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 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF 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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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in this Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL's members are repeat players in plea negotiations with the government and have an acute interest in ensuring that their clients' constitutional rights are protected at every stage of litigation. They routinely represent defendants grappling with the decision whether to enter into a plea agreement and agree to an appeal waiver. This case presents an

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[1] Counsel for *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution.

opportunity to confirm that appeal waivers cannot shield unconstitutional convictions or sentences from appellate review.

SUMMARY OF ARGUMENT

Every day, criminal defendants plead guilty to charges. In doing so, they forgo valuable constitutional and statutory rights while subjecting themselves to substantial restraints on their liberty. Plea agreements are reached through negotiations characterized by uneven bargaining power and frequently include terms offered by the government on a take-it-or-leave-it basis. These terms often include broad waivers of defendants' rights to appeal or collaterally attack their convictions and sentences in all but the most extreme of circumstances. These open-ended waivers threaten to undermine the constitutional rights of criminal defendants and the integrity of the criminal justice system.

Read broadly, many appeal waivers prevent defendants from seeking judicial recourse for violations of their fundamental constitutional rights. As Petitioner knows too well, this approach to appeal waivers bars convicted individuals from seeking relief from unconstitutional sentences. The problems do not stop there: defendants find themselves barred from obtaining judicial review of sentences they received for conduct this Court has deemed lawful and non-criminal. Still others are left without recourse after discovering that the same prosecutors who negotiated their guilty plea withheld exculpatory material that should have resulted in reduced sentences, in plain violation of their due process rights, or after learning that the sentencing court violated the rules that

Congress has enacted to govern the sentencing process.

The courts of appeals have taken different approaches to broad appeal waivers. *See* Cato Cert. Amicus Br. 9–13. Some recognize broad categories of exceptions to appeal waivers that facilitate challenges based on clearly unjust circumstances. *E.g.*, *United States* v. *Wells*, 29 F.4th 580, 587 (9th Cir. 2022) (permitting challenges to unconstitutional sentences except as to specific rights expressly identified in appeal waiver). Others have adopted a hard line in favor of enforcing appeal waivers even when clearly unjust circumstances are present. *E.g.*, *United States* v. *Barnes*, 953 F.3d 383, 390 (5th Cir. 2020) (enforcing broad appeal waiver to bar habeas relief for defendant sentenced under unconstitutionally vague statute). Most circuits fall somewhere in the middle or have yet to develop a clear, consistent approach to challenges subject to appeal waivers. *See, e.g.*, *United States* v. *Jackson*, 523 F.3d 234, 244 (3d Cir. 2008) (acknowledging that "there may well be unusual situations in which an unreasonable sentence, standing alone, could require invalidating the waiver to avoid a miscarriage of justice" but adding that such circumstances "will be a rare and unusual situation").

Relying on appeal waivers to dismiss challenges to unjust district court decisions risks lending finality to unconscionable sentences without the benefit of judicial review. This case concerns one particularly troubling manifestation of that risk: the unforeseen imposition of a sentence that violates a defendant's constitutional rights. No defendant can reasonably be expected to foresee that his agreement to plead guilty

and waive his general right of appeal constitutes permission for the sentencing judge to violate his constitutional rights with impunity. This alone is sufficient cause for reversal.

Petitioner's case also shines a spotlight on the narrow approach to appeal waivers taken by the court below, whose ramifications reach beyond the case at bar. By failing to account for the possibility that a sentence imposed on a defendant whose plea agreement includes an appeal waiver may be unconstitutional, illegal, or unconscionable, the strict approach to appeal waivers leaves defendants' fundamental rights at risk. The better course is a more practical approach that preserves basic protections for defendants' constitutional rights without undermining the efficiencies achieved by plea bargaining.

Below, *Amicus* highlights the perverse consequences of a strict enforcement regime for the Petitioner and for other defendants subject to unconstitutional sentences and other violations of their constitutional rights. It contrasts the harsh implications of that approach with the benefits achieved by permitting appeals, despite waivers, when strict enforcement would be clearly unjust.

ARGUMENT

I. Non-Negotiable Plea Agreements Represent The Vast Majority Of Criminal Convictions.

A. Most Federal Criminal Prosecutions are Resolved through Guilty Pleas.

For better or worse, guilty pleas have been a feature of the criminal justice system since at least the mid-nineteenth century.[2] Plea bargaining is "inherent in the criminal law and its administration" in part because "both the [government] and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." *Brady* v. *United States*, 397 U.S. 742, 751–52 (1970). But "[t]his is not to say that guilty plea convictions hold no hazards for the innocent or that methods of taking guilty pleas . . . employed in this country are necessarily valid in all respects." *Id*. at 757–58. Indeed, "[t]his mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, [this Court has] take[n] great precautions against unsound results, and . . . should continue to do so, whether conviction is by plea or by trial." *Id*. at 758.

