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IN THE SUPREME COURT OF THE UNITED STATES

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MUNSON P. HUNTER, III, )

Petitioner, )

v. ) No. 24-1063

UNITED STATES, )

Respondent. )

- - - - -

Washington, D.C.

Tuesday, March 3, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ZOE A. JACOBY, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-1063, Hunter versus United States.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Mr. Chief Justice, and may it please the Court:

All contracts are subject to defenses. So appeal waivers are also subject to defenses and can be excused in more circumstances than the two recognized below. The government argues that no contract defense can apply to knowing and voluntary appeal waivers, no exceptions. But, if appeal waivers bind defendants under contract principles, they can be excused under contract principles.

A contrary approach is anathema to our criminal justice system. No appeal for sentences above the statutory maximum based on race, religion, national origin, tribal status, or pure vindictiveness. No appeal for pregnancy bans, castration, or compelled church

1 attendance either. These scenarios are all  
2 real cases.

3 Or take this case. Only the most  
4 paramount government interest overcomes the  
5 fundamental right to refuse medical treatment.  
6 But Hunter was sentenced to a mandatory medical  
7 condition even though he had no mental health  
8 issues, let alone one connected to the crime or  
9 related to any sentencing goal.

10 Defendants bargain for caps on their  
11 sentencing exposure. Those bargains are  
12 destroyed by plainly unlawful sentences that  
13 are totally outside the realm of plausibility  
14 of either party.

15 Now floodgates concerns are belied by  
16 decades of experience in the 11 circuits that  
17 reject the Fifth Circuit's rule. Applying  
18 defenses to appeal waivers maintains the status  
19 quo. Contract defenses are narrow by design  
20 and rarely satisfied. Appeal waivers will  
21 continue to bar the vast majority of alleged  
22 sentencing errors, guidelines miscalculations,  
23 insufficient explanation, or misbalancing under  
24 3553(a).

25 But contract defenses may be satisfied

1 in the rare case of clear legal error and  
2 punishment unauthorized by statute or that  
3 violates the Constitution.

4 At a minimum, this Court should remand  
5 on the second question presented.

6 I welcome questions.

7 JUSTICE THOMAS: Ms. Blatt, if you can  
8 waive constitutional rights or statutory  
9 rights, why can't you waive these contractually  
10 rights that are statutory here?

11 MS. BLATT: You absolutely can waive  
12 the -- the -- the right to appeal and there's a  
13 appeal agreement, but the issue here is, absent  
14 this plea agreement, which is a contract, the  
15 defendant could just walk away. The only thing  
16 that is binding him to the waiver, and the  
17 government is asserting, the enforceability of  
18 the appeal waiver by contract.

19 I don't think there's any dispute that  
20 the plea agreement is a contract. If you waive  
21 your right to trial when you -- at -- at the  
22 arraignment and just say I waive my fundamental  
23 right to trial, that's a pretty big waiver.  
24 Tomorrow, you can get up and say, you know  
25 what, Judge, I think I want a jury trial. You

1 can just revoke it.

2 But, here, there's a plea agreement.  
3 There's a contract. The government has to rely  
4 on the contract principles. The government  
5 gets out of plea agreements by relying on  
6 contract defenses. And there's just no  
7 rational -- or it's just inexplicable that you  
8 would not apply contract defenses to this  
9 contract when you do to all others.

10 JUSTICE THOMAS: Could -- in this  
11 case, could the government simply void the  
12 agreement and proceed with the 10 counts?

13 MS. BLATT: Yeah, I -- I don't think  
14 so, but here's why. The government has in many  
15 cases asserted frustration of purpose and did  
16 exactly what you said. I think, here, because  
17 the government has no interest and is not  
18 defending the mandatory medication condition,  
19 there's just no countervailing principles.

20 Now the government has not disputed it  
21 can allege a breach of the plea agreement, and  
22 that would result in an invalidation of the  
23 plea. The government just doesn't dispute  
24 that. That's why defendants so rarely bring  
25 these appeals, is because they run a

1 substantial risk of exactly what you're saying.

2 We would try to argue that there's no  
3 breach based on the fact that the judge told  
4 him he had a right to appeal. And even if it  
5 is a breach, you know, it's -- it's justified  
6 by defending the contract exception, and the  
7 government doesn't have any countervailing  
8 interest to invalidate the whole agreement.  
9 And that's all the stuff we would fight on  
10 remand.

11 Here, we're cut off because the -- the  
12 Fifth Circuit has this categorical rule that,  
13 although it's a contract and you're denied the  
14 benefit of the bargain with sentences that  
15 exceed the statutory maximum, it allows no  
16 other exceptions.

17 CHIEF JUSTICE ROBERTS: Counsel, it  
18 seems to me that you're really asking for an  
19 equivalent of a Miranda warning that somebody  
20 would have to give, the -- the prosecutor,  
21 maybe even the judge, going through all the  
22 things that you're required to.

23 What -- what exactly -- what are the  
24 elements of what they must -- you must tell  
25 the -- the defendant so long as you -- so that

1 you don't leave any, you know, strings untied?

2 MS. BLATT: So there's a distinction  
3 between the first question presented and the  
4 second question presented. If the judge said  
5 absolutely nothing, we'd still be here on a  
6 contract defense. There's no warnings. It's  
7 just there's 30 years of -- actually, 34 years  
8 where this has been the law.

9 We think, in terms of the second  
10 question presented, all the judge has to say is  
11 that you had -- you may have a right to appeal;  
12 you should look at your plea agreement. That's  
13 it. There's no other warnings. There's no  
14 nothing.

15 So that's the second question  
16 presented, but on the first question presented,  
17 we're just arguing there's -- the government is  
18 enforcing the plea waiver. We're saying it's  
19 subject to one of contract defenses or a  
20 miscarriage-of-justice exception. So that's  
21 all to brief on remand. This has nothing to do  
22 with what a court would have to -- to --

23 CHIEF JUSTICE ROBERTS: Well --

24 MS. BLATT: -- educate the defendant  
25 about.

1 CHIEF JUSTICE ROBERTS: Well, I think  
2 it does have to do with that, and it seems to  
3 me that the court is the only one can do --  
4 that can do it.

5 You know, if you're the defense  
6 attorney, I don't know, you want to advise your  
7 client, of course, but, you know, if the judge  
8 says something that's not right, it seems to me  
9 that it's -- the lawyer's in a tough position  
10 because the judge has given them an opportunity  
11 to raise this after the fact if you think --  
12 and so it would be odd, I think, for the lawyer  
13 to stand up and say, oh, Your Honor, remember  
14 you've got to tell him that he can't do this or  
15 this or, otherwise, it might not be valid.

16 MS. BLATT: So, on the second question  
17 presented, we're literally arguing a straight  
18 litigation forfeiture waiver. All we're  
19 saying -- this is on the second question  
20 presented -- all courts hold what you just said  
21 except for the Ninth Circuit. It doesn't  
22 matter what the judge says, except the Ninth  
23 Circuit.

24 What we're trying to argue on the  
25 second question presented is, when the judge

1 said you have a right to appeal, given the back  
2 and forth on the medication condition, and when  
3 the prosecutor said, Your Honor, I believe,  
4 um -- well, I -- no, that he -- two things  
5 happened. One, the defendant detrimentally  
6 relied on that in bringing the appeal and  
7 exposed himself to a breach, and, two, and I  
8 think the better argument, is, had the  
9 prosecutor spoken up, we would not be wondering  
10 had the court imposed this bizarre medication  
11 condition thinking that there could be a right  
12 to appeal, and that's a simple remand.

13 CHIEF JUSTICE ROBERTS: Well, that's  
14 kind of --

15 MS. BLATT: But the more important  
16 question is the first question presented, where  
17 all 11 circuits -- this has nothing to do with  
18 what -- what a court would advise. You just  
19 sign a plea agreement, and there are broad  
20 waivers and that's it. Defendants don't bring  
21 these because it's an alleged breach.

