No. 26-5367

IN THE

SUPREME COURT OF THE UNITED STATES

REGINALD DEWAYNE BROWN,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

Kyle Singhal
Counsel of Record
HOPWOOD & SINGHAL PLLC
1701 PENNSYLVANIA AVE., N.W.
SUITE 200
WASHINGTON, DC 20006
KYLE@HOPWOODSINGHAL.COM
TELEPHONE: (202) 769-4080

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The courts of appeals apply conflicting standards to a district court's rejection of a plea agreement that embodies a charging decision. 1

II. The plea agreement in this case embodied a charging decision, and the district court rejected the agreement without considering the prosecutor's reason for that decision. 6

III. Plain-error review is no obstacle to deciding the question presented. 9

IV. The government does not dispute that the question presented is important and recurring. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Henderson v. United States, 568 U.S. 266 (2013) 10

Holguin-Hernandez v. United States, 589 U.S. 169 (2020) 10, 11

Hughes v. United States, 584 U.S. 675 (2018) 5

In re Ellis, 356 F.3d 1198 (9th Cir. 2004) (en banc) 3, 7

In re Flynn, 973 F.3d 74 (D.C. Cir. 2020) (en banc) 12

In re United States, 32 F.4th 584 (6th Cir. 2022) 4, 7

In re United States, 345 F.3d 450 (7th Cir. 2003) 8, 12

Tapia v. United States, 564 U.S. 319 (2011) 10

Trump v. United States, 603 U.S. 593 (2024) 12

United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) 2, 4

United States v. Bean, 564 F.2d 700 (5th Cir. 1977) 2

United States v. Goodall, 236 F.3d 700 (D.C. Cir. 2001) 5

United States v. Mancinas-Flores, 588 F.3d 677 (9th Cir. 2009) 11

United States v. Miller, 722 F.2d 562 (9th Cir. 1983) 3, 7

United States v. Ochoa-Luna, 2026 U.S. Dist. LEXIS 231357 (D. Colo. Oct. 8, 2026) 13

United States v. Papke, 149 F.4th 1169 (10th Cir. 2025) 2, 3, 4, 5, 8

United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995) 2, 3, 7

United States v. Texas, 599 U.S. 670 (2023) 11

United States v. Torres-Echavarria, 129 F.3d 692 (2d Cir. 1997) 2

Wayte v. United States, 470 U.S. 598 (1985) 8

Rules

Fed. R. Crim. P. 11 ..... 5, 6, 7

Fed. R. Crim. P. 51 11

Fed. R. Crim. P. 52 10

Sup. Ct. R. 15.2 10

Sentencing Guideline

U.S.S.G. § 6B1.2 ..... 5, 9

REPLY BRIEF FOR PETITIONER

The government does not contest the importance of the question presented. It does not cite, let alone reconcile, the decisions of the Second, Fourth, Fifth, Seventh, and Eleventh Circuits that permit a district court to reject a plea agreement reducing the charges whenever the court finds the resulting sentence too lenient. Pet. 13-14. And it does not dispute three facts. The government reduced the charges against Brown from offenses involving five kilograms or more of cocaine to offenses involving 500 grams or more, which lowered the mandatory minimum sentence from ten years to five. The parties stipulated to a sentence at that five-year minimum. And the Sentencing Guidelines range of 130 to 162 months, against which the district court measured the parties' agreement, rested on 11.58 kilograms of cocaine, a quantity that the government describes as "consistent with the original indictment." BIO 8.

The government argues that this case involves only a "Type-C" agreement to a specific sentence, BIO 7-11, and that the question presented would be reviewed only for plain error, BIO 11-12. The first argument depends on a label that misdescribes both the law of the circuits and the agreement in this case. The second argument was not adopted by the court of appeals, and plain-error review could not change the answer to the question presented.

I. The courts of appeals apply conflicting standards to a district court's rejection of a plea agreement that embodies a charging decision.

The circuits disagree about what a district court must do with the Executive's charging judgment when a plea agreement embodies one. The government's division

of plea agreements into "Type-A" agreements and "Type-C" agreements does not resolve that disagreement.