When the Court upheld the constitutionality of knowing and voluntary plea agreements in *Brady*, it acknowledged that, at the time, "well over three-fourths of the criminal convictions in this country rest[ed] on pleas of guilty." *Id*. at 752. Since then, guilty pleas have continued to proliferate. By 2012

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[2] *See generally* A. W. Alschuler, *Plea Bargaining and its History*, 79 Colum. L. Rev. 1, (1979); William Ortman, *When Plea Bargaining Became Normal*, 100 B. U. L. Rev. 1435 (2020).

the Court observed that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri* v. *Frye*, 566 U.S. 134, 143 (2012). That remains true: in fiscal year 2024, over ninety-seven percent of federal criminal convictions resulted from guilty pleas.[3] And in fiscal year 2022, just over two percent of all federal criminal cases went to trial; less than nine percent were dismissed; and the remaining *ninety percent* ended with guilty pleas.[4] State court systems operate similarly: a 2023 report from the American Bar Association's Plea Bargaining Task Force found that "[i]n the last decade, states like New York, Pennsylvania, and Texas have all had trial rates of less than 3%," while "[s]ome jurisdictions in the country report not having had a criminal trial in years."[5] Though it is difficult to discern what proportion of guilty pleas were obtained through plea bargaining, the government estimated during oral argument in *Class* v. *United States* that "twenty-five percent of the pleas in the federal system don't . . . involve plea agreements," suggesting that seventy-five percent do. Tr. of Oral Argument at 61–62, 583 U.S. 174 (2018) (No. 16-424).

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[3] U.S. Sent'g Comm'n, *2024 Sourcebook of Federal Sentencing Statistics* (29th ed.) (Table 11).

[4] John Gramlich, *Fewer Than 1% of Federal Criminal Defendants Were Acquitted in 2022*, Pew Research Center (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/.

[5] American Bar Association, *Plea Bargain Task Force Report* 6 n.2 (2023).

In short, the criminal justice system remains "for the most part a system of pleas, not a system of trials." *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012). Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144.

B. Most Plea Agreements Leave No Room for Defendants or Judges to Negotiate Appeal Waivers.

While the federal criminal justice system relies heavily on plea agreements, the terms of those agreements are rarely the product of actual negotiations. And because the Federal Rules of Criminal Procedure generally forbid district judges from involving themselves in plea negotiations, *see* Fed. R. Crim. P. 11(c)(1), the terms of the agreements are not subject to any meaningful judicial oversight.

In most federal districts, the United States Attorney dictates the form and content of plea agreements that are offered to criminal defendants on a take-it-or-leave-it basis. Therefore, most plea agreements—at least within each district—are identical and adhesive, not the product of arms-length negotiation. United States Attorneys frequently refuse to depart from their form agreements, citing the need for consistency across cases. As a result, criminal defendants have no ability to negotiate any terms, including the scope of an appeal waiver. It is, instead, a fixed feature of almost all plea agreements.

Given the imbalance of power between the parties and the consequences of these agreements for criminal defendants, the inability to negotiate should give the Court significant pause. This Court has

recognized that "[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights," even as it has blessed waivers in plea agreements generally. *United States* v. *Mezzanatto*, 513 U.S. 196, 209–10 (1995).

Criminal defendants juggle a host of considerations and competing pressures during the plea negotiation process. The result is that some such agreements "may not be the product of an informed and voluntary decision." *Town of Newton* v. *Rumery*, 480 U.S. 386, 393 (1987). This is because "[t]he risk, publicity, and expense of a criminal trial may intimidate a defendant, even if he believes his defense is meritorious." *Id*. The Court has accordingly taken a flexible, real-world approach, rejecting *per se* rules regarding plea negotiations. *See*, *e.g.*, *id.* Ultimately, while plea agreements are presumed to be fair, that is only a presumption, and they are not negotiated by parties on even footing; indeed, their terms are often not negotiated at all.

The problematic lack of meaningful negotiation surrounding the terms of a plea agreement is compounded by the prohibition on district judges' engagement with those terms. The Federal Rules of Criminal Procedure explicitly state that "[t]he court must not participate in these discussions," instead limiting them to attorneys for the government and defendant. Fed. R. Crim. P. 11(c)(1). Thus, these discussions exist in a black box—closed to courts and the public, and affected by the immense pressure prosecutors may bring to bear on criminal defendants. Prosecutors set the terms out of court, and district

judges accept and enforce them without meaningful oversight or involvement.

It is for this reason that, while this Court has generally accepted the validity of waivers in plea agreements, the law "permit[s] case-by-case inquiries into whether waiver agreements are the product of fraud or coercion." *Mezzanatto*, 513 U.S. at 210. This flexible approach reflects the "well established" principle 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." *Rumery*, 480 U.S. at 392.

II. Inflexible Implementation of Broad Appeal Waivers Risks Foreclosing Review of Unlawful Sentences.

In administering today's "system of pleas," the Court's obligation to "take great precautions against unsound results" remains. *Brady*, 397 U.S. at 758. Overly zealous adherence to appeal waivers threatens courts' ability to meet that mark, undermining the public's interest in protecting the constitutional rights of the accused. *See, e.g.*, *United States* v. *Hall*, 93 F.3d 1337, 1339 (7th Cir. 1996) ("One of the hallmarks of the American criminal justice system is the importance it attaches to the protection of the rights of criminal defendants."); *Leaders of a Beautiful Struggle* v. *Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) ("[I]t is well-established that the public interest favors protecting constitutional rights.").

