely, a challenger's failure to comply with state procedural rules is excused when he can show "cause and prejudice"—that is, when he can show a reason for the failure and that it is likely that, but for the asserted error, he would not have been convicted. *See United States* v. *Dominguez Benitez*, 542 U.S. 74, 81-83 (2004); *see also Wainwright* v. *Sykes*, 433 U.S. 72, 90-91 (1977) ("The cause-and-prejudice exception . . . will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.").

Courts have also developed exceptions to other would-be bars to habeas relief in an effort to prevent "fundamental miscarriages of justice" in cases plausibly asserting claims of actual innocence. Those

exceptions allay arguments that a petitioner is unable to seek habeas because of abusive or successive uses of the writ, *Herrera* v. *Collins,* 506 U.S. 390, 404 (1993); that the petitioners claim is procedurally defaulted, *House* v. *Bell*, 547 U.S. 518, 537-538 (2006); that the claim was not fairly presented on direct appeal, *Bousley* v. *United States,* 523 U.S. 614, 622 (1998); that the claim was brought outside the statute-set filing limitations period, *McQuiggin* v. *Perkins*, 569 U.S. 383, 394 (2013); or that the claim is otherwise procedurally barred, *id.* at 392 (collecting examples). That exception, this Court has said, "is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U.S. at 404 (quotation marks omitted).

Preservation rules, too, are excepted when justice requires. The plain error exception, for example, permits courts to address a forfeited claim if the asserted error is plain and has a likely effect on the outcome of the proceeding and letting it stand would seriously affect the fairness, integrity, or public reputation of the judicial process. *See Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); Fed R. Crim. P. 52(b) (codifying standard set out in *United States* v. *Olano*, 507 U.S. 725 (1993)).

In each context, courts have recognized that justice mandates that even the most judicial-resource-conserving rules cannot be indiscriminately applied to every case within their technical reach. Instead, those rules must, at times, give way for narrowly crafted exceptions. *See Dretke* v. *Haley*, 541 U.S. 386, 393 (2004*); McQuiggin*, 569 U.S. at 393; *Puckett* v. *United States*, 556 U.S. 129, 135 (2009).

The same would be true here. As explained above, the rule Petitioner requests would be similarly circumscribed to allow only the most consequential questions to be raised notwithstanding a broad appeal waiver.

CONCLUSION

For the foregoing reasons and those in Petitioner's brief, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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