22 You do have these rare exceptions  
23 where it can mean a contract defense or be a  
24 miscarriage of justice, the castration example,  
25 a pregnancy ban, the government's view, race,

1 mandatory medication that tough, that -- that's  
2 it, you signed the appeal waiver.

3 That's absurd when everyone from Elon  
4 Musk to billionaires to corporations to  
5 mom-and-pop -- mom-and-pops can assert contract  
6 defenses. The government doesn't even tell you  
7 why this contract, unlike any other contract in  
8 the entire universe, can't have a defense.

9 JUSTICE KAGAN: Ms. -- Ms. Blatt, I  
10 guess I'm trying to figure out what the nature  
11 of your argument is. You refer to contract  
12 defenses. Then you say or a miscarriage-of-  
13 justice exception. In the time you've been up  
14 there, you've said the question is whether it's  
15 outside the realm of plausibility. You've  
16 referred to constitutional violations.

17 MS. BLATT: Mm-hmm.

18 JUSTICE KAGAN: I mean, when is it  
19 that this would come into play in your view  
20 more specifically?

21 MS. BLATT: So, hopefully, almost  
22 never because courts don't do crazy things like  
23 here, but let me --

24 JUSTICE KAGAN: Well, but I'm asking  
25 for a standard.

1 MS. BLATT: Sure.

2 JUSTICE KAGAN: Like, what are we  
3 looking to?

4 MS. BLATT: The -- the -- the standard  
5 is that the easiest and the high-level rule  
6 statement is it's subject to contract defenses.

7 JUSTICE KAGAN: Well, I don't --  
8 what --

9 MS. BLATT: So now I'm going to --

10 JUSTICE KAGAN: -- what is a contract  
11 defense? Does that just mean it's against  
12 public policy or --

13 MS. BLATT: No, I'm going to break  
14 that --

15 JUSTICE KAGAN: -- are you referring  
16 to other kinds of --

17 MS. BLATT: -- break that down. There  
18 are hundreds of years of precedent on very  
19 narrow defenses that sound maybe in label  
20 broad, but once you take off that label, they  
21 all have a thumb on the scale, exceedingly a  
22 thumb on the scale in favor of enforcement.

23 That's why contract defenses are so  
24 rare. And if you go past the Restatements, you  
25 start reading why they're never applied,

1 including public policy. Public policy, as  
2 this Court said in *Rumery*, the first public  
3 policy is enforcement of the contract. So you  
4 would have to have some really out there public  
5 policy that would outweigh that now.

6 JUSTICE KAGAN: Is there -- is there  
7 anything other that you're -- than public  
8 policy that you're talking about --

9 MS. BLATT: No. I think --

10 JUSTICE KAGAN: -- when you refer to  
11 contract defenses?

12 MS. BLATT: -- I think the one that  
13 makes -- public policy's a good one because  
14 it's rooted in this Court's case law. The one  
15 that makes the most sense is the one the  
16 government asserts, which is frustration of  
17 purpose.

18 The government has gotten out of plea  
19 agreements in the two cases both in the Fifth  
20 Circuit and the Tenth Circuit because they said  
21 it was frustrated when a defendant didn't do  
22 anything wrong but just got out on collateral  
23 relief. Just -- so if I -- frustration of  
24 purpose, why I think it's the best and that's  
25 why I got the standard of outside the realm of

1       plausibility.

2                   JUSTICE SOTOMAYOR:  Ms. Blatt --

3                   JUSTICE ALITO:  Well, Ms. Blatt, I --

4       I think you've got a strong argument on  
5       something like miscarriage of justice or  
6       something that's shockingly improper, something  
7       that would capture the examples that you  
8       started out with, where the -- the sentence is  
9       based on race or religion or something like  
10      that.  I think you've got a -- a strong  
11      argument on that.

12                   When you go further, then I get  
13      nervous because public policy is very broad.  
14      Plea agreements have some attributes of a  
15      contract, but they're not just -- they're not  
16      like ordinary contracts.  And the -- imposing  
17      the entire law of contracts here seems to me  
18      rather open-ended.  So --

19                   MS. BLATT:  Okay.  Then can you please  
20      say the entire law of contracts does not apply  
21      to the government?  Because that's all they do  
22      is cite contract law in enforcing these plea  
23      agreements.  So make sure you write your  
24      decision that they're not enforceable either  
25      under contract principles, that the government

1 can't rely on it. It is a double standard,  
2 including in the Fifth Circuit.

3 JUSTICE ALITO: All right. Well, what  
4 do you in concrete terms, what do you think  
5 would -- the law of contracts would say about a  
6 variety of issues that might be waived? How  
7 about constitutional venue?

8 MS. BLATT: I -- I don't know what you  
9 mean by that.

10 JUSTICE ALITO: Sixth Amendment venue.

11 MS. BLATT: So all I'm talking --

12 JUSTICE ALITO: The right to be tried  
13 in the --

14 MS. BLATT: So --

15 JUSTICE ALITO: -- the state or  
16 district where the offense occurred.

17 MS. BLATT: -- I mean, waiver,  
18 Mezzanatto, you have a million cases on waiver.  
19 In terms of -- this case involves no waiver of  
20 a trial right. This is involving a waiver of  
21 the right to appeal sentencing errors.

22 And all -- the courts have generally  
23 said miscarriage of justice, but all of -- at  
24 least eight of them have said contract  
25 principles.

1 JUSTICE ALITO: What about the Sixth  
2 Amendment right to a speedy trial?

3 MS. BLATT: Well, you have -- you have  
4 cases on all of this about the waiver has to be  
5 knowing and voluntary and then you have to  
6 decide if it's a personal right versus a public  
7 right.

8 JUSTICE ALITO: What about the  
9 suppression of evidence under the Fourth  
10 Amendment or the Sixth Amendment?

11 MS. BLATT: You waive all that when  
12 you waive your right to trial. A defendant can  
13 almost never get out of a plea agreement.  
14 You've held back in, I think, '72 under Brady  
15 that plea agreements are binding and they waive  
16 the right.

17 The only way to get out of a plea  
18 agreement --

19 JUSTICE GORSUCH: So I -- I thought --  
20 I thought the only thing --

21 MS. BLATT: -- you have cases on that,  
22 Lafler. You actually have Supreme Court cases  
23 that say you can almost never get out of a plea  
24 agreement.

25 JUSTICE GORSUCH: Ms. Blatt, I thought

1 the only thing before us was waiver of  
2 sentencing errors.

3 MS. BLATT: Correct.

4 JUSTICE GORSUCH: Not anything else.

5 MS. BLATT: Correct. Because you have  
6 a million cases saying defendants can't get out  
7 of plea agreements.

8 JUSTICE GORSUCH: Yeah. And on --  
9 on -- on -- on Justice Alito's point about  
10 whether these are ordinary contracts or not, if  
11 they're not, we might think about  
12 unconstitutional conditions doctrine in this  
13 area too. And I was a little surprised we  
14 didn't have more of that in the briefing before  
15 us, and I'm kind of curious why.

16 I mean, as I understand it, the  
17 defendant here pleaded guilty to one count of  
18 fraud for \$32,000. That was the only amount  
19 charged in the indictment. And then he wound  
20 up being sentenced for something like a half a  
21 million dollars worth of fraud and a whole  
22 bunch of other unindicted incidents.

23 And it's not clear to me what benefit  
24 he got from his plea waiver -- appeal waiver, I  
25 should say, that would be proportionate and

1 have a nexus to that additional right foregone.

2 MS. BLATT: So let me just -- and I  
3 think this captures, Justice Alito, a lot of  
4 defendants are unhappy with their sentences,  
5 but when they're -- and they're mostly  
6 guidelines, but within -- when they're within  
7 the statutory maximum, courts have universally  
8 said tough luck, that part of the appeal waiver  
9 is the assumption that the court will make  
10 ordinary errors in sentencing guidelines as  
11 long as you're sentenced within the statutory  
12 maximum. The government's view is you can  
13 sentence someone for 30 years for a misdemeanor  
14 and there's no right to defense.