First, the government does not deny that the circuits apply different standards to a plea agreement that reduces the charges. In the D.C. Circuit, a judge may condemn the prosecutor's agreement to reduce the charges "only in a blatant and extreme case." *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973). The Fifth Circuit rejected that rule by name: "[W]e find unacceptable the District of Columbia standard that a court must accept the plea unless the bargain is 'such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.'" *United States v. Bean*, 564 F.2d 700, 703 n.4 (5th Cir. 1977) (quoting *Ammidown*, 497 F.2d at 622). The Fifth Circuit reasons that "a plea bargain to dismiss charges is an indirect effort to limit the sentencing power of the judge." *Id.* at 704. The Tenth Circuit reasons that a dismissal of charges implicates the court's sentencing discretion "in precisely the same manner it is implicated by prosecutorial decisions to bring charges in the first place, where prosecutorial discretion is nearly absolute." *United States v. Papke*, 149 F.4th 1169, 1181 (10th Cir. 2025) (quoting *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995)). In the Second Circuit, a district court presented with a plea to a lesser offense has "broad latitude to evaluate the proposed plea," and the Second Circuit upheld the rejection of such a plea "when the Guidelines applicable to the offense of indictment called for a much higher sentence," which is the benchmark that the district court used in this case. *United States v. Torres-Echavarria*, 129 F.3d 692, 697 (2d Cir. 1997).

Second, the conflict extends to plea agreements that also stipulate a sentence. Every court of appeals permits a district court to refuse a stipulated sentence that the court finds too lenient, and Brown has never contended otherwise. The government's restated question presented, which asks whether the district court "was required to accept" an agreement to "a sentence that it found inappropriate," BIO I, therefore answers an argument that Brown has not made. The conflict concerns what a district court must do with the prosecutor's reasons when the same agreement that stipulates a sentence also reduces the charges.

In the Tenth Circuit, an agreement that dismisses charges and stipulates a sentence "directly implicates both judicial and prosecutorial discretion," and "[w]hile the district court has considerable leeway in rejecting the bargain based on its sentencing aspect, its discretion is more limited when its decision is based on the bargain's charging aspect." *Robertson*, 45 F.3d at 1438-39. "Whenever a district court rejects any plea bargain—whether a charge bargain, sentence bargain, or hybrid bargain—it 'must set forth, on the record, the prosecution's reasons for framing the bargain and the court's justification for rejecting it.'" *Papke*, 149 F.4th at 1181 (quoting *Robertson*, 45 F.3d at 1438). The Ninth Circuit imposes the same requirement when an agreement reduces the charges, *United States v. Miller*, 722 F.2d 562, 566 (9th Cir. 1983), and it has treated an agreement that "specified both a reduced charge and the sentence" as one "implicating both judicial and executive decisionmaking," *In re Ellis*, 356 F.3d 1198, 1209 (9th Cir. 2004) (en banc). And in the D.C. Circuit, a reduction in charges that might otherwise appear to intrude on

the court's sentencing function "takes on an entirely different coloration if it is explained to the judge that there was a prosecutorial purpose, an insufficiency of evidence, [. . .] or other similar consideration." *Ammidown*, 497 F.2d at 623.

The Sixth Circuit does not require a district court to identify or weigh the prosecution's reasons for an agreement that reduces the charges and stipulates a sentence. Under the decision below, a district court has an "independent obligation to ensure that" the agreement "stipulate[s] to an appropriate sentence within the applicable Guideline range, or else justify any departure from the Guidelines." Pet. App. 8a. The panel's opinion does not mention the prosecutor's reason for reducing the charges against Brown. Nor did the panel apply the Sixth Circuit's own rule that "[a] court considering a charge bargain must, therefore, exercise its discretion with due regard to prosecutorial prerogatives," although the panel twice cited the page on which that rule appears. *In re United States*, 32 F.4th 584, 594 (6th Cir. 2022); Pet. App. 6a, 8a.