This Court has rightly acknowledged that "no appeal waiver serves as an absolute bar to all appellate claims." *Garza* v. *Idaho*, 586 U.S. 232, 238

(2019). Every federal court of appeals recognizes, for example, that defendants who waive their appellate rights retain the ability to raise challenges based on ineffective assistance of counsel. *Id*. at 239. But there are other basic constitutional rights that, at present, prosecutors can effectively nullify by including broad, non-negotiable appeal waivers in proposed plea agreements. This is wrong. *Cf. Daniels* v. *United States*, 532 U.S. 374, 391 (2001) (Souter, J., dissenting) ("[T]here is no excuse for picking and choosing among constitutional violations here, when other forums are closed. The need to address *Gideon* is no reason to ignore . . . any other recognized violations of the Constitution.").

Among the rights left in the lurch are the right to be free from unconstitutional sentences; the right to be free from criminal conviction under an unconstitutional statute; and the right to have exculpatory information in the government's possession produced to the defendant and considered at sentencing. These basic constitutional guarantees protect all citizens from prosecution and punishment beyond the dictates of the law. Defendants' abilities to seek their vindication must not be contingent on prosecutors' prior consent.

A. Petitioner's Challenge to the Constitutionality of His Sentence Must Survive His Appeal Waiver.

While district courts enjoy significant discretion at sentencing, that discretion is cabined by constitutional and statutory constraints. *See Concepcion* v. *United States*, 597 U.S. 481, 494 (2022) ("The only limitations on a court's discretion to

consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution."); *Pepper* v. *United States*, 562 U.S. 476, 489 n.8 (2011) ("Of course, sentencing courts' discretion . . . is subject to constitutional constraints."). When an appellate court strictly enforces an appeal waiver to foreclose review of the constitutionality of a sentence, it accepts a risk that defendants may be deprived of the Constitution's protections with no recourse. This is what happened to Petitioner in the court below.

Petitioner was charged in a ten-count superseding indictment with conspiracy, bank fraud, conspiracy to commit wire fraud, and wire fraud. Indictment, *United States* v. *Hunter*, No. 4:23-CR-00085, ECF No. 74 (S.D. Tex. Oct. 5, 2023). These are purely financial crimes—none of the allegations against Petitioner suggests any tendency toward violence or mental instability. *See id.* Petitioner entered a plea agreement, pleading guilty to one count of wire fraud affecting a financial institution in violation of 18 U.S.C. 1343. Pet.App.4a–17a (Plea Agreement). The plea agreement listed a range of punishments and consequences that might befall Petitioner as a result of his plea: the potential for imprisonment, immigration consequences, restitution, and a special assessment fee. *See generally id.* It did not suggest that Petitioner might be compelled to surrender his right to be free from the administration of unwanted psychiatric medication. *Id.*

Prior to sentencing, the Bureau of Prisons prepared a presentence investigation report, which

apparently included a recommendation that Petitioner's sentence require him to participate in a mental health treatment program, including taking any medications prescribed by his provider. *See* Pet.App.18a–37a, Tr. of Sentencing Proceedings ("Sent'g Tr.") at 7:12–8:4; 20:19–20.[6] At the sentencing hearing, the court asked Petitioner whether he objected to any of the conditions of supervision recommended in the presentence report. Petitioner responded, "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 be forced to medicate**." Sent'g Tr. 7:15–23 (emphasis added). The court responded: "Well, if you're going to participate in mental health treatment and the treatment provider prescribes drugs, you should take them. If there's a dispute, you can address it to a probation officer. If the probation officer can't resolve the dispute, you can address it to me." Sent'g Tr. 7:24–8:3. The court's written judgment included the following special condition of supervision in Petitioner's sentence: "You must take all mental-health medications that are prescribed by your treating physician. You must pay the costs of the medication, if financially able." Pet.App.38a (Judgment).

Petitioner appealed his sentence, arguing that the court's requirement that he take any medication recommended by his mental health provider is unconstitutional. He insisted that "the district court's condition of supervision requiring him to take all prescribed mental health medications is not

[6] The presentence investigation report is sealed.

supported by the record and, thus, infringes on [Petitioner]'s fundamental due process liberty interest in being free of unwanted mental health medication (as a non-dangerous person)." Br. of Appellant, *United States* v. *Hunter*, No. 24-20211, ECF No. 19 at 10 (5th Cir. Aug. 8, 2024).

Petitioner's constitutional argument is far from frivolous. In *Washington* v. *Harper*, and again in *Sell* v. *United States*, this Court "recognized that an individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.'" *Sell*, 539 U.S. 166, 178 (2003) (quoting *Harper*, 494 U.S. 210, 221 (1990)). No court has had occasion to substantively review the standard that the sentencing court used in requiring Petitioner to take unwanted mind-altering medications, nor whether that standard "recognize[s] 'both the [defendant]'s medical interests and the [government]'s interests'" as required by the Due Process Clause of the Fifth Amendment. *Harper*, 494 U.S. at 246. By enforcing Petitioner's appeal waiver, the court below determined, in effect, that even if his sentence *is* unconstitutional, Petitioner has no ability to vindicate his constitutional rights.