15 Now they want to try to rely on maybe  
16 something in the contract, but that contract  
17 provision doesn't say what the government says.  
18 So -- nor the Fifth Circuit. The Fifth  
19 Circuit, I mean --

20 JUSTICE GORSUCH: With respect,  
21 Ms. Blatt, do I get an answer to my question  
22 about why we don't have an unconstitutional  
23 condition?

24 MS. BLATT: It -- the -- the sentence  
25 seemed to me, 51 months and all the fines, I --

1 I don't think he -- because we're just -- I  
2 mean, yeah, the defendant's not happy with his  
3 sentence. Most defendants aren't. But they're  
4 within the statutory maximum. So I think  
5 that's the answer.

6 The condition of probation -- sorry,  
7 the condition of supervised release is the  
8 preposterous one that says you have to follow  
9 the recommendations.

10 JUSTICE GORSUCH: All right.

11 JUSTICE KAVANAUGH: In your --

12 JUSTICE GORSUCH: One -- one might  
13 argue, though, that that's an unconstitutional  
14 condition to be required to give up a bodily --  
15 a right of bodily integrity without a  
16 compelling showing by the government.

17 MS. BLATT: Or any showing.

18 JUSTICE GORSUCH: Any showing.

19 MS. BLATT: I mean, it's just totally  
20 bizarre. The government doesn't defend it.  
21 It's -- I'm going to get this example out. If  
22 there was a law that was passed that said all  
23 judges must take antidepressants recommended by  
24 their physician, I think you would find it  
25 stupidly unconstitutional and offensive.

1 JUSTICE GORSUCH: Well, I think we  
2 already have. I mean, we've got a very --

3 MS. BLATT: And it might be  
4 medically -- and it might be medically  
5 appropriate to take antidepressants.

6 JUSTICE GORSUCH: -- 50-year-old  
7 case --

8 MS. BLATT: It doesn't matter.

9 JUSTICE JACKSON: But, Ms. --  
10 Ms. Blatt, is the problem that you couldn't  
11 really raise Justice Gorsuch's very significant  
12 point because there is this waiver?

13 Like, the unconstitutional condition,  
14 I think, is an argument that could be made in  
15 the context of an appeal when you were trying  
16 to say that the -- that the trial judge or the  
17 sentencing judge did something wrong.

18 MS. BLATT: Yes. And --

19 JUSTICE JACKSON: But the problem is  
20 you have a waiver, so you never even get to  
21 raise that issue.

22 MS. BLATT: Can't raise it. That's  
23 what I was trying to say to Justice Kagan. In  
24 the universe of reading all of these cases, the  
25 court of -- so, first of all, defendants don't

1 bring them because they don't want to get  
2 turned around and have the plea agreement  
3 breached.

4 The lawyers don't want to bring them  
5 because they've been sanctioned.

6 And, third, the court of appeals don't  
7 want to see these cases because they have to  
8 deal with it. And that's why, when you read  
9 them, they say, this is going to be rarely  
10 applied, please don't bring them, it has to be  
11 an extreme case.

12 JUSTICE JACKSON: Right.

13 JUSTICE BARRETT: So is your issue --

14 JUSTICE KAGAN: Well, it might be  
15 rare, but, usually, you know, we have a  
16 standard, you know, what are those rare cases?  
17 How do we identify them? And that's what I'm  
18 trying to figure out.

19 MS. BLATT: So --

20 JUSTICE KAGAN: Now you said, well,  
21 you could definitely argue if it's above the  
22 statutory maximum. But the Fifth Circuit  
23 actually seems to agree with you. So -- so, on  
24 that one, you're in the same place as the Fifth  
25 Circuit.

1           So what else? And how do we identify  
2 these errors? And is it -- I guess maybe the  
3 backup point is, is this really a place where  
4 we should look to contract law, or is it a  
5 place where we should just say, yes, we should  
6 have an exception for, you know, miscarriages  
7 of justice and -- and people know what that  
8 means --

9           MS. BLATT: So --

10          JUSTICE KAGAN: -- and know that --

11          MS. BLATT: Yeah. And --

12          JUSTICE KAGAN: -- it refers only to  
13 extreme cases?

14          MS. BLATT: And what I've distilled,  
15 which I think is a really good standard, is,  
16 first, the error has to be obvious, like clear  
17 and indisputable, like no even argument on the  
18 other side. It just has to be a really bad  
19 mistake, whether that's in excess of the  
20 statutory maximum, the case involving Judge  
21 Stras in the Eighth Circuit, it was a person  
22 who possessed a gun. The court imposed a very  
23 bizarre, unrelated, weird condition that he had  
24 a lifetime ban. It just kind of came out of  
25 nowhere. Those are clear errors.

1           Now, once you get past clear error,  
2     like, if you're having an argument about it,  
3     the defendant is just going to lose. But, when  
4     it's a stupid clear error, that's one. That's  
5     the first gateway.

6           The second gateway is exactly what you  
7     said. It's got to be really bad. And what I  
8     said what really bad means is it's just so  
9     plainly unauthorized by statute or a violation  
10    of a constitutional right, which covers race,  
11    First Amendment, religion, bodily integrity.

12           JUSTICE GORSUCH: Why --

13           JUSTICE JACKSON: But there is another  
14    option, isn't there, I mean, in addition to  
15    those possibilities for saying this waiver is  
16    unenforceable? Isn't there the option of  
17    saying that we really just don't allow these  
18    kinds of waivers? In other words, that, you  
19    know, it's not, for example, knowing and  
20    voluntary for a defendant to prospectively  
21    waive his right to object or to appeal a  
22    sentencing error.

23           MS. BLATT: Yeah.

24           JUSTICE JACKSON: And so they're just  
25    not enforceable. I know you don't make this

1 argument --

2 MS. BLATT: No, but here's --

3 JUSTICE JACKSON: -- but there are --

4 there are --

5 MS. BLATT: No, I like it that you  
6 have a case kind of against me on it. So  
7 the -- the knowing and voluntary just says you  
8 have to know, you know, you know all about what  
9 the waiver of the right to mean. You don't  
10 have to know the consequences. So that's why.

11 Now there are some --

12 JUSTICE JACKSON: Well, I understand,  
13 but there are -- there are district court  
14 judges, very thoughtful district court judges,  
15 who have accepted the view that this is  
16 different than a trial waiver that, you know,  
17 goes with your guilty plea --

18 MS. BLATT: Mm-hmm.

19 JUSTICE JACKSON: -- that there's  
20 something unique about the prospective waiver  
21 of a sentencing proceeding that you know is  
22 going to happen, but you're giving up your  
23 right to appeal any errors with respect to that  
24 proceeding, that -- that that's just -- you  
25 can't knowingly --

1 MS. BLATT: So --

2 JUSTICE JACKSON: -- have that kind of  
3 waiver some courts have said.

4 MS. BLATT: -- you're correct -- the  
5 Fourth Circuit in 2025 in a -- in a case,  
6 Smith, cited by Cato, does exactly what you  
7 said. It said this cannot possibly be a  
8 knowing and voluntary waiver, but we're going  
9 to also apply miscarriage of justice. So they  
10 did the two steps, but they said what you said.  
11 I just don't know if the rest of you would  
12 agree with that analysis, but they said --

13 JUSTICE BARRETT: Ms. -- Ms. Blatt --

14 JUSTICE KAVANAUGH: What -- what are  
15 the --

16 MS. BLATT: -- exactly what you said.

17 JUSTICE KAVANAUGH: -- what are the  
18 specific exceptions that you would identify?  
19 Ineffective assistance of counsel?

