

No. 24-1063

In the Supreme Court of the United States

MUNSON P. HUNTER, III,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

REPLY BRIEF FOR THE PETITIONER

BRENT E. NEWTON
ATTORNEY AT LAW
*19 Treworthy Road
Gaithersburg, MD 20878*

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLLOUD
JAMES N. SASSO
DANA B. KINEL
MIHIR KHETARPAL
ROHIT P. ASIRVATHAM
YOAV PAZ-PRIEL
WILLIAMS & CONNOLLY LLP
*680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com*

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The first question presented asks whether the Fifth Circuit is correct to recognize two exceptions to general appeal waivers. Hunter and the government agree that the Fifth Circuit’s rule is wrong, but for different reasons.

Hunter’s position—endorsed by the majority of circuits—is that two is too few. Traditional contract defenses apply to appeal waivers and can bar enforcement in more scenarios than the Fifth Circuit recognizes. If the Court agrees, it can resolve this case by taking the modest step of reaffirming that an appeal waiver “can be set aside by a court ... on some ground that is sufficient for setting aside other contracts.” *Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1977) (citation omitted). At a minimum, the Court

can recognize, in line with most courts of appeals, that there is at least some additional safety valve for appellate review in cases of repugnant and manifestly unjust sentences.

The government's position requires the Court to go miles further. While the government previously called the Fifth Circuit's outlier approach "draconian," Pet. Br. 3, it now advocates a rule that would give Draco himself pause: Appeal waivers that lack textual exceptions are *always* enforceable if knowing and voluntary. Even misdemeanants sentenced to death may have no avenue for appeal. To state that rule shows it is wrong.

No court of appeals has adopted the government's position. It is thus hard to take seriously the government's paean to the virtues of finality. Courts do not allow defendants to undo their pleas based on mere regret, and Hunter is not asking for such a rule. At the same time, courts have for decades recognized that making even the most egregious punishments categorically unreviewable does our legal system a disservice. Their dockets have not been flooded by the tidal wave of meritless appeals the government predicts.

The government alternatively argues that no conceivable exception would cover Hunter's appeal. But that is an issue for remand. And in any event, the government dramatically understates the gravity of what occurred below. Hunter pleaded guilty to a financial offense. Over sustained objection and without any supporting factual findings, the district court required Hunter to subject himself to whatever mental-health drugs a doctor might prescribe, no matter any moral or religious objections. That is not a garden-variety condition of supervised release; it is an open-ended deprivation of liberty.

The government’s position on the second question presented is equally wrong. The district court told Hunter, without qualification, that he “ha[d] a right to appeal,” then invited the government to speak; the prosecutor—who drafted the waiver—declined. The government would hold these statements and its silence categorically irrelevant, no matter the context. Familiar doctrines of waiver, forfeiture, and modification say otherwise. At a minimum, the Court should remand so that the district court can explain whether its understanding that Hunter had a right to appeal shaped the court’s decision to impose this bizarre and baseless condition.

I. The Fifth Circuit’s “Two Exceptions Only” Rule Is Wrong

The government accepts that a “plea agreement is generally treated as a contract between the government and a criminal defendant.” U.S. Br. 13 (citing *Puckett v. United States*, 556 U.S. 129, 137 (2009)). But it resists the obvious implication of that concession: A plea agreement “can be set aside by a court ... on some ground that is sufficient for setting aside other contracts.” *Blackledge*, 431 U.S. at 75 n.6 (citation omitted). Many such grounds exist. The Fifth Circuit’s inflexible “two exceptions only” rule cannot be squared with those bedrock contract principles. And the government’s proposed “no exceptions” rule is even more extreme and unfounded. If anything, narrowly cabined exceptions are even more appropriate in the context of plea agreements, where “[t]he stakes are not goods or money, but liberty and justice.” *United States v. Cruz*, 95 F.4th 106, 110 (3d Cir. 2024) (Bibas, J.).