Faced with the same constitutional argument raised by the Petitioner, the Second Circuit recently illustrated a better approach. In *United States* v. *Schloss*, the Second Circuit declined to enforce an appeal waiver and reached the merits of another criminal defendant's challenge to the legality of his sentence. No. 22-3111, 2025 WL 2814700, at * 1 n.2 (2d Cir. Oct. 3, 2025). After being indicted for his role in an armed robbery scheme, Schloss, like Petitioner,

entered a plea agreement pursuant to which he waived his right to appeal his sentence. *Id.* Like Petitioner, Schloss's sentence included "a condition mandating mental health treatment including compliance with any medications prescribed." *Id.* at *1. Instead of dismissing the appeal based on Schloss's appeal waiver, the court assessed the merits of Schloss's claim after finding that the appeal waiver did "not address conditions of supervised release." *Id.* at *1 n.2. Evaluating the merits of Schloss's claim, the court determined that the medication condition was permissible in the circumstances of that case, but adopted a narrow construction of the medication condition and emphasized that he "may seek to modify this condition if, at some future time, he disagrees with the mental health program treatment provider's prescription." *Id.* at * 3 n.8. By reaching the merits of Schloss's appeal, the court was able to assure itself of the adequacy of the record underlying his sentence, protect his rights, and give effect to the district court's sentence in a manner that comports with the Constitution.

Petitioner received no such review. Absent this Court's intervention, his sentence, *even if unconstitutional*, will stand. This is a particularly troubling manifestation of the injustice caused by a stringent enforcement approach: it is difficult to conceive of a class of cases more ripe for exclusion from the reach of an appeal waiver than those in which a defendant is sentenced, over his objection, to conditions that violate his settled constitutional rights. This alone warrants reversal.

B. Appeal Waivers Cannot Shield Unlawful Sentences from Appellate Review.

Of course, Petitioner's is not the first constitutional challenge to a criminal sentence that the Fifth Circuit has declined to review out of deference to a broad appeal waiver. The court of appeals has long recognized that "despite the broad discretion left to the trial judge in assessing background information for sentencing purposes . . . a defendant retains the right not to be sentenced on the basis of invalid premises." *United States* v. *Espinoza*, 481 F.2d 553, 555 (5th Cir. 1973); *see also United States* v. *Tucker*, 404 U.S. 443 (1972) (affirming lower court order to remand case for resentencing after determining that state court convictions comprising criminal history were unconstitutionally obtained). Nevertheless, even after explicit determinations from this Court that sentencing enhancements under the residual clause of the Armed Career Criminals Act, 18 U.S.C. 924(e) ("ACCA") were unconstitutionally vague, *and* that the vagueness ruling announced a substantive rule applicable on collateral review, the court of appeals relied on broad appeal waivers to leave in place a sentence explicitly built on that unconstitutional premise.

On April 16, 2013, a Mississippi grand jury returned a one-count indictment charging Michael James Barnes with violating 18 U.S.C. 922(g)(1) and 924(e), which make it a crime to be a felon in possession of a firearm. *Barnes* v. *United States*, No. 3:13-CR-00038, 2018 WL 1747623 at *1 (S.D. Miss. April 10, 2018). The indictment invoked the

ACCA, which required a fifteen-year mandatory minimum sentence for any individual previously convicted of three or more qualifying crimes that include serious drug offenses and crimes of violence such as "burglary, arson, or extortion, [crimes] involv[ing] use of explosives, or [crimes] otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). The indictment listed four qualifying prior convictions under Florida and Mississippi law: (i) possession of precursors; (ii) kidnapping; (iii) burglary of a dwelling; and (iv) attempted robbery and possession of a firearm. Indictment, *United States* v. *Barnes*, No. 3:13-CR-00038, ECF No. 2 at 1 (S.D. Miss. April 16, 2013).

Barnes pleaded guilty pursuant to a plea agreement and received the then-applicable mandatory minimum sentence of 180 months in prison. Plea Agreement, *United States* v. *Barnes*, No. 3:13-CR-00038, ECF No. 17 at 1 (S.D. Miss. July 9, 2013). His plea agreement waived the right to directly appeal or collaterally attack his sentence. *Id*. at 4–5.

Then, in 2015, this Court held that ACCA's definition of "violent felony" was unconstitutionally vague to the extent that it encompassed crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" (ACCA's "residual clause"). *Johnson* v. *United States*, 576 U.S. 591, 596 (2015) (citation omitted). The following year, the Court confirmed in *Welch* v. *United States* that "the rule announced in *Johnson* is substantive" and thus "has retroactive effect . . . in cases on collateral review." 578 U.S. 120, 129–30 (2016).

Recognizing that he had been sentenced pursuant to an unconstitutional statute, Barnes sought relief under 28 U.S.C. 2255. He argued that after *Johnson*, his prior convictions no longer placed his conduct within the ambit of the ACCA, and that without that statute's unconstitutionally vague sentencing enhancement, he would have been sentenced with a guidelines range of thirty-seven to forty-six months. Br. of Appellant, *United States* v. *Barnes*, No. 18-60497, ECF No. 22 at 3–4 (5th Cir. Sep. 19, 2018). In other words, an unconstitutionally vague statute required the sentencing court to impose a sentence more than ***eleven years*** longer than the high end of the otherwise-applicable guidelines. Citing the appeal waiver, the court declined to consider whether Barnes's sentence violated his constitutional rights, instead determining that its hands were tied by the appeal waiver. *Barnes*, 953 F.3d at 385. Several other petitioners raising *Johnson* arguments have faced the same hurdle. *E.g.*, *In re Garner*, 664 Fed. App'x 441, 443–44 (6th Cir. 2016) (denying *Johnson* challenge based on appeal waiver); *Sanford* v. *United States*, 841 F.3d 578, 580–81 (2d Cir. 2016) (same); *United States* v. *Hurtado*, 667 Fed. App'x 291, 292–93 (10th Cir. 2016) (same).