20 MS. BLATT: So that, yeah, goes to  
21 knowing and voluntary.

22 JUSTICE KAVANAUGH: Right.

23 MS. BLATT: And then --

24 JUSTICE KAVANAUGH: And a sentence  
25 exceeds the statutory maximum, right?

1 MS. BLATT: Yes.

2 JUSTICE KAVANAUGH: And  
3 unconstitutional factors used in the sentence?

4 MS. BLATT: Yeah. I would just call  
5 that violates the Constitution. Now --

6 JUSTICE KAVANAUGH: Well, those are  
7 three.

8 MS. BLATT: No, just two.

9 JUSTICE KAVANAUGH: Well, I listed  
10 three there, but --

11 MS. BLATT: Hold on. Let me just --  
12 can I combine them into two? So the  
13 unauthorized by statute, the problem with the  
14 Fifth Circuit is, you know, you could have what  
15 that means. You could have restitution  
16 unauthorized by statute. In the case of the  
17 Eighth Circuit, they applied a lifetime ban on  
18 certain things for this gun. It was -- just  
19 unauthorized by the statute to me covers a  
20 little more than sentence -- sentences  
21 exceeding the maximum.

22 Also, this condition of supervised  
23 release, if it was you have to go to church,  
24 it's just -- it's not allowed by statute. It's  
25 just -- and it's plainly unconstitutional.

1 JUSTICE KAVANAUGH: Well, supervised  
2 release conditions, I think, do present a  
3 different bucket, and I just wonder --

4 MS. BLATT: They do.

5 JUSTICE KAVANAUGH: -- how would you  
6 characterize what the exception --

7 MS. BLATT: Oh. Are just --

8 JUSTICE KAVANAUGH: -- for conditions  
9 of supervised --

10 MS. BLATT: -- unconstitutional. You  
11 can could say it exceeds the statute. The  
12 statute is very broad about reasonably  
13 necessary. Yeah, it's just got a lot of, you  
14 know, yada, yada, yada about kinds of stuff.

15 But, when it gets to this kind of  
16 stuff, which is just weird stuff like, you  
17 know, go to church -- castration seems a little  
18 bit outside the statute. One of them said the  
19 defendant was getting so many women pregnant  
20 out of wedlock -- this is a federal court --  
21 and said, if you're going to get someone  
22 pregnant, can you please make it your wife?  
23 You know, you just can't do that. Come on,  
24 that's silly.

25 CHIEF JUSTICE ROBERTS: Counsel, how

1 much of this --

2 MS. BLATT: It's just -- you just  
3 can't do that. And that's unauthorized by the  
4 supervised release statute.

5 JUSTICE KAVANAUGH: And then anything  
6 beyond that? I just want to have a defined  
7 list if we're going to do this.

8 MS. BLATT: So what cabins it is the  
9 first part. You can't just say, well, I  
10 have -- you know, I don't want to talk to my  
11 probation officer every day because that  
12 violates my free speech. You're not even going  
13 to get past the first gate, I mean, and you're  
14 going to run the risk of getting sanctions. So  
15 all that kind of garbage is out.

16 JUSTICE GORSUCH: Ms. Blatt --

17 JUSTICE KAVANAUGH: And then you -- if  
18 I could finish.

19 JUSTICE GORSUCH: Yeah. Please.

20 MS. BLATT: Sorry.

21 JUSTICE KAVANAUGH: On your -- in your  
22 beginning, you said clear legal error. And now  
23 that seems to open up -- because everyone  
24 thinks their legal error is clear, open up a  
25 wider box. And I just want to make sure --

1 MS. BLATT: So, no, because you can  
2 say, like, mandamus, clear and indisputable,  
3 clearly established, plain error, the error has  
4 to be obvious, clear.

5 And that's what the courts below say.  
6 You can even say it louder. I mean, you -- you  
7 get -- you get to say what you want.

8 JUSTICE KAVANAUGH: Well, some courts  
9 say that and some courts don't. There's --  
10 that's why we're here. There's a split.

11 MS. BLATT: Some -- I will be honest,  
12 some are really broad and just say any illegal  
13 sentence. And guess what, there's no flood,  
14 there's no appeals. There's 30 years of this.  
15 The first --

16 JUSTICE KAVANAUGH: I'm not disputing  
17 you.

18 MS. BLATT: Okay. Okay. I'm sorry.

19 JUSTICE KAVANAUGH: These are not  
20 hostile questions.

21 (Laughter.)

22 MS. BLATT: So -- okay. The thing is  
23 I -- I trust the system on the three systemic  
24 reasons --

25 JUSTICE KAVANAUGH: Yeah.

1 MS. BLATT: -- because there's an  
2 appeal waiver.

3 JUSTICE KAVANAUGH: Yeah.

4 MS. BLATT: And the court of appeals  
5 don't want to see these, and lawyers, you know,  
6 are very careful in bringing them.

7 On terms of clear error, I do think  
8 it's like the second prong of Olano. It's just  
9 plain error. It's easy. It's applied every  
10 day in forfeiture. No one has a problem  
11 misunderstanding that.

12 JUSTICE GORSUCH: Are you essentially  
13 endorsing the Fourth Circuit's test, which is a  
14 fundamental constitutional or statutory right  
15 that was firmly established at the time of  
16 sentencing? Is that what you're saying to  
17 Justice Kavanaugh?

18 MS. BLATT: I like that. I mean,  
19 yeah, that sounds good. I hadn't heard that  
20 one, but, yeah, I just think in terms of  
21 Justice --

22 JUSTICE GORSUCH: Fourth Circuit's --  
23 that's the Fourth Circuit's standard.

24 MS. BLATT: I'm just trying to get  
25 Justice Alito's vote, and what I'm trying to

1 say --

2 (Laughter.)

3 MS. BLATT: -- to Justice Alito is --

4 I care about the rest of you too, but --

5 JUSTICE ALITO: Thank you very much.

6 (Laughter.)

7 JUSTICE ALITO: It's very -- very few

8 advocates have that --

9 JUSTICE GORSUCH: I'll just stop then.

10 (Laughter.)

11 JUSTICE ALITO: -- goal.

12 JUSTICE SOTOMAYOR: Ms. Blatt --

13 MS. BLATT: Sorry.

14 JUSTICE SOTOMAYOR: -- I'm -- I'm

15 trying to figure out how we articulate this,

16 okay? You've come in with a simple proposition

17 that ordinary contract principles, defenses

18 should generally apply. There might be some --

19 MS. BLATT: The same standard the

20 government has.

21 JUSTICE SOTOMAYOR: The same standard

22 the government has. And that's not just

23 frustration of purpose because frustration of

24 purpose means both a procedural and substantive

25 component. And you may not have a procedural

1 component in this kind of waiver.

2 But I think the other defense are  
3 policy, public policy, it's against public  
4 policy. That's the rationale for statutory  
5 maximums, which is Congress has said you should  
6 only receive a sentence of X amount, okay?  
7 That's what you get.

8 MS. BLATT: Yeah. And there's  
9 separation of powers issues. Yeah.

10 JUSTICE SOTOMAYOR: Exactly.  
11 Unconscionability.

12 MS. BLATT: I think it depends on your  
13 comfort level with those two words.

14 JUSTICE SOTOMAYOR: All right. But I  
15 think --

16 MS. BLATT: A lot of people freak out  
17 at that word. I don't because --

18 JUSTICE SOTOMAYOR: I know, but I  
19 don't either.

20 MS. BLATT: Okay.

21 JUSTICE SOTOMAYOR: And the implied  
22 duty of good faith, that has to do with a judge  
23 doing what he's supposed to do, and that  
24 subsumes unconscionability -- that subsumes --

25 MS. BLATT: Yes, and --

1 JUSTICE SOTOMAYOR: -- clear error.

2 MS. BLATT: Yes, and --

3 JUSTICE SOTOMAYOR: It subsumes  
4 constitutional error.

5 MS. BLATT: And is a heavy thumb on  
6 the -- the implied -- parties' expectation that  
7 the contract would be enforced. So what I  
8 think what the government -- the scare tactics,  
9 they sound really broad. They're not because,  
10 if you just read one Delaware case, it'll tell  
11 you the implied covenant of good faith has to  
12 mean --