A. Contracts May Be Unenforceable For Multiple Reasons

The government (at 9-10, 13, 16-17, 20) insists that contracts are always enforceable “if they were knowingly

and voluntarily entered into.” But “[u]nder no system of law that has ever existed are all promises enforceable.” 1 A. Corbin, *Corbin on Contracts* § 1:1 (2025). Instead, contract law has always had “various rules determining the circumstances under which a promise is said to be enforceable.” *Id.*

Crack open any contract-law treatise and you’ll find a series of defenses and exceptions to the enforcement of knowing and voluntary contracts. *See* Pet. Br. 18-24. Even a “party that has not qualified its duty in some way” can invoke those defenses if its “basic assumptions ha[ve] proved to be wrong.” Farnsworth on Contracts § 9.01 (4th ed.). Although this power to deny enforcement is to be “exercised cautiously,” its existence is “unquestioned” and “clearly necessary.” 5 R. Lord, *Williston on Contracts* § 12:4 (4th ed.) (citation omitted).

The government’s contrary argument (at 15-17) rests on a series of high-level rule statements—for instance, that “hindsight regret” and “buyer’s remorse” do not excuse performance. This first-half-of-the-syllabus understanding of contract law proves too much. On the government’s view, if a homeowner contracts to pay a housekeeper to declutter her house, the homeowner is bound to pay even if the housekeeper eliminates the clutter by burning down the house. Luckily, the law is not always an ass. *Contra* 3 Charles Dickens, *Oliver Twist* 279 (1839). Promises are not invariably enforced when “unexpected circumstances cause a clause that did not seem oppressive at its inception to misfire.” Farnsworth, *supra*, § 4.30.

Four foundational contract defenses illustrate the point. Pet. Br. 18-24.

Public policy. “[A] plea agreement that attempts to waive a right conferred by a federal statute is, like any

other contract, unenforceable if the interest in its enforcement is outweighed under the circumstances by a public policy harmed by enforcement.” *Price v. U.S. Dep’t of Just. Att’y Off.*, 865 F.3d 676, 683 (D.C. Cir. 2017) (cleaned up).

Courts repeatedly recognize that the public-policy defense is applicable to contracts that, like appeal waivers, limit or avoid litigation—from forum selection clauses, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), to contracts “for a shortened period of limitations,” *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 31 (Mich. 2005), to “prospective waiver[s] of a party’s right to pursue statutory remedies,” *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013) (citation omitted). The same goes for release-dismissal agreements, which this Court analogized to plea agreements. *See* Pet. Br. 19 (citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)). The government (at 22) argues that *Rumery* drew distinctions between the two types of agreements. But those distinctions at most indicate that the public-policy principle may apply differently to plea-bargains, not that it has no application. *Rumery*, 480 U.S. at 393 n.3. And the fact that the public-policy defense in *Rumery* was *unsuccessful* does not mean that the defense is categorically *unavailable*. *Contra* U.S. Br. 21-22.

Contrary to the government’s intimations (at 20-21), “the public policy exception is not limited solely to instances where the [contract] violates positive law.” *See, e.g., E. Assoc. Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 63 (2000). Besides, Congress *did* “announce[] a[] public policy,” U.S. Br. 20, by codifying a sweeping statutory right to appeal criminal sentences, *see* 18 U.S.C. § 3742(a). “When the law confers upon an individual a right ... because it is in the public interest, it may

be contrary to the public interest to permit the holder” to contract it away. 15 Corbin, *supra*, § 88.7.

While the government (at 21) notes that Congress does not *require* defendants to appeal their sentences, a *prospective* waiver is far different from a defendant’s “choice not to appeal.” U.S. Br. 21. There is “a clear distinction between declining to take advantage of a privilege” and “binding” oneself *ex ante* not to exercise “a right which the law has allowed.” *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234-35 (1892) (citation omitted).

The government’s argument (at 21) that later events cannot invalidate an earlier agreement misses the point. Hunter is not contending that the appeal waiver only recently became unenforceable. From the moment the appeal waiver was executed, it would violate public policy if invoked (as here) to bar appeals based on unforeseeable and egregious sentences. But Hunter necessarily could only resist enforcement when the challenged condition was put into practice. *See* 5 Williston, *supra*, § 12:4.

Unconscionability. If a court “finds the [plea agreement] to have been unconscionable ... the court may refuse to enforce” it. *E.g.*, *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).