Here again, there is a better approach. In *United States* v. *Torres*, the Ninth Circuit concluded that a sentence imposed pursuant to an unconstitutionally vague sentencing provision "render[ed] Torres's sentence 'illegal,'" and on that basis, determined that "the waiver in his plea agreement [did] not bar [his] appeal." 828 F.3d 1113, 1125 (9th Cir. 2016). The Fourth Circuit reached the same conclusion in *United States* v. *Cornette*, reasoning that "because the

residual clause was struck from the ACCA in *Johnson* and the Supreme Court determined in *Welch* that *Johnson* announced a substantive rule that applied retroactively, the district court is now deemed to have had no statutory authority to impose Cornette's sentence under the residual clause of the ACCA. Accordingly, we may review Cornette's sentencing challenge notwithstanding the appeal waiver." 932 F.3d 204, 210 (4th Cir. 2019).

A similar circuit conflict has emerged over the treatment of defendants who pleaded guilty to charges under 18 U.S.C. 924(c), the statute that establishes mandatory minimum sentences for defendants who use, possess, or carry a firearm in connection with a federal "crime of violence or drug trafficking crime." Like the ACCA, that statute's definition of "crime of violence" includes a residual clause, which encompasses any felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). In *United States* v. *Davis*, the Court determined that this, too, was unconstitutionally vague. 588 U.S. 445 (2019). The Court explained the danger of enforcing unconstitutionally vague criminal statutes, remarking that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime' . . . . Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id*. at 451 (citing *United States* v. *Hudson*, 7 Cranch 32, 34 (1812); *Kolender* v. *Lawson*, 461 U.S. 352, 357–58 & n.7

(1983); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89–91 (1921); *United States* v. *Reese*, 92 U.S. 214, 221 (1875)).

For many defendants who plead guilty, "relatively unaccountable police, prosecutors, and judges" still have the last word.

This is true for people like Damien Antoine Jones, who pleaded guilty in November 2015 to charges related to a scheme to commit armed robbery. Jones was charged by an eight-count indictment; four of the charges were for using a firearm while committing a crime of violence under section 924(c). Indictment, *United States* v. *Jones*, No. 3:14-CR-300, ECF No. 41 (N.D. Tex. June 23, 2015). If convicted on every count, the section 924(c) charges alone would have required an ***eighty-two year*** minimum sentence (resulting from consecutive mandatory minimums of twenty-five, twenty-five, twenty-five, and seven years of imprisonment, respectively). Br. of Appellant, *United States* v. *Jones*, No. 21-11185, ECF No. 21 at 4–5 (5th Cir. Jan. 28, 2022). Jones entered a plea agreement pursuant to which the government dropped two of the section 924(c) charges, reducing his mandatory minimum sentence if convicted in exchange for his guilty plea to the other six counts in the indictment. Plea Agreement, *United States* v. *Jones*, No. 3:14-CR-00300, ECF No. 70 at 6 (N.D. Tex. Nov. 16, 2015). Jones was sentenced to fifty-nine years in prison, thirty-two years of which resulted from the remaining section 924(c) charges. Judgment, *United States* v. *Jones*, No.3:14-CR-00300-B, ECF No. 154 at 3 (N.D. Tex. Sept. 9, 2016). Jones's plea agreement included a broad appeal waiver. Plea Agreement, *United States*

v. *Jones*, No. 3:14-CR-00300, ECF No. 70 at 7 (N.D. Tex. Nov. 16, 2015).

After *Davis*, Jones sought habeas relief, recognizing that *Davis*'s invalidation of the residual clause would result in a twenty-five year reduction in the minimum sentence Jones could face under section 924(c). Br. of Appellant, *United States* v. *Jones*, No. 21-11185, ECF No. 21 at 9, 29 (5th Cir. Jan. 28, 2022). Jones's argument was bolstered by the Fifth Circuit's 2019 opinion in *United States* v. *Reece*, where the court recognized that, like *Johnson*, *Davis* applied retroactively to cases on collateral review. 938 F.3d 630 (5th Cir. 2019). But even that was not enough for the court of appeals to overlook Jones's appeal waiver. The Fifth Circuit dismissed Jones's appeal without reaching the merits. *United States* v. *Jones*, No. 21-11185, 2025 WL 2206974 (5th Cir. Aug. 4, 2025); *see also Portis* v. *United States*, 33 F.4th 331, 334 (6th Cir. 2022) (rejecting similar section 2255 petition based on *Davis* upon determination that scope of court's review "begin[s] and end[s] with the plea agreement.").

Other courts of appeals have forged a better path. In *United States* v. *McKinney*, the Fourth Circuit reversed a district court's denial of a similar section 2255 petition based on *Davis*. 60 F.4th 188 (4th Cir. 2023). Like Jones, McKinney pleaded guilty to charges arising out of a robbery scheme, including a 924(c) charge. Like Jones, after this Court's decision in *Davis*, McKinney filed a section 2255 petition seeking a reduction in sentence. And like Jones, McKinney's petition was, at first, denied on the basis of the appeal waiver included in his plea agreement. But unlike the Fifth Circuit, the Fourth Circuit's

approach to appeal waivers allowed it to correct the error. The court acknowledged that, because the statute under which the defendant had been convicted was unconstitutionally vague, "McKinney now [stood] convicted of, and imprisoned for, conduct that does not violate § 924(c) and in fact is not criminal." *Id*. at 190. McKinney thus "made a cognizable claim of actual innocence." *Id.* at 192. Under the Fourth Circuit's rule, that meant that his case fell within one of the "few limited circumstances" in which the court can "refuse to enforce" an appeal waiver, namely because doing so would result in a miscarriage of justice. *Id*. The court reversed the district court's denial of McKinney's section 2255 petition and remanded the case with instructions to vacate his 924(c) conviction. *Id*. at 198.