13 JUSTICE SOTOMAYOR: All right. Let  
14 me -- let me just stop you on all of this  
15 discussion.

16 MS. BLATT: Okay.

17 JUSTICE SOTOMAYOR: Arizona,  
18 Minnesota, California, and Texas, all of their  
19 high courts say that they -- a prospective  
20 waiver of a not-yet-imposed sentence is not  
21 enforceable, all right, when the defendant does  
22 not know what errors, if any, that there could  
23 be because they're not giving up a right --

24 MS. BLATT: A -- a known --

25 JUSTICE SOTOMAYOR: -- a known right.

1 You haven't argued that. It may be too much  
2 water under the bridge, but there is a strong  
3 argument, by the way, and it -- and it goes  
4 back to something that Justice -- that Justice  
5 Gorsuch was referring to -- on the sentencing  
6 guidelines. The reports when the guidelines  
7 came out said we're permitting appeal waivers  
8 because appellate review of sentences is  
9 essential to ensure that the guidelines are --  
10 are applied properly and to provide case law  
11 development -- development of the reasons for  
12 sentencing outside the guidelines.

13 MS. BLATT: Yeah. Guideline errors  
14 are just going to be out. And they've been  
15 here for --

16 JUSTICE SOTOMAYOR: I know. But --  
17 but don't give up so easily, okay?

18 MS. BLATT: Let me just break it down  
19 and --

20 JUSTICE SOTOMAYOR: No, no, no, let me  
21 just come down to --

22 MS. BLATT: Oh, sure. Yeah, take it.

23 JUSTICE SOTOMAYOR: Let me finish my  
24 question, okay?

25 MS. BLATT: Yeah. I'm sorry.

1 JUSTICE SOTOMAYOR: I know you want to  
2 correct me along the way, but --

3 MS. BLATT: No, you're -- it's  
4 wonderful what you're saying, so keep going.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: The reason why  
7 Justice Alito's arguments about trial errors  
8 doesn't work is because you are giving up some  
9 known defenses to a trial. You can look at all  
10 of those things, you can imagine them, and you  
11 can say whatever they are, I'm going to give  
12 them up. So those are never considered, the  
13 trial-related errors.

14 What we're talking about is sentencing  
15 errors, which is at a time where you don't know  
16 what the judge is going to do and so you have  
17 to make certain presumptions. One of them is  
18 they're not going to act outside of their  
19 constitutional or statutory duty. That's your  
20 argument, isn't it?

21 MS. BLATT: Yeah. I -- I can tell you  
22 I did think about what you said because you can  
23 make an argument, like, in all your cases --  
24 Mezzanatto is the best one that explains what  
25 you can waive -- and, basically, personal

1 rights -- this goes to Justice Alito --  
2 personal rights can be waived.

3 Now you get to a certain point where  
4 there's a public interest in the actual right.  
5 And what we were trying to say when courts go  
6 so outside the bounds of what anyone could have  
7 been thinking, government can't even defend it,  
8 it's implausible, there's something to be said  
9 for the criminal justice system not bringing  
10 itself into disrepute and having these  
11 embarrassing sentences out there. And the  
12 judiciary has certainly the authority or duty  
13 to correct them. So you can --

14 CHIEF JUSTICE ROBERTS: Thank --

15 MS. BLATT: -- analyze it under  
16 Mezzanatto, but it just seemed like a higher --  
17 higher hill to climb.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Just one brief question. How much of  
21 this is -- could be taken care of under the one  
22 ground that everybody seems to agree isn't  
23 waived, which is ineffective assistance of  
24 counsel? In other words, if you weren't  
25 advised by your counsel as -- that this is what

1 could happen if I say yes, go ahead, you know,  
2 I -- I agree with the -- you know, to -- to  
3 waive -- allow the court to sentence as part of  
4 the presentence -- the agreement.

5 MS. BLATT: Because there's -- there's  
6 no fiduciary duty to say, and it's not just  
7 within the realm of plausible, ineffective  
8 assistance of counsel is you're waiving the  
9 right to appeal. I don't -- you would have to  
10 say, and I just don't think it makes sense, is  
11 that I have a fiduciary duty to tell you this  
12 judge may impose the death penalty and order  
13 castration. That's just not --

14 CHIEF JUSTICE ROBERTS: Well, that's  
15 why I said --

16 MS. BLATT: So --

17 CHIEF JUSTICE ROBERTS: -- that's why  
18 I said in many cases, not -- not all of them.  
19 I mean, for -- I don't know, for example --  
20 maybe this is a good example, where the -- the  
21 counsel presumably knows a little bit about his  
22 client and he could advise him, look, you have  
23 to understand that if you accept this  
24 agreement, they may require you to take  
25 medication.

1           And if he doesn't, then maybe that's  
2 something that can be brought --

3           MS. BLATT: But that --

4           CHIEF JUSTICE ROBERTS: -- as an  
5 ineffective assistance --

6           MS. BLATT: With all due respect --

7           CHIEF JUSTICE ROBERTS: Maybe I'll  
8 finish the sentence.

9           MS. BLATT: Yeah. Okay, sorry.

10          CHIEF JUSTICE ROBERTS: You know, if  
11 it doesn't, maybe that's something that could  
12 be brought as an ineffective assistance claim  
13 that would allow him to get out of the  
14 sentence.

15          MS. BLATT: I don't think that would  
16 succeed because it was not ineffective and this  
17 guy doesn't -- there was no mental health  
18 condition. He did it for the assistance of --  
19 the probation officer just said it might be  
20 easier if this guy were medicated. That's  
21 preposterous. I mean, it might be easier if  
22 you were medicated too for my job. It just --  
23 that's not how you get to medicate people.

24          CHIEF JUSTICE ROBERTS: Okay. Thank  
25 you.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: Well, let me begin  
4 with Justice Sotomayor's rebuttal of what she  
5 took me to be asking about regarding  
6 constitutional rights.

7 Now she will have the right to  
8 surrebuttal, which I won't have a chance to  
9 answer under this questioning regime that we  
10 have now.

11 The Fourth Circuit test, which you  
12 seem to agree with, as I understand it, was any  
13 important constitutional right. So that  
14 wouldn't be limited to sentencing errors, would  
15 it? It would encompass all of the things I was  
16 asking about before.

17 MS. BLATT: No. We're just talking  
18 about the appellate right on the sentence.

19 JUSTICE ALITO: Okay. We're just  
20 talking about the sentence.

21 MS. BLATT: Yeah. That's all -- every  
22 circuit, the whole circuit split is about when  
23 you can appeal sentences. So, as Justice  
24 Jackson said, these are all things you -- you  
25 know, you -- you wouldn't --

1 JUSTICE ALITO: So anything that  
2 couldn't -- wasn't known prior to the time of  
3 sentence.

4 MS. BLATT: At sentencing. Again, I  
5 tried to say with Justice Gorsuch it has to be  
6 clear. So, when you have an unconstitutional  
7 right to not go to church, and just it seems  
8 ridiculous that a -- a lawyer would say, by the  
9 way, you're sentencing this, I know you're  
10 religious, so there might be a chance at  
11 supervised release he's going to think you're a  
12 religious fanatic and say don't go to church.  
13 And all we're saying is come on.

14 JUSTICE ALITO: Okay. What if it's a  
15 sentencing issue that was known by the parties  
16 before entering into the plea agreement?

17 MS. BLATT: Yeah. So all of that  
18 would be factored into any contract defense.  
19 It would be factored into miscarriage of  
20 justice. That's why guidelines are all out, is  
21 because it's known at the time of sentencing  
22 that, you know, you could be sentenced up to  
23 the statutory maximum. It really doesn't  
24 matter what the guidelines say.

25 JUSTICE ALITO: What about guidelines

1 issues during the period when compliance with  
2 the guidelines was mandatory?