The government suggests that the doctrine applies only when the contract is both “procedurally and substantively unconscionable.” U.S. Br. 22-23 (quoting 8 Williston, *supra*, § 18:10). But the government’s own cited authority recognizes that “substantive unconscionability may be sufficient in itself.” 8 Williston, *supra*, § 18:10. Compliance with even knowing and voluntary agreements may therefore be excused where they “contravene ... public policy,” “negate the reasonable expectations of the nondrafting party,” or have “unreasonably and unexpectedly harsh terms.” *Id.*

The law review article the government (at 24) relies on says only that unconscionability does not “justif[y] the *categorical prohibition* of plea bargains,” not that the unconscionability defense can never apply to any plea agreement terms, no matter how unconscionable. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1918 (1992) (emphasis added). The same article acknowledges that when “the bargaining *outcomes* are either unjust or socially harmful,” that is “precisely the kind[] of defect that, under classical contract principles, would override a presumption of enforcement.” *Id.* at 1917 (emphasis added).

The government (at 24) claims it inappropriate to focus on the egregiousness of the “sentence” rather than the “appeal waiver itself.” But the sentence matters because appeal waivers are unconscionable *when applied* to bar review of egregious sentences. That does not render the waiver entirely invalid, *contra* U.S. Br. 22-25, just unenforceable as to “unconscionable result[s],” Pet. Br. 20 (quoting U.C.C. § 2-302).

Implied duty of good faith. A “plea agreement, ... [l]ike all contracts, ... includes an implied obligation of good faith.” *United States v. Jones*, 58 F.3d 688, 692 (D.C. Cir. 1995). The government (at 26) argues that this duty does not apply to district courts because their authority to impose a sentence stems from statute rather than the plea agreement. But the duty of good faith does not turn on the source of a third-party’s authority. The duty is premised on “honoring the reasonable expectations” of the parties, *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.), including the parties’ expectation that a key decisionmaker under the contract will not exercise discretion unlawfully or arbitrarily, *see* Pet.

Br. 21-23. Thus, the doctrine applies to government officials (like judges) who act as third-party decisionmakers. *See* Pet. Br. 22-23 (citing cases).

Regardless, appeal waivers *do* vest additional authority in sentencing courts, beyond that conferred by statute. Absent waivers, sentencing courts lack the kind of *unreviewable* discretion that waivers purport to provide.

Supervening frustration of purpose. “[T]he frustration of purpose doctrine” applies to “plea agreement obligations.” *United States v. Bunner*, 134 F.3d 1000, 1005 (10th Cir. 1998). The government (at 26-27) objects that the doctrine is difficult to satisfy. But *difficult* does not mean *inapplicable*. Indeed, the government’s cited case *did* evaluate a defendant’s frustration-of-purpose defense to his appeal waiver. *See United States v. Chaidez-Guerrero*, 665 F. App’x 723, 726 (10th Cir. 2016) (per curiam). And the government has happily accepted the benefits of this doctrine in prior cases. Pet. Br. 32-33. Contract law is not a one-way street.

The government (at 26-27) also protests that parties presume that sentencing courts may make some legal errors. But Hunter’s argument is not that *every* legal error at sentencing sufficiently frustrates the purpose of the agreement, just that *some* can. *See* Pet. Br. 24.

B. The Fifth Circuit’s Rule Collapses On Its Own Logic

The Fifth Circuit’s application of contract defenses to some sentences but not others is irrational. The Fifth Circuit accepts a statutory-maximum defense because parties to a plea agreement operate under the “truism that a court must not impose a sentence ... that is unauthorized by law.” *United States v. Kim*, 988 F.3d 803, 810 n.1 (5th Cir. 2021). Thus, “both parties to [a] plea agreement[] contemplate[] that ... the non-contracting ‘party’ who implements the agreement (the district judge) will

act legally in executing the agreement.” *United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019) (citation omitted). So in some circumstances, the Fifth Circuit agrees that performance can be “excused on the ground that one of [the promise’s] basic assumptions has proved to be wrong.” Farnsworth, *supra*, § 9.01.

The government offers no justification for the Fifth Circuit’s actual rule or rationale. Instead, the government (at 30-31) attempts to reconceptualize the Fifth Circuit’s rule as a matter of contract interpretation. According to the government (at 31), because the statutory maximum is sometimes mentioned in plea agreements, the Fifth Circuit’s outcomes can sometimes be justified by construing the appeal waiver to apply only to sentences within that maximum. The Fifth Circuit has expressly disclaimed that plea-agreement-specific explanation, holding that such “language ... merely provide[s] additional support” for its rule, which applies regardless of the plea agreement’s language. *Kim*, 988 F.3d at 810 n.1.