Had Jones been sentenced in North Carolina, subject to the Fourth Circuit's more flexible approach to appeal waivers, he could have benefitted from judicial review of the unconstitutional basis of his sentence. But because he was sentenced in the Texas, subject to the Fifth Circuit's strict enforcement regime, he had no recourse.

The practice of strictly enforcing broad appeal waivers carries an inherent risk that criminal defendants might be subject to unconstitutional sentences without recourse. A more flexible approach is required to ensure that such defendants have a mechanism to vindicate their rights in these admittedly exceptional circumstances. By recognizing that some fundamental constitutional rights are nonwaivable, and that no appeal waiver can vitiate a defendant's right to be free from

unconstitutional sentencing conditions, the Court can preserve the efficiencies gained through the plea bargaining system while ensuring that no defendant can be sentenced to public flogging, prohibitions on church attendance, prohibitions on procreation, or compelled sterilization, without an avenue for relief. *See* Pet. Br. 26–28.

C. Appeal Waivers Cannot Preserve Convictions Under Invalid Criminal Statutes.

Strict enforcement of broad appeal waivers also results in defendants serving sentences for conduct that Congress has not criminalized. In recent years, this Court has weighed in to restrict federal prosecutors' aggressive use of criminal statutes to penalize conduct that is, at bottom, not criminal. *See*, *e.g.*, *Kelly* v. *United States*, 590 U.S. 391 (2020); *Yates* v. *United States*, 574 U.S. 528 (2015); *Ciminelli* v. *United States*, 598 U.S. 306 (2023); *Snyder* v. *United States*, 603 U.S. 1 (2024); *Percoco* v. *United States*, 598 U.S. 319 (2023); *Marinello* v. *United States*, 584 U.S. 1 (2018). The Court has unanimously stated that it "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell* v. *United States*, 579 U.S. 550, 576 (2016) (citation omitted). Inflexible adherence to broad appeal waivers undermines the Court's decisions in these cases by leaving defendants' erroneous convictions unreviewable.

In 2023, for example, the Court rejected the "right to control" theory of wire fraud, which rested on a construction of the wire fraud statute to prohibit schemes to deprive victims of potentially valuable

economic information. In *Ciminelli* v. *United States*, the unanimous Court held that "the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." 598 U.S. at 316.

Unsurprisingly, individuals previously convicted under the right-to-control theory quickly sought postconviction relief, with mixed results. Courts evaluating these post-*Ciminelli* claims considered whether the right-to-control theory actually formed the basis of the defendant's guilty verdict and, accordingly, whether the inclusion of this legally erroneous theory of relief in jury instructions constituted reversible error. *E.g.*, *Alfaro* v. *United States*, No. SA-23-CV-1425-FB, 2024 WL 2194852, *4 (W.D. Tex. May 14, 2024) ("[T]he [*Ciminelli*] holding may . . . serve as a basis for habeas relief for a defendant convicted under [the right-to-control] theory as it places certain kinds of conduct beyond the power of the criminal law to proscribe. Movant was not, however, convicted on a right-to-control theory."). In some cases, courts have carefully analyzed the specific events giving rise to a defendant's conviction and determined that any error was harmless, denying relief. *E.g.*, *United States* v. *Hild*, 147 F.4th 103, 106 (2d Cir. 2025) ("But although the jury instructions were indeed erroneous, no retrial is warranted because Hild was convicted on a theory of fraud that remains valid post-*Ciminelli*."). In others, they have determined that postconviction relief is warranted. *E.g.*, *Johnson* v. *United States*, 144 F.4th 133 (2d Cir. 2025) (granting post-trial petition for writ of coram nobis challenging jury conviction based in part on right-to-control theory).

At least one defendant's post-*Ciminelli* appeal has been barred by an appeal waiver, rendering his conviction unreviewable despite his claim that the conduct for which he pleaded guilty is not, and was never, a federal crime.

Roger Paul Bradford was indicted for conspiracy to commit wire fraud in May 2022. Indictment, *United States v. Bradford*, No. 4:22-CR-00067, ECF No. 2 at 2–6 (S.D. Iowa, May 18, 2022). Bradford was the Director of Construction for an agriculture company and was responsible for managing construction projects on the company's property. The government alleged that Bradford urged the general contractor on a project to select a particular subcontractor without disclosing that he would receive kickbacks from the subcontractor. *Id*. at 3. This was the cornerstone of the government's indictment, which alleged that "[h]ad [Bradford] and [his co-conspirator] informed the general contractor of their kickback agreement, the general contractor would have informed Vermeer officials of that illicit agreement." *Id*. at 4. "If Vermeer officials had been informed of the kickback agreement, they would have ensured that no contracts were awarded to [the co-conspirator]." *Id*. at 4–5.