3 MS. BLATT: Oh, I think that that  
4 would have been -- I mean, now you're taking me  
5 back to --

6 JUSTICE ALITO: That's a sentencing  
7 error.

8 MS. BLATT: Yeah, you're taking me  
9 back to pre-Booker. So, no, I don't -- I --

10 JUSTICE ALITO: No?

11 MS. BLATT: I don't think so.  
12 Sentencing guidelines is just something that  
13 happened. Now we could talk --

14 JUSTICE ALITO: I mean, it was above  
15 the statutory maximum because the statutory  
16 maximum was defined by the mandatory  
17 guidelines.

18 MS. BLATT: Yeah. And we -- look, we  
19 could talk about that, but we don't need to  
20 because it's advisory and all courts have said  
21 sentencing errors are out. And if you write  
22 this opinion, you can say that too. So that  
23 way you just --

24 JUSTICE ALITO: What if the guidelines  
25 call for a sentence of six months'

1 imprisonment, but the -- but the judge says  
2 that's woefully inadequate and anyway, they're  
3 not mandatory, so --

4 MS. BLATT: Thirty years.

5 JUSTICE ALITO: Right, right.

6 MS. BLATT: The statutory maximum?

7 Some of you could leave open the  
8 miscarriage of justice, but I just wouldn't  
9 because courts -- courts have just said they  
10 don't want to see sentencing errors, but, yeah,  
11 sure. If you want to say they -- they so  
12 misapplied the -- the criminal, whatever it's  
13 called, the -- the criminal career offender one  
14 where you get this massive bump, I just --  
15 courts really don't want to see those. They  
16 just want, look, up to the statutory maximum,  
17 guideline errors are out.

18 JUSTICE ALITO: Okay. One final  
19 question. If we're -- well, maybe not the  
20 final one. But, if we're going to apply  
21 contract law, what body of contract law do  
22 we -- do we look to? It's not the same  
23 everywhere.

24 MS. BLATT: Yeah. You look to the  
25 same that you would look every time you apply

1 contract law, including in Rumery. You look to  
2 the Restatements, you look to centuries of case  
3 law.

4 JUSTICE ALITO: We look to the  
5 Restatements?

6 MS. BLATT: That's what you did in  
7 Rumery. You cited Restatement 171, and that's  
8 what all the courts have done. I mean, you  
9 have -- the Court said -- held we'll apply, you  
10 know, general common law to contracts.

11 But you have so many cases and plenty  
12 of collective bargaining agreements, we cite a  
13 lot of cases in the brief where you're applying  
14 contract law. Remember, the government is  
15 always applying contract law.

16 I don't know where they're citing the  
17 state that they're in or they're citing -- I  
18 don't -- I don't think the cases really care.  
19 All contract defenses are so narrowly  
20 circumscribed that -- and the court of appeals,  
21 if 34 years, not even a trickle? Much less a  
22 flood, a river.

23 JUSTICE ALITO: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Sotomayor, anything further?

1 Justice Kagan?

2 Justice Gorsuch?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: Just to make sure  
5 on a few things. You are not arguing that  
6 appeal waivers are impermissible across the  
7 board, correct?

8 MS. BLATT: Absolutely not.

9 JUSTICE KAVANAUGH: And if that were  
10 to be the case, presumably, Congress or the  
11 Rules Committee would have to do that.

12 MS. BLATT: Yeah. I mean, you'd have  
13 to go through the analysis Justice -- Justice  
14 Sotomayor said, and you already had that Brady  
15 case that says you can plea. So I think it's  
16 just not going to win.

17 JUSTICE KAVANAUGH: And then,  
18 notwithstanding an appeal waiver, you can  
19 appeal a condition of supervised released if --  
20 if you could fill in the blank, just to  
21 summarize, not --

22 MS. BLATT: Yeah. Not with -- I mean,  
23 the easiest for me is just it was not within  
24 the realm of plausibility of either party. So  
25 I would take into account the government's

1 expectation that supervised release is no fun,  
2 but you have these -- some of these conditions  
3 and we've talked about them. It can't include  
4 who you get pregnant with. That's just -- no.

5 JUSTICE KAVANAUGH: But, obviously,  
6 you want a broader standard than that. Is  
7 there a phrase you would use for the broader  
8 standard?

9 MS. BLATT: Oh, yeah. Just violates  
10 the Constitution and it was not within the  
11 realm of plausibility, government has no  
12 justified expectation in the enforcement of  
13 that condition. I mean, all these conditions,  
14 the government would look ridiculous saying,  
15 well, yeah, no, we really need to do that.

16 JUSTICE KAVANAUGH: And then, last, I  
17 just want to confirm this. You just said this  
18 to Justice Alito, that misapplying the  
19 guidelines, procedural or substantive  
20 unreasonableness would not be a basis.

21 MS. BLATT: Not under any contract  
22 defense or any -- like, any public policy or  
23 not miscarriage of justice because it's always  
24 within the reasonable expectation that the  
25 court could veer off from the guidelines and

1 impose under the statutory maximum. And this  
2 is what the courts of appeals have held, so I'm  
3 just parroting what's already been held.

4 JUSTICE KAVANAUGH: I -- I agree.  
5 Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett?

8 JUSTICE BARRETT: So there's a lot of  
9 intuitive appeal to the contract analogy,  
10 especially because it's used for the underlying  
11 plea agreement. One thing that concerns me,  
12 however, is that at least on this question of  
13 appeal waivers, I don't understand any of the  
14 courts of appeals to go all in on this contract  
15 analogy.

16 MS. BLATT: Fair.

17 JUSTICE BARRETT: And it wasn't  
18 fleshed out below in the Fifth Circuit. And I  
19 think you've had a lot of questions today  
20 exploring how there could be difficulties with  
21 it. So it seems kind of risky to go all in on  
22 this contract thing.

23 MS. BLATT: So I guess three  
24 responses. One, as always, you're correct.  
25 It's fair. Only eight circuits have applied

1 contract law to plea agreements generally. And  
2 they're not -- I think maybe only the Tenth  
3 Circuit and the Second Circuit has talked about  
4 this in terms of defense. So you're just a  
5 hundred percent correct.

6 Number two, ironically, that is the  
7 Fifth Circuit. The Fifth Circuit's rationale  
8 for all of this is you can always appeal above  
9 the statutory maximum because the defendant  
10 didn't get the benefit of his bargain. I mean,  
11 that's too broad and it kind of -- it -- you  
12 know, it makes the Fifth Circuit's decision  
13 just not defensible. But they say over and  
14 over again that's not what the defendant  
15 bargained for.

16 So we've already gone down that crazy,  
17 you know, open-ended route, and so I --

18 JUSTICE BARRETT: Well, but Judge  
19 Bibas wrote an opinion in the Third Circuit  
20 that located the statutory maximum thing and  
21 separation of powers and said you'd be going  
22 beyond the sentence.

23 So just because the Fifth Circuit said  
24 this would be beyond reasonable expectations of  
25 the bargain doesn't mean that that is, you

1 know, what we would have to say is the  
2 rationale for that exception if we accepted it.

3 MS. BLATT: I -- I think separation of  
4 powers is good. It's just, you know, for the  
5 Constitution, you have to get a little more  
6 tricky with why that -- you know, outside of  
7 Article III power for a supervisor -- you know,  
8 a supervised -- condition of supervised  
9 release, it's just absurd, unconstitutional.

10 JUSTICE BARRETT: Well, and -- and  
11 here's another question I have about the  
12 contract analogy. It doesn't seem to me like a  
13 lot of the exceptions that we're batting around  
14 really fall within contract defenses. It's  
15 almost like we're trying to shoehorn them in.

16 MS. BLATT: I disagree because I've  
17 argued two cases in the Delaware Supreme Court,  
18 and they're all about expectations of the  
19 parties, and one side usually wins as I  
20 expected the contract to be enforced as  
21 written.