In all events, the government’s logic means Hunter should be able to appeal. If the mention of the statutory maximum term of imprisonment creates a justifiable assumption that the sentencing court will comply with that law, then the same goes for a plea agreement’s reference to the supervised release statute, which also contains limits on what conditions can be imposed. *See* 18 U.S.C. §§ 3583(d), 3563(b)(9). Here, Hunter’s plea agreement references the supervised release statute in the section entitled “Punishment Range.” Pet.App.5a. The government does not dispute that the imposition of this forced-medication condition exceeded that statute’s bounds. *See* Pet. Br. 23, 29.

C. The Government’s Radical “No Exceptions” Rule Is Wrong

Rather than defend the Fifth Circuit’s reasoning, the government asks this Court to go even further and hold that knowing and voluntary plea agreements are *always* enforceable. No circuit has ever adopted this position. Ever since the government began demanding appeal waivers, circuits have uniformly agreed that “a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court.” *See, e.g., United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). The government asks this Court to break that decades-long consensus.

1. The government’s position is extreme and unprecedented.

The government (at 35) does not dispute that its position would preclude defendants from appealing even “egregious” sentencing errors. *See* Pet. Br. 26-29. The government (at 36) tells the Court not to worry, because such sentences are rare. Thankfully so. But still, judges sometimes sentence defendants above the statutory maximum. *E.g., United States v. Johnson*, 4 F.3d 904, 918 (10th Cir. 1993); *United States v. Lillard*, 57 F.4th 729, 736 (9th Cir. 2023). Judges sometimes impose sentences where the defendant is not present. *E.g., United States v. Bryant*, 643 F.3d 28, 31 (1st Cir. 2011). Judges sometimes impose sentences that may “reflect[] ... [the judge’s] own sense of religious propriety.” *E.g., United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991). Judges may sometimes sentence based on “vindictiveness.” *E.g., United States v. Chang*, 121 F.4th 1044, 1050 (4th Cir. 2024). Judges may sometimes sentence based on “national origin.” *E.g., United States v. Borrero-Isaza*, 887 F.2d 1349, 1355 (9th Cir. 1989). Judges may sometimes impose “significantly higher sentence[s]” based on tribal

status. *E.g.*, *United States v. Bulltail*, 594 F. App'x 346, 347 (9th Cir. 2014). And judges may sometimes sentence Black defendants on the perception that they “look[] like a criminal to me.” *E.g.*, *United States v. Liggins*, 76 F.4th 500, 506 (6th Cir. 2023). In short, judges sometimes impose sentences based on “unambiguous and prejudicial mistake[s]” that “seriously affect[] the fairness, ... integrity and public reputation of judicial proceedings.” *See United States v. Phillips*, 124 F.4th 522, 527-28 (8th Cir. 2024) (Stras, J.) (cleaned up).

The government (at 31) magnanimously suggests it might waive appeal waivers in cases of “egregiously unjust” sentences. In fact, the government does seek to enforce appeal waivers even in extreme cases, such as when a written judgment imposed a sentence five years longer than the court’s oral pronouncement, *see United States v. Tancil*, 817 F. App'x 234, 236 (7th Cir. 2020). Regardless, this Court does not replace legal defenses with government promises of benevolence. *See Snyder v. United States*, 603 U.S. 1, 17 (2024).

The government (at 36-37) claims that egregious sentencing errors must not be a “real concern[] for defendants” because plea agreements do not include express carveouts for them. That assumes defendants have enough bargaining power to demand such exceptions. They don’t—not by a long shot. *See* Pet. Br. 36-37; NACDL Br. 7-9. Regardless, the fact that nobody *expects* judges to commit such errors is exactly why contract defenses kick in.

The government (at 36) says Congress can step in to solve any problems. Congress already stepped in to provide a right to appeal. Contracts that abridge that right should be subject to traditional defenses.

2. The government’s rationale for its extreme position is unpersuasive.

The government makes four main arguments for its no-exceptions position. None work.

a. The government (at 19-20) objects that applying contract defenses to appeal waivers requires “craft[ing] a rule of federal common law.” But this Court’s use of general contract principles is omnipresent, spanning from the Spending Clause, *Cummings v. Premier Rehab Keller*, 596 U.S. 212, 219-23 (2022), to collective-bargaining agreements, *M&G Polymers USA v. Tackett*, 574 U.S. 427, 435 (2015). Indeed, this Court has long held that “agreement[s] purport[ing] to waive a right ... conferred by a federal statute” are governed by “traditional common-law principles.” *Rumery*, 480 U.S. at 392. Plea agreements are no different.