The government observes that the Tenth Circuit allows a district court "considerable discretion" over sentence bargains, BIO 9-10, and *Papke* itself upheld the rejection of a first agreement that stipulated a sentencing range. But under that first agreement the defendant would have pleaded guilty to the most serious count, which "carried a minimum of fifteen years and a maximum of life imprisonment," so the dismissal of the two lesser counts did not reduce the sentence available to the district court. 149 F.4th at 1174. The Tenth Circuit reversed the rejection of the second agreement, which dismissed that most serious count, "[b]ecause the district

court did not show due deference to the Government's reasons for entering the second plea agreement." *Id.* Here, the stipulated sentence of 60 months was lawful only because the government had reduced the charges, the prosecutor gave her reason for the agreement, and neither court below considered that reason.

Finally, the conflict extends to the policy statement of the Sentencing Commission on which the decision below rests. The panel described a district court's inquiry under U.S.S.G. § 6B1.2(c) as an "independent obligation," Pet. App. 8a, and the government reads *Hughes v. United States* to mean that a district court "may not accept the agreement unless" the conditions of § 6B1.2(c) are satisfied, BIO 6. The D.C. Circuit holds that "policy statements, such as § 6B1.2, are non-binding 'norms,'" and that "[t]he Commission did not intend § 6B1.2 to bind courts." *United States v. Goodall*, 236 F.3d 700, 701, 705 (D.C. Cir. 2001). The government calls *Goodall* inapposite, BIO 11, but the agreement in *Goodall*, like the agreement in this case, dismissed charges and stipulated a sentencing range, and "[t]he prosecutor, in turn, argued that 'proof problems' were a 'justifiable reason' for the court to accept a plea agreement with a lower sentence." 236 F.3d at 702-03. And *Hughes*, which decided only whether a defendant sentenced under a Rule 11(c)(1)(C) agreement is eligible for a later sentence reduction, reaffirmed that "the Guidelines are advisory only." 584 U.S. 675, 687 (2018).

This Court should grant review to resolve the conflict.

II. The plea agreement in this case embodied a charging decision, and the district court rejected the agreement without considering the prosecutor's reason for that decision.

The government's answer to the conflict is that the district court "took the charges, as set forth in the superseding information, as a given" and rejected only the stipulated sentence. BIO 7. That description of the district court's ruling is wrong for four reasons.

First, the agreement reduced the charges. The grand jury indicted Brown for conspiring to possess, and for possessing, five kilograms or more of cocaine with intent to distribute, offenses that carry a mandatory minimum sentence of ten years. Pet. App. 4a, 27a. After the parties reached their agreement, the government filed a superseding information charging "the same two offenses, but for the amount of '500 grams or more.'" Pet. App. 4a-5a. Those reduced charges carry a mandatory minimum sentence of five years. Pet. App. 27a. The stipulated sentence of 60 months was that five-year minimum, and the district court could not lawfully have imposed it under the indictment. The government concedes that the charges in the superseding information "were lesser-included offenses" of the charges in the indictment. BIO 8. The reduced charges and the stipulated sentence were two terms of a single bargain: the government reduced the charges so that the agreed sentence would be lawful.

Second, Rule 11 does not sort plea agreements into mutually exclusive types. The rule begins with a plea "to either a charged offense or a lesser or related offense," and it tells the court what to do "[t]o the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C)." Fed. R. Crim. P. 11(c)(1), (c)(3)(A). The words "to

the extent" presuppose that a single agreement may contain provisions of more than one type. The government describes *Ellis* as a case about "a Type-A agreement," BIO 9, but the agreement in *Ellis* was "governed by both Rule 11(c)(1)(A) and (C)": Ellis agreed to plead guilty to a superseding information charging a lesser offense, with an agreed sentence of 132 months. 356 F.3d at 1200-01. And when a district court in the Sixth Circuit rejected an agreement that "reduced [the defendant's] mandatory minimum sentence by half" and also contained sentencing recommendations, the United States sought mandamus, treated the agreement as a charge bargain, and argued that "the district court's authority to accept or reject a charge bargain is limited to two considerations." *In re United States*, 32 F.4th at 589, 596.