22 The other side has to really get out  
23 of it by saying it's so outside the realm of  
24 industry standard or so outside the realm that  
25 anyone could have thought of, that anyone could

1 have perceived.

2 JUSTICE BARRETT: Yeah, but what about  
3 the other ones? Like, what's the analogy for  
4 miscarriage of justice or -- I mean, that --  
5 that -- that is grounded, I think, in systemic  
6 concerns, maybe constitutional concerns.

7 MS. BLATT: Correct.

8 JUSTICE BARRETT: That reflects the  
9 fact that this isn't a pure contract between  
10 the prosecutor and the defendant, but the judge  
11 is involved because the judge signs off on it.  
12 But that doesn't map on.

13 MS. BLATT: Correct.

14 JUSTICE BARRETT: And I think the  
15 statutory maximum thing, you know, okay, well,  
16 maybe we can talk about it. I mean, nobody's  
17 really put it in those contract terms. Maybe  
18 the Fifth Circuit has gestured that way.

19 MS. BLATT: And I think --

20 JUSTICE BARRETT: But then what --  
21 what -- what -- let me just finish this part of  
22 it.

23 MS. BLATT: Sure.

24 JUSTICE BARRETT: What rationale would  
25 there be for us not taking every possible

1 contract defense that could come along or  
2 limiting it to certain ones? I take it you  
3 would say no, any contract defense from the  
4 Restatement would be on the table.

5 MS. BLATT: Justice Barrett, with all  
6 due respect, whatever the government can do,  
7 the defendant should be able to do. The  
8 government doesn't get to just say I can only  
9 look at three principles of contract law in  
10 interpreting the contract and the defendant has  
11 a different rule.

12 I mean, that's just -- just whatever  
13 Elon Musk could get, a criminal defendant has  
14 to be able to get under a contract.

15 JUSTICE BARRETT: Okay. But -- but,  
16 Ms. Blatt -- and I haven't looked at all the  
17 cases in which the government is saying that or  
18 alleging breach. You know, I -- I -- I know  
19 Judge Easterbrook said that before and invited  
20 the government essentially to -- to allege that  
21 there was a breach when the defendant appealed.

22 But, in all of these contract  
23 analogies, you're looking at the term itself  
24 and asking if the term itself is, say,  
25 unconscionable. And you're not arguing here

1 that the term, that the waiver of the statutory  
2 right to appeal, that term is not void against  
3 public policy.

4 MS. BLATT: Correct.

5 JUSTICE BARRETT: It's not  
6 unconscionable. You're talking about one  
7 narrow circumstance, which is the application  
8 of that term. So it's not really like the  
9 contract itself.

10 MS. BLATT: Well, so, A, you're  
11 absolutely correct in terms of what Justice  
12 Kavanaugh said, but in every contract, again,  
13 over and over, we cite cases involving  
14 government contracts where a third party has to  
15 apply that provision, and there's just defenses  
16 that apply when the third party goes off the  
17 rails.

18 But unconscionability, I think you're  
19 right, it's tricky. So the only way we would  
20 get there -- unconscionability I haven't seen  
21 applied. The only way you would get there is,  
22 in the government's view, this contract  
23 literally says you waive your right to appeal  
24 no matter what, no matter how many body parts  
25 they remove for you and no matter what the

1 court sentences, no matter what the contract  
2 says.

3 And all we're saying is, oh, come on,  
4 there's got to be a contract defense to that  
5 somewhere.

6 JUSTICE BARRETT: Okay. Last  
7 question. This is just a factual one.

8 As I understand the record, the  
9 district court said at sentencing when he  
10 objected to this medical condition, medical  
11 condition of supervised release --

12 MS. BLATT: Correct.

13 JUSTICE BARRETT: -- that, listen, if  
14 you go and get treatment and they do prescribe  
15 drugs that you have to take, talk to your  
16 probation officer, and if that's not fruitful,  
17 you can come back and see me. Did he go back  
18 to see the district court?

19 MS. BLATT: No. He just got out of  
20 jail and he now is under an ordered mental  
21 health treatment program. Now there's  
22 something slightly comical about that because  
23 Mr. Hunter thinks he will go to hell and thinks  
24 God has told him he can't take drugs, which is  
25 why he doesn't drink. That conversation is

1 going to be a little difficult with the judge:  
2 Okay, I really -- God tells me no, and whatever  
3 that medical manual is says it's indicated.

4 I just don't see that conversation  
5 working out too well. But, if it does, I mean,  
6 I don't know what this goes to, whether you  
7 think it's not a violation. Again, if -- I'll  
8 get a really bad law if all women have to --

9 JUSTICE BARRETT: I -- no, no, no, no.  
10 I mean, like, I just wanted to know. I wanted  
11 to clarify that factually --

12 MS. BLATT: You are correct.

13 JUSTICE BARRETT: -- that's what  
14 happened because I do think then that gives him  
15 some recourse to go back to someone in the  
16 judicial system to ask. So I just --

17 MS. BLATT: Not really because, if the  
18 court says no --

19 JUSTICE BARRETT: But the court didn't  
20 say no here. He didn't go back.

21 MS. BLATT: Correct. But there's --  
22 again, he has a threat of imprisonment if he  
23 doesn't take the drug. I mean, that's bad.

24 JUSTICE BARRETT: Okay. Thanks.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So, when I'm  
3 thinking about this, I am mindful of the  
4 narrowness of the question presented as you  
5 have set it forth. You say whether the only  
6 permissible exceptions to a general appeal  
7 waiver -- waiver are for claims of an  
8 ineffective assistance of counsel or that the  
9 sentence exceeds the statutory maximum.

10 MS. BLATT: Correct.

11 JUSTICE JACKSON: I suppose we could  
12 answer no --

13 MS. BLATT: Yes.

14 JUSTICE JACKSON: -- to the extent  
15 that we see other exceptions that some of the  
16 other circuits have accepted and we think those  
17 should be allowed as well. This questioning  
18 that you're getting is, I think, an effort to  
19 say what -- we could offer more than that --

20 MS. BLATT: Yeah.

21 JUSTICE JACKSON: -- what exactly are  
22 circuits supposed to be doing. And you point  
23 to contract principles, but I guess that  
24 doesn't necessarily have to be where we go with  
25 this, right?

1           MS. BLATT: Correct. I mean, the  
2 question presented is the Fifth Circuit is  
3 obviously wrong, please reverse and let us try  
4 to get a defense, but -- because there was  
5 questioning about, well, what will that mean on  
6 remand. But, no, you just need to say the  
7 Fifth Circuit's rule is indefensible.

8           JUSTICE JACKSON: Yes. And -- and I  
9 guess let me just add -- add one thing or ask  
10 one thing about the conversation you had with  
11 Justice Kavanaugh. I guess I'm not sure that  
12 Congress or the Rules Committee would  
13 necessarily be the only body that could  
14 determine whether these kinds of waivers are  
15 categorically unenforceable.

16           I would think that based on our case  
17 law and sort of standing principles about  
18 knowing and voluntary waivers that this Court  
19 could perhaps avoid the concerns about picking  
20 a particular set of waivers, which -- I mean --  
21 excuse me -- exceptions, which ones, are they  
22 contract principles or whatever, if we could  
23 be, enough of us, persuaded that in a  
24 circumstance where the defendant is pleading  
25 guilty and we know a sentencing hearing will

1 happen, it is not sufficiently knowing to have  
2 a waiver of any errors that are going to happen  
3 in that sentencing proceeding, that it's just  
4 not an enforceable thing consistent with our  
5 understanding of knowingness and voluntariness  
6 with respect to the exercise of one's ability  
7 to make a waiver.

8 MS. BLATT: So, A, correct, and, B,  
9 that's the law that Congress passed in 1984,  
10 which is you could bring appeals. Appeal  
11 waivers didn't even become boilerplate until  
12 the late 2000s. So we had a world in which you  
13 could just appeal your sentence. There was no  
14 flood.