Indeed, the government regularly relies on contract principles—what it now pejoratively calls “federal common law”—to interpret plea agreements. Without contract principles, the government could not enforce appeal waivers; defendants could simply revoke their promises to not appeal. Again, the government cannot have it both ways. If common-law contract principles can be used to enforce a plea agreement, they can likewise be used to determine whether enforcement is appropriate.

b. The government (at 13-19) says that many important rights can be waived. Agreed. But that does not mean no defenses to enforcement of a waiver ever apply. There is no unwaivable statutory or constitutional right to timely receive widgets or litigate in a particular forum. Contract law nonetheless determines whether such waivers are enforceable. *See* Pet. Br. 31.

That plea agreements are enforceable despite a defendant’s “ignorance” of the law or the “quality of the

[government’s] case,” *United States v. Ruiz*, 536 U.S. 622, 630-31 (2002), *cited in* U.S. Br. 17-18, accords entirely with contract principles. Mere ignorance does not excuse performance. Extreme changes in circumstance or unfairness can.

c. The government (at 16) contends that traditional contract defenses are unnecessary because “[p]lea agreements ... come with considerable protections.” While those protections might make it *harder* to successfully apply a particular contract defense, they do not make defenses *inapplicable*. The government ignores Hunter’s example of consent decrees, which are entered into only after a “fairness hearing,” *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991), but are still excusable upon a showing of “grievous wrong,” Pet. Br. 35 (citations omitted).

Zooming out, plea agreements require up-front “protections” precisely *because* they are rife with dangers for defendants. *See* Cato Br. 13-21; Federal Defenders Br. 5-6, 8-14; NACDL Br. 5-7; Plea Bargaining Institute Br. 19-22. “[P]lea agreements are not ordinary contracts”; they force defendants to make decisions with enormous stakes in a context where the other side enjoys “awesome advantages in bargaining power.” *United States v. Lajeunesse*, 85 F.4th 679, 692 (2d Cir. 2023) (cleaned up). It would be passing strange to require protections on the front-end to mitigate those dangers and then use the existence of those protections to strip away back-end safety valves.

d. Finally, the government raises policy arguments.

The government (at 14-15) highlights that appeal waivers are beneficial to both the government and defendants. All contracts are mutually beneficial. They are nonetheless subject to defenses which ensure contracting

parties that their contracts will not be applied in wholly unjust and unforeseeable ways.

The government (at 27-29, 34-36) warns that adopting Hunter's position would "undermine the enforcement of nearly all appeal waivers." Empirical evidence proves the government wrong twice over. *First*, contract defenses have existed for centuries and yet parties still regularly enter contracts, which are regularly enforced. It is no answer to say (at 28, 34-35) that defenses to appeal waivers would be particularly pernicious because the purpose of an appeal waiver is to avoid appeals. Forum selection clauses, agreements to forego litigation, consent decrees, and arbitration clauses are all intended to prevent recourse to courts. Contract law nonetheless permits parties to litigate defenses to enforcement. The government has no unqualified right to determine the enforceability of its contracts free from litigation.

Second, the sky has not fallen under the status quo, which has existed for decades. *Every* circuit recognizes at least some additional exceptions beyond the two identified by the Fifth Circuit, Pet. Br. 29-30, which is all Hunter asks for. And courts of appeals regularly apply contract-law defenses to plea agreements. *See supra* pp. 5-8. The government is unable to point to any epidemic of frivolous appeals in those circuits, relying instead (at 34) on snippets of cases suggesting that a "miscarriage of justice" exception may be fuzzy around the margins. But as one of the government's cited cases (at 34) recognizes, courts agree on the basic contours; the exception is applied "sparingly and without undue generosity," only to the most "egregious" cases. *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001).

Regardless, courts do not jettison workable rules just because hard cases may arise. To take one example, any ambiguity in a miscarriage-of-justice rule is also true of

the analogous plain-error test courts routinely apply to forfeited arguments, which similarly looks for egregious errors that amount to a miscarriage of justice. Courts have not done away with the test for determining plain error to avoid dealing with edge cases.