Bradford pleaded guilty in September 2022, and his plea agreement included a broad appeal waiver. Plea Agreement, *United States* v. *Bradford*, No. 4:22-CR-00067, ECF No. 26 (S.D. Iowa, Sep. 23, 2022). Bradford was sentenced to twenty months imprisonment on May 4, 2023. Judgment, *United States* v. *Bradford*, No. 4:22-CR-00067, ECF No. 78 (S.D. Iowa, May 4, 2023). One week later, the Court ruled in *Ciminelli*. Bradford moved to vacate his

sentence, withdraw his guilty plea, and dismiss the indictment, arguing that it was based on the same theory as *Ciminelli*. *United States* v. *Bradford*, No. 4:22-CR-00067, ECF Nos. 82 & 83 (S.D. Iowa, May 18, 2023) (Motion to Vacate Sentence and Motion to Withdraw Plea of Guilty). He simultaneously appealed, causing the sentencing court to deny his pending motions for lack of jurisdiction. Order, *United States* v. *Bradford*, No. 4:22-CR-00067, ECF No. 103 (S.D. Iowa, June 7, 2023). But the Eighth Circuit declined to assess the merits of his argument because it determined that "the challenge to his conviction [was] covered by the valid and enforceable appeal waiver." *United States* v. *Bradford*, 113 F.4th 1019, 1025 (8th Cir. 2024).

Bradford served the entirety of his prison sentence without the benefit of any court's consideration of *whether he had actually committed any crime* in light of the Court's decision in *Ciminelli*.

The same thing could have happened just as easily in the wake of the Court's decision in *Kelly* v. *United States*, 590 U.S. 391 (2020). *Kelly* involved the prosecution of three New Jersey public employees who executed a scheme to reduce a city's access to the George Washington Bridge and thereby impose gridlock traffic on the city as an act of political retaliation against the city's mayor. One of the three defendants, David Wildstein, entered a plea agreement with the government that waived his right to appeal or seek habeas relief. Plea Agreement, *United States* v. *Wildstein*, No. 2:15-CR-000209, ECF No. 5 (D.N.J. May 1, 2017). Wildstein was sentenced to probation, ordered to perform community service,

prohibited from "seeking or holding any employment, elected, appointed or otherwise, paid or unpaid, with any government agency," and was ordered to pay a fine and restitution. Judgment, *United States* v. *Wildstein*, No. 2:15-CR-000209, ECF No. 11 (D.N.J. July 12, 2017).

Wildstein's fellow defendants, meanwhile, were convicted at trial for wire fraud, federal program fraud, and conspiracy. *Kelly*, 590 U.S. at 397–98. But their convictions were vacated because this Court found that their conduct did not involve the taking of property, an essential element under both fraud statutes. *Id.*

Following *Kelly*, the government submitted a letter to the Court in Wildstein's case, noting that Wildstein's counsel "assert[ed] that he [was] legally innocent of the offenses to which he pled guilty and that his conviction should be vacated pursuant to 28 U.S.C. § 2255." Gov't. Letter, *United States* v. *Wildstein*, No. 2:15-CR-000209, ECF No. 18 at 1 (D.N.J. June 10, 2020). Luckily for Wildstein, the government did "not oppose that relief" and agreed that "dismissal of the Information against Mr. Wildstein [would be] proper with leave of court." *Id.*

What if Wildstein's prosecutors had been less generous? Without the government's consent, Wildstein's plea agreement, strictly construed, would have foreclosed "any appeal, any collateral attack, or any other writ or motion" that he may have filed, leaving him vulnerable to continued punishment for conduct deemed non-criminal by the Court, even after his *codefendants'* convictions were overturned. No defendant's right to be free from imprisonment for

non-criminal conduct should depend solely on his prosecutors' generosity. *Cf. United States* v. *Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

This Court's early rulings evidence a longstanding tradition of vigilance against the deployment of the federal criminal justice system to punish those whose conduct does not violate any law that is enacted by Congress and is consistent with the Constitution. *See Ex parte Siebold*, 100 U.S. 371, 376–77 (1879) ("An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."); *United States* v. *Holliday*, 70 U.S. 407, 415 (1865) ("It has been decided that no common law crime or offence is cognizable in the Federal courts."); *Todd* v. *United States*, 158 U.S. 278, 282 (1895) ("It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms."). The Fifth Circuit's position deviates from this tradition, adding an exception to the general rule against criminal sanctions for non-criminalized conduct. It posits that noncriminal conduct *can* be a legal cause for punishment if the defendant preemptively promised not to argue otherwise. In the context of today's plea-heavy system, this exception leaves little left of the rule, effecting a significant departure from the historical safeguards the Court has enacted for citizens accused of federal crimes.

D. Appeal Waivers Do Not Excuse Substantive and Procedural Errors in the Sentencing Process.

A defendant's decision to plead guilty does not end his case. It is the first step in a complex sentencing process that results in a final judgment. The Constitution, federal statutes, and the Federal Rules establish a host of procedural and substantive safeguards to ensure that the sentencing process is fair. All-encompassing appeal waivers undermine those safeguards by eliminating any remedy if they are ignored.