Third, the prosecutor explained the agreement, and her explanation was a judgment about the strength of the government's case. Brown's counsel told the district court that the prosecutors "thought there may be some problems with the case, and I think that's why we came to this resolution." R.203 at PageID#1736. The prosecutor agreed: "there was just some balancing of litigation risk in this case versus going forward with trial, and that's why the decision was made." *Id.* at PageID#1737-38. In the Tenth and Ninth Circuits, the district court would have been required to set forth that explanation on the record and to give it deference. *Robertson*, 45 F.3d at 1438; *Miller*, 722 F.2d at 566. The district court's ruling in this case does not mention the prosecutor's explanation. The court weighed only Brown's mitigating circumstances, concluding that his history and characteristics "may very well justify a substantial downward variance" but that it could not "agree that that alone justifies

a variance from 130 to 60." Pet. App. 32a-33a. The strength of the government's case is a matter "not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985). When a district judge substitutes his own view for the government's assessment of "the risk of losing at trial," the judge "is playing U.S. Attorney." *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003).

The government emphasizes that the district court was troubled by Brown's criminal history. BIO 4. But Brown's criminal history category of VI was already reflected in the Guidelines range of 130 to 162 months, as the district court recognized when it said that Brown's prior convictions "drive[] the recommendations of the guidelines up." R.205 at PageID#1755. And "with full information about Brown's criminal history, the parties agreed that a 72-month sentence was appropriate." Pet. App. 9a. The district court rejected that second agreement because the difference between the stipulated sentence and the Guidelines range "is not justified by the offense conduct reported in the PSR." R.205 at PageID#1752. The offense conduct reported in the presentence report involved 11.58 kilograms of cocaine. Pet. App. 9a.

Fourth, it makes no difference that the district court "never suggested what charges (if any) petitioner should face." BIO 8. The district court in *Papke* did not suggest what charges the defendant should face either; it rejected an agreement to dismiss the most serious count because the agreement "improperly limited the court's sentencing discretion." 149 F.4th at 1174. A district court's concern about the sentence does not take its ruling outside the law that protects the Executive's

charging discretion. The government's reliance on real-conduct sentencing, BIO 8-9, answers a question that the petition does not present. Brown does not dispute that relevant conduct, including all 11.58 kilograms of cocaine, determines the Guidelines range once a plea agreement is accepted. The question presented concerns the standard for accepting the agreement in the first place when the agreement embodies the Executive's decision to charge a lesser offense. The Sentencing Commission's policy statement treats the acceptance of an agreement and the calculation of relevant conduct as separate inquiries. U.S.S.G. § 6B1.2(a); Pet. 12-13.

This case presents the conflict.

III. Plain-error review is no obstacle to deciding the question presented.

The government contends that Brown "failed to object to the district court's rejection of the plea agreement," so that the question presented "would be subject only to plain-error review." BIO 11-12. That contention is not a reason to deny review.

First, the court of appeals did not adopt the government's contention. The panel declined to choose between abuse-of-discretion review and plain-error review: "We need not decide because we conclude that the district court did not err under either standard of review." Pet. App. 6a. The question presented was pressed and passed upon. Brown argued that the Guidelines range of 130 to 162 months was the wrong benchmark because "the prosecution made a charging decision" when it replaced the indictment with the superseding information, Brown C.A. Reply Br. 1-2, and the panel rejected that argument on the merits, Pet. App. 8a-9a. The government's brief in opposition does not contend that the question presented was

not pressed or passed upon below, and any such objection "may be deemed waived." Sup. Ct. R. 15.2.

Second, this Court's practice is to decide the question presented and to leave any question about the defendant's failure to object for the court of appeals on remand. "Consistent with our practice, [. . .] we leave it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed." *Tapia v. United States*, 564 U.S. 319, 335 (2011). In *Holguin-Hernandez v. United States*, the Court declined to decide the government's additional questions about preservation: "We shall not consider these matters, however, for the Court of Appeals has not considered them." 589 U.S. 169, 175 (2020). The government's authority, BIO 12, shows only that a prevailing party may defend its judgment on a ground that it raised below. That rule would apply after a grant of certiorari; it supplies no reason to deny review of a question that the court of appeals decided on the merits.