The government's fears are also logically unsound. Frivolous efforts to avoid an appeal waiver can come at a cost. For example, if the court determines that no exception applies, the defendant's appeal may breach the plea agreement and the government may rescind the agreement and reinstate dropped counts. *See* Pet. Br. 39-40 (citing cases). The government does not contend otherwise. Frivolous appeals can also lead to sanctions. *See, e.g., United States v. Gaitan*, 171 F.3d 222, 224 (5th Cir. 1999) (imposing sanctions "for pursuing this appeal contrary to the waiver").

Moreover, for defendants dead-set on raising a frivolous claim, there is little practical difference between Hunter's rule and the government's. Under the government's rule, defendants can still appeal on contract formation and interpretation grounds, meaning that defendants could simply repackage their frivolous contract-defense arguments as frivolous reasons why the contract was not knowing or could not have meant what it said. The only thing the government's rule does differently from Hunter's is choke off *meritorious* claims challenging the worst errors.

The government also overstates the burdens of the status quo. Appeals challenging plea agreements rarely look anything like full-on sentencing appeals. Courts can and do quickly dispose of run-of-the-mill complaints about guidelines miscalculations or misapplications of sentencing factors without reviewing the merits. *See, e.g., United States v. Moller*, 2022 WL 17491260, at *1 (1st Cir. 2022)

(enforcing appeal waiver, rejecting miscarriage of justice argument, and dismissing appeal in one paragraph).

The government conjures a strawman, alleging that Hunter's rule would permit appeals whenever "the sentence was not what the defendant 'reasonably expected.'" U.S. Br. 27 (quoting Pet. Br. 17). Contract defenses have strict requirements, *see supra* pp. 4-8, and don't simply ask what the parties, in a colloquial sense, "reasonably expected." The government (at 28) also sees no "coherent" way to distinguish run-of-the-mill procedural errors from serious substantive ones. But courts of appeals already separate wheat from chaff. *See* Pet. Br. 29-30. And contract law has for centuries distinguished between serious, unforeseeable issues and ordinary, foreseeable ones. That's why these contract defenses are well-settled and accepted: They make sense, further the parties' expectations, and take into account overriding public policy concerns.

The government (at 33) relies on finality interests, pointing to habeas law. But habeas' strict limits come from statute. And even in habeas, the rule is not zero exceptions to finality. *See* Federal Defenders Br. 24-26. Plus, habeas' restrictions come into play only after initial recourse to direct appeals. *Bousley v. United States*, 523 U.S. 614, 621 (1998). In any event, when Congress granted defendants the right to appeal, Congress made the judgment that the interest in appellate review outweighs finality interests, at least as a default rule.

The government's nightmare scenario of more sentencing appeals is simply the world Congress envisioned when statutorily enshrining defendants' right to appeal their sentences. Indeed, that was the way the world worked until the government began insisting that defendants sign appeal waivers. Federal Defenders Br. 7.

D. The Court Should Vacate and Remand

The government's rehashed vehicle objections are unresponsive to the first question presented and wrong anyway. The Court should resolve this question in Hunter's favor and remand.

a. The government (at 37-38) argues that Hunter will ultimately fail to establish a contractual defense or satisfy any safety valve. That is an issue for remand. The question presented simply asks whether the Fifth Circuit's two-circumstances-only rule is correct. This Court should answer no and permit Hunter to take his shot under the correct framework.

The government is also wrong that Hunter's mandatory-medication condition was foreseeable. The district court imposed an across-the-board requirement that Hunter take any mental-health medication prescribed by his physician, irrespective of side-effects, risks, or necessity. That's not a run-of-the-mill "treatment" condition; it's an open-ended mandate imposed without any medical evaluation, any finding it was needed, or any nexus to the offense.

Hunter had no reason to foresee that illegal and bizarre condition. Hunter committed a white-collar crime, and probation's mandatory-medication recommendation was based on nothing more than childhood diagnoses of depression and anxiety that nobody contends impacts him today. Pet. Br. 33-34. While the government (at 37) claims that courts "frequently" apply medication conditions to white-collar offenders, its three cited instances over the past decade—and none in the past 5 years—hardly seem "frequent[]." Nor does the government say why the condition was imposed in those cases or whether the defendants there even objected.