Federal Rule of Criminal Procedure 32 and 18 U.S.C. 3553 require district judges to follow certain procedures in sentencing, regardless of whether the defendant pleaded guilty or was convicted at trial. This Court and the courts of appeals routinely assess whether district judges have imposed substantively reasonable sentences, and whether those sentences were imposed in a way that comports with these statutory due process guarantees. *See, e.g.*, *Gall* v. *United States*, 552 U.S. 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed"); *United States* v. *Touray*, 151 F.4th 1317 (11th Cir. 2025) (reviewing sentence for substantive and procedural reasonableness); *United States* v. *Waithe*, 150 F.4th 16 (1st Cir. 2025) (same). Appeal waivers, read mechanically, provide no remedy when a defendant is sentenced in a manner that violates these statutory provisions. *See, e.g.*, *United States* v. *Tapia*, 748 Fed. App'x 859, 860 (10th Cir. 2019)

(enforcing plea waiver after district court denied defendant's right of allocution, despite "agree[ing] . . . that the right to allocute is an important part of the sentencing process").

For its part, the Constitution requires that prosecutors, prior to sentencing, disclose materially favorable information that may bear on a defendant's sentence. "[W]hen the [government] withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law." *Cone* v. *Bell*, 556 U.S. 449, 469 (2009); *accord Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)).

But strict adherence to appeal waivers leaves defendants vulnerable to violations of their right to exculpatory information in the prosecution's possession. After pleading guilty, many defendants have no recourse if they discover that prosecutors withheld evidence before sentencing that might materially bear on a more favorable outcome.

Consider *Cone* v. *Bell*, where this Court recognized that the government's deprivation of a defendant's access to material evidence reasonably likely to result in a more favorable sentence justified remand for resentencing. 556 U.S. at 476. Gary Cone was convicted of murder by a Tennessee state court in 1982. *Id*. at 451. Cone argued that he was not guilty

by reason of insanity, claiming that he was suffering from a drug-induced psychosis at the time of the killings. *Id*. at 454. The government persuaded a jury that Cone's claim of a drug-induced psychosis was "baloney," painting him as "a premeditated, cool, deliberate—and even cowardly, really—murderer." *Id*. at 455. At the penalty phase of the trial, Cone's counsel "urged the jury to consider Cone's drug addiction when weighing the aggravating and mitigating factors in the case." *Id*. at 456. The jury sentenced Cone to death. But a decade later, Cone discovered that the government had suppressed evidence that supported his claim of a drug-induced psychosis. *Id*. at 459. Cone filed a petition for a writ of habeas corpus. *Id* at 461. The Court concluded that the suppressed evidence "may have persuaded the jury [at sentencing] that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone's drug use played a mitigating, though not exculpating, role in the crimes he committed." *Id*. at 475. The Court remanded for renewed consideration of Cone's *Brady* claim. *Id*. at 476.

Had Cone entered a plea agreement with a standard appeal waiver clause instead of taking his case to trial, in some circuits his claims would be a non-starter, even in light of the prosecution's suppression of favorable evidence in violation of the Due Process Clause. Cone's claims of a *Brady* violation may or may not have been meritorious. But with an appeal waiver, he would not have been able to raise them, in any form, absent this Court's intervention.

Ensuring that courts of appeals can consider viable *Brady* claims despite appeal waivers is consistent with the Court's ruling in *Garza* v. *Idaho*, where it dispelled the notion that appeal waivers represent "a monolithic end to all appellate rights," in part because "all jurisdictions appear to treat at least some claims as unwaiveable." *Garza*, 586 U.S. at 239. "Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary." *Id.*; *see also Brady* v. *United States*, 397 U.S. at 748 ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). That much cannot be said of defendants facing sentencing without the benefit of exculpatory or mitigating evidence in the government's possession.

And enforcing guilty plea defendants' *Brady* rights at sentencing will not open the floodgates. Because many plea agreements contain stipulated facts and sentencing guidelines, cases in which the government suppresses material exculpatory evidence at sentencing are rarely litigated. The benefits of ensuring that defendants' sentences are reached with an adequate factual predicate far outweigh the minimal burden that such a practice would impose on the courts of appeals.

* * *

Unconstitutional sentences. Imprisonment for lawful activity. A permission slip for the suppression of evidence. These are the fruits of a system

dominated by plea agreements designed to prevent judicial oversight of convictions and sentences. Even if Petitioner's condition of supervision *is* unconstitutional; even if it *does* violate his protected liberty interest in being free from nonconsensual medication; even if the facts underlying his conviction *don't* justify the sentence he received; the rule from the court below would leave Petitioner with no recourse. If he refuses to acquiesce to the violation of his rights, *he* becomes vulnerable to further punishment by the government. His plea agreement is then, to Petitioner, the supreme law of the land—if a conflict exists between the Constitution and the terms imposed by his plea agreement, the latter controls. When judicial review is unavailable, injustice proliferates, and for those within its reach, becomes the law.

Petitioner's position poses no general threat to the institution of plea bargaining, or even to the validity of appeal waivers in general. It seeks only to give effect to the Court's prior finding that "while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain." *Garza*, 586 U.S. at 239. Surely the narrow category of claims implicated by Petitioner's appeal—those based on the unforeseeable imposition of an unconstitutional sentence—must be among those that remain.

Accordingly, the Court should reverse the ruling of the Fifth Circuit and endorse an approach to appeal waivers sufficiently flexible to protect the basic rights of criminal defendants. In doing so, it would ensure that "[e]veryone . . . is bound by law. That goes for

[sentencing] judges too." *Trump* v. *CASA, Inc.*, 606 U.S. 831, 859 (2025).

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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