Third, plain-error review could not change the answer to the question presented. The question is whether a district court may reject a plea agreement on the ground that the stipulated sentence departs too far from the Guidelines range for conduct that the government declined to charge. If it may not, the district court in this case erred, and an error is plain if it is plain "at the time of appellate consideration." *Henderson v. United States*, 568 U.S. 266, 279 (2013). The remaining requirements of plain-error review, which concern the effect of the error on Brown's substantial rights and on the fairness of the proceedings, would be for the court of appeals to apply on remand. *See* Fed. R. Crim. P. 52(b).

Finally, even if the standard of review mattered at this stage, the government's premise is mistaken, because Brown preserved his claim. "Exceptions to rulings or orders of the court are unnecessary." Fed. R. Crim. P. 51(a). A party who informs the court of the "action" he "wishes the court to take" "ordinarily brings to the court's attention his objection to a contrary decision." *Holguin-Hernandez*, 589 U.S. at 173 (quoting Fed. R. Crim. P. 51(b)). The district court gave notice before the hearing that it might reject the agreement, and it opened the hearing by inviting argument. Pet. App. 7a n.4, 30a. Brown's counsel responded, "we're imploring the Court to do it today," and the prosecutor described the agreement as "the resolution we're asking the Court to accept." R.203 at PageID#1736, 1738. A defendant who has "asked the court to accept his plea and argued in favor of it" does "not have to ask the court to reconsider its decision or point out possible errors in the decision." *United States v. Mancinas-Flores*, 588 F.3d 677, 686 (9th Cir. 2009). The government's argument about the standard of review is no reason to deny the petition.

IV. The government does not dispute that the question presented is important and recurring.

The petition explained that the question presented is important and recurring. Pet. 18-19. The government does not respond. That silence is notable, because the decision below permits a district court to reject a plea agreement that reduces the charges without considering the Executive's reason for reducing them.

"Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *United States v. Texas*, 599 U.S. 670, 678 (2023). The Executive

Branch "has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute." *Trump v. United States*, 603 U.S. 593, 620 (2024). A decision by federal prosecutors to resolve a case on a reduced charge and an agreed sentence is an exercise of that authority. The Executive may make that decision because it doubts that it can prove the greater charge, because the defendant has agreed to cooperate, or because the President and the Attorney General have set enforcement priorities that favor a prompt and certain conviction over a trial. Under the decision below, a district court in the Sixth Circuit need not consider any of those reasons once the parties stipulate to a sentence.

District courts have second-guessed the Executive's judgment about how to resolve prosecutions of every kind. When the government moved to dismiss a prosecution for making false statements to federal agents, and the defendant consented, the district court appointed an amicus curiae "to present arguments in opposition to the government's Motion to Dismiss." *In re Flynn*, 973 F.3d 74, 76-77 (D.C. Cir. 2020) (en banc). When a prosecutor agreed to dismiss two of three counts against a police officer in order to obtain a felony conviction "without the risk of a trial, which might result in [the officer's] being acquitted," the district judge rejected the plea agreement and later "appointed a private lawyer to prosecute" a count that the government had moved to dismiss. *In re United States*, 345 F.3d at 451-52. And in October 2026, a district court rejected as "too lenient" an agreement under which the government, relying on the defendant's cooperation and on the "less demanding burden of proof" for a lesser charge, had agreed to dismiss charges carrying a twenty-

year mandatory minimum sentence. *United States v. Ochoa-Luna*, 2026 U.S. Dist. LEXIS 231357, at *2, *10-12 (D. Colo. Oct. 8, 2026). Because that court sits in the Tenth Circuit, it at least placed "on the record" the "Government's reasons for framing the rejected bargain as it did," in order "to ensure appropriate deference to charging discretion." *Id.* at *9-10. The district court in this case was not required to do even that.

This case is another example. Twice, the United States concluded that a sentence of five or six years was the appropriate disposition of its prosecution of Brown. The district court rejected both agreements without considering the reason that the prosecutor gave for them. Brown withdrew his plea, was convicted at trial on the original indictment, and is serving a sentence of 198 months.

This Court should grant the petition and decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Kyle Singhal
Counsel of Record
HOPWOOD & SINGHAL PLLC
1701 Pennsylvania Ave., N.W.
Suite 200
Washington, DC 20006
KYLE@HOPWOODSINGHAL.COM
(202) 769-4080

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