The government (at 38) attempts to frame Hunter's complaint as about procedural error. But Hunter contends that his sentence substantively exceeded constitutional and statutory limits. And while medical treatment is a possible discretionary condition of supervised release in some cases, *see* 18 U.S.C. § 3583(d)(3) (cross referencing *id.* § 3563(b)), it was not statutorily authorized here. The condition can be imposed only when certain factual predicates are met that indicate the condition is sufficiently "necessary." *See id.* § 3583(d)(2). The district court made no such findings. The government does not even attempt to defend the mandatory-medication condition here.

b. Although the government does not affirmatively argue that Hunter's appeal was unripe, it suggests (at 38) that the Fifth Circuit could conclude otherwise on remand. But the only basis for the Fifth Circuit's decision below was the appeal waiver. Even if the panel on remand were to deem Hunter's appeal unripe, Hunter could challenge the Fifth Circuit's incorrect ripeness precedent en banc or in this Court.

In any event, Hunter was just released from prison, is now on supervised release, and is immediately forced to make decisions about whether to even seek medical advice and treatment, lest he be forced to consume unwanted medication. He faces an imminent risk that this unlawful condition of release will force him to either accept whatever medication a doctor suggests or face the possibility of reimprisonment.

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

The Fifth Circuit applies another categorical rule in cases like Hunter’s: A defendant can never rely on a sentencing judge’s unqualified statement that he has a “right to appeal.” See *United States v. Gonzalez*, 259 F.3d 355, 358 (5th Cir. 2001). This Court should reject that mechanistic rule as well.

A. Appeal Waivers Can Be Waived Or Modified

At least three legal principles bar the government from enforcing an appeal waiver where the sentencing judge advises the defendant of his right to appeal.

Waiver. A party can waive the other’s contractual obligations by “clearly manifest[ing] an intention to waive the provision” or by “reasonably induc[ing] the nonwaiving party to rely on an apparent waiver of the term or provision to its detriment.” 13 Williston, *supra*, §§ 39:14, 39:27.

The government (at 46) argues that it did not intend to waive the appeal waiver. That contradicts the sentencing transcript. Immediately after the sentencing judge informed Hunter he had a “right to appeal,” the judge asked the government whether it wished to “say anything else.” Pet.App.36a. In response, the prosecutor stated, “Your Honor, I believe – well, no. I – no.” Pet.App.36a. That response demonstrates “an intention to waive the provision” barring appeals. 13 Williston, *supra*, § 39:27.

The government (at 46) next argues that “silence, acquiescence, or inactivity is insufficient.” But silence or acquiescence paired with “detrimental reliance” by the other party can amount to a waiver. 13 Williston, *supra*, § 39:35. And the government does not dispute that

Hunter relied on that assurance here or that defendants in Hunter's situation may be harmed if they rely on apparent waivers. Pet. Br. 39-40.

The government (at 46) contends that "circuit precedent relieved it of any duty to object." But that is the very circuit precedent at issue here. See *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992). And lawyers typically have a duty to respond to a court's questions.

Acquiescence. The government can also waive or forfeit its ability to enforce an appeal waiver by acquiescing to the sentencing judge's statement of appellate rights. Pet. Br. 40. That's also what happened here. Pet.App.36a.

The government (at 44) argues it did not "affirmatively abandon[] its right to enforce the appeal waiver." But the sentencing judge sought objections *immediately after* advising Hunter of his right to appeal. The government's decision to say "no" instead of correcting the sentencing judge amounts to a "intentional relinquishment" of its right to enforce the appeal waiver. *United States v. Olano*, 507 U.S. 725, 733 (1993) (cleaned up).

And even if not waiver, then forfeiture. The government (at 45) rests its argument against forfeiture on *Class v. United States*, 583 U.S. 174 (2018). But *Class* underscores that "the[] circumstances" matter. *Id.* at 185. *Class* held that the defendant's statement during the plea colloquy did not amount to forfeiture because the district judge's statement that the defendant would be "generally" giving up his appellate rights was equivocal, signaling that some appellate rights remained and making an objection unnecessary to preserve those appellate rights. *Id.* at 185; *Class*, No. 16-424, J.A. 63. Here, by contrast, the judge's "right to appeal" statement was absolute, yet the government made no objection.

Modification. The sentencing judge told Hunter he had a right to appeal, thereby proposing a modification of the plea agreement. And when the judge invited the government to object, it expressly declined to do so, manifesting its acceptance of the proposed modification. Pet.App.36a; Restatement (Second) of Contracts § 69 (1981); Pet. Br. 41-43.

The government (at 44) acknowledges that silence can constitute acceptance where the silence “manifest[s]” an intent to accept the modification. It argues that the plea agreement’s no-oral-modifications clause somehow prevents silence from manifesting such an intent. But “an oral agreement is sufficient to modify or rescind a written contract notwithstanding” such clauses. *See* 10 Williston, *supra*, § 29:42.

That the district court’s role in the plea process is “strictly limit[ed]” is of no moment. *Contra* U.S. Br. 43 (citation omitted). Of course the court cannot “amend[] or modify[]” a plea agreement “at the unilateral request of one of the parties.” *See United States v. Scanlon*, 666 F.3d 796, 798 (D.C. Cir. 2012). But that’s not what happened here—*both* Hunter *and* the government accepted the sentencing judge’s proposed modification.

Nor does it matter that the government “derived no apparent benefit” from the modification. *Contra* U.S. Br. 43. Oral modifications without consideration are enforceable “to the extent that justice requires enforcement in view of material change of position in reliance” on the modification. Restatement, *supra*, § 89. The government does not contest that Hunter detrimentally relied on the district judge’s statement and the government’s acquiescence. Pet. Br. 43. Equally important, the court itself may have imposed the disputed medication condition here only on the understanding there was a right to appeal.

When the court invited the government to object, it was incumbent on the government to speak up. The court may not have imposed the same sentence had the government done so. Pet. Br. 43.

B. The Government’s Remaining Arguments Are Incorrect

“[C]riminal defendants should be entitled to take the statements of district court judges” for their “plain meaning.” Pet. Br. 43-44 (quoting *United States v. Godoy*, 706 F.3d 493, 495 (D.C. Cir. 2013)). The government (at 41, 46-47) seeks to flip this fundamental principle on its head. In the government’s view (at 41), it is incumbent on the defendant to seek clarification from a district judge if he is confused. But to put the same responsibility on the government? That would have “disruptive consequences for the plea process.” U.S. Br. 46. The Court should not adopt such a one-sided rule.

Equally unavailing is the government’s contention (at 47) that, absent the Fifth Circuit’s categorical rule, defendants would be “incentivized to bait courts into making” broad appellate right statements. The government fails to explain how a criminal defendant could possibly “bait” a court into issuing such a statement, particularly with the government there to object.

The government (at 40) contends the district court’s “right to appeal” statement was “accurate” because Hunter had the right to appeal ineffective assistance of counsel. But in context, the district court’s statement is best viewed as an advisement that Hunter could appeal *generally*. Indeed, the statement was issued after Hunter strenuously objected to the mandatory-medication condition, and after the sentencing judge assured him that the condition was reviewable. Pet.App.24a; Pet.App.36a. And the fact that the government responded to the court’s

query with “Your Honor, I believe – well, no. I – no” suggests that the government itself had some concerns about the accuracy of the court’s statement.

The government (at 39-42) argues that the sentencing judge’s broad “right to appeal” statement was *required* by Federal Rule of Criminal Procedure 32(j)(1)(B). Not so. That rule requires sentencing courts to advise defendants of “*any* right to appeal the sentence.” Fed. R. Crim. P. 32(j)(1)(B) (emphasis added). At most, it requires sentencing judges to advise defendants who enter into plea agreements containing an appeal waiver of their “remaining, though strictly limited, right to appeal.” *United States v. Marsh*, 944 F.3d 524, 528 (4th Cir. 2019).

At bottom, whether the district court’s statement was a failed attempt to comply with Rule 32 or was inaccurate in context, both are issues best addressed on remand. See *Koon v. United States*, 518 U.S. 81, 113-14 (1996) (remanding for clarification by district court); *Williams v. United States*, 503 U.S. 193, 206 (1992) (same).

CONCLUSION

The Court should vacate the Fifth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

BRENT E. NEWTON
ATTORNEY AT LAW
*19 Treworthy Road
Gaithersburg, MD 20878*

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLLOUD
JAMES N. SASSO
DANA B. KINEL
MIHIR KHETARPAL
ROHIT P. ASIRVATHAM
YOAV PAZ-PRIEL
WILLIAMS & CONNOLLY LLP
*680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com*

FEBRUARY 13, 2026

Counsel for Petitioner