15 JUSTICE JACKSON: And it's hard to see  
16 really -- and I'll ask the --

17 MS. BLATT: But I -- I'm not going to  
18 get any votes for this, so --

19 JUSTICE JACKSON: No, I understand.  
20 You don't want to waste your time because you  
21 feel that it is not --

22 MS. BLATT: No, it's fine. I love  
23 what you're saying. And -- and nothing bad  
24 would happen too.

25 JUSTICE JACKSON: You feel it's not

1 productive, but my job is to make sure that all  
2 of the issues are being taken into account when  
3 the Court decides what they're going to do.

4 MS. BLATT: Oh, I think you can get  
5 there.

6 JUSTICE JACKSON: And my point is --  
7 my point is that when we're thinking about what  
8 a waiver is and we're trying to understand the  
9 circumstances and we're balancing the public  
10 policy issues on both sides, I'm going to ask  
11 the government, what are they gaining out of  
12 ensuring that people don't appeal obvious  
13 waivers -- obvious errors in their sentencing.

14 MS. BLATT: Yeah.

15 JUSTICE JACKSON: Like, what's the  
16 public policy interest in that.

17 MS. BLATT: My --

18 JUSTICE JACKSON: So all of those  
19 things might lead one rationally to think it's  
20 really not worth the candle for us to try to  
21 parse out exactly what kinds of waivers in  
22 which situations we would allow or not allow as  
23 opposed to just saying we're not going to allow  
24 this sort of thing because of the knowingness  
25 and voluntariness problem.

1           MS. BLATT: I mean, as I sit here, I  
2           kind of like what you're saying, and I -- I  
3           actually think it's a way of looking at it  
4           because nobody brings these appeals. I think,  
5           from the government, just putting the  
6           government hat on, they just don't like the  
7           guideline appeals because people get -- you  
8           know, they're advisory and if the court goes  
9           above it.

10           But you could just -- you could get  
11           all the same way and say, well, that has to be  
12           knowing because everyone knows that the  
13           guidelines are advisory. Just in terms of the  
14           state of the law now, it's just not that bad  
15           for the government. They just don't --

16           JUSTICE JACKSON: Thank you.

17           MS. BLATT: Okay? Thank you.

18           CHIEF JUSTICE ROBERTS: Thank you,  
19           counsel.

20           Ms. Jacoby.

21           ORAL ARGUMENT OF ZOE A. JACOBY

22           ON BEHALF OF THE RESPONDENT

23           MS. JACOBY: Mr. Chief Justice, and  
24           may it please the Court:

25           Knowing and voluntary presentence

1 appeal waivers are enforceable bargains, and no  
2 doctrine of contract law calls for a different  
3 result based on the subsequent sentence that  
4 the defendant receives.

5           Petitioner asks this Court to create  
6 new substantive limits on the enforceability of  
7 those knowing and voluntary waivers, but he's  
8 provided no administrable limits on which  
9 waivers should be in or out. The litigation  
10 that would inevitably follow under his  
11 front-line approach would essentially eliminate  
12 all appeal waivers.

13           As a fallback, Petitioner proposes a  
14 safety valve to appeal waivers for the most  
15 egregious sentences. But, without more  
16 real-world evidence of the most farfetched  
17 hypotheticals, this is a solution in search of  
18 a problem, and it's a solution that comes with  
19 costs. An amorphous exception for egregious  
20 sentences will also invite litigation over what  
21 is egregious. Such litigation will deprive the  
22 government of the benefit of its bargain, thus  
23 making appeal waivers less valuable as  
24 bargaining chips for defendants.

25           In all events, this Court should make

1 clear that there is no exception that would  
2 permit Petitioner's appeal rather than simply  
3 remanding, as Petitioner suggests. No  
4 injustice would be worked by dismissing  
5 Petitioner's unripe due process claim, but  
6 remanding would signal down on that score to  
7 lower courts and litigants, opening the  
8 floodgates to garden-variety waived appeals  
9 like Petitioner's.

10 Finally, this Court should reject  
11 Petitioner's argument as to the second question  
12 presented. The district judge's statement that  
13 Petitioner had a right to appeal was accurate  
14 under the terms of the waiver and circuit  
15 precedent, but even if it were not, the  
16 government's non-objection to a misstatement by  
17 the district court did not modify or waive the  
18 parties' written appeal waiver.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: If the -- if this  
21 Court says that the agreement is void, would a  
22 remedy that would eliminate the underlying  
23 agreement be that you totally eliminate the  
24 plea agreement?

25 MS. JACOBY: Yes, I do think there is

1 a possibility that if this is -- you know, this  
2 is an essential part of the bargain, and if we  
3 are not getting our part of the bargain, then  
4 we don't have to enforce our -- our end of the  
5 bargain either.

6 I think Petitioner has argued that the  
7 possibility that we'll, you know, reinstate the  
8 dropped charges is enough of a disincentive to  
9 stop the floodgates of dismissed appeals,  
10 but -- sorry -- pardon -- of -- of waived  
11 appeals.

12 But, in practice, that's not actually  
13 much of a deterrent because it's not some --  
14 it's not an option we avail of our -- avail  
15 ourselves of all that often because our whole  
16 point in bargaining for an appeal waiver is we  
17 want to bring finality to the proceedings and  
18 we want to stop spending resources on it. So  
19 the idea of having recourse to go back and  
20 reinstate the charges is kind of at that  
21 point --

22 JUSTICE THOMAS: So, in this case --

23 MS. BLATT: -- counterproductive.

24 JUSTICE THOMAS: -- though, just  
25 confining it to this case, what's the

1 disincentive to allowing an appeal here?

2 MS. JACOBY: I mean, that is our whole  
3 concern, is that if you open the -- the  
4 floodgates to sort of a broad miscarriage-of-  
5 justice exception, there isn't really a  
6 powerful disincentive, and we will, in -- in  
7 various cases, be deprived the benefit of our  
8 bargain because we'll have to be litigating  
9 whether this exception, amorphous exception, to  
10 appeal waivers applies.

11 JUSTICE KAVANAUGH: And you're --  
12 you're asking --

13 CHIEF JUSTICE ROBERTS: So I  
14 thought --

15 JUSTICE SOTOMAYOR: Your -- your --

16 CHIEF JUSTICE ROBERTS: I thought you  
17 said that it wouldn't apply in particularly  
18 egregious cases. Did I mishear that?

19 MS. JACOBY: That's correct. I mean,  
20 our front-line position --

21 CHIEF JUSTICE ROBERTS: Correct that I  
22 didn't -- but --

23 MS. JACOBY: Correct that you didn't  
24 miss --

25 CHIEF JUSTICE ROBERTS: Correct that I

1 misheard it or that --

2 MS. JACOBY: Our front-line position  
3 is that there should not be an exception for --  
4 for even egregious miscarriage of justice  
5 because the Petitioner has argued this case  
6 based in contract doctrine, and we don't think  
7 there's a basis in contract doctrine for that.

8 If this Court goes the route of  
9 wanting to have a -- a miscarriage exception  
10 for reasons other than contract law, maybe some  
11 kind of, you know, sort of federal common law  
12 policymaking or -- or constitutional, we would  
13 very strongly urge this Court to define  
14 whatever that exception would be very narrowly  
15 and to make clear it doesn't apply here.

16 CHIEF JUSTICE ROBERTS: So all of the  
17 hypotheticals that Ms. Blatt presented us,  
18 you're comfortable defending all of those?

19 MS. JACOBY: Our front-line position,  
20 yes, is that the appeal waivers in --

21 CHIEF JUSTICE ROBERTS: Well, you keep  
22 saying front-line position.

23 MS. JACOBY: Yeah. Sure.

24 CHIEF JUSTICE ROBERTS: To me, that  
25 conveys the notion that you're ready to

1 retreat.

2 MS. JACOBY: No, I -- I'm not -- I am  
3 not ready to retreat. I'm not ready to  
4 retreat. Our position is that the -- the  
5 appeal waiver is enforceable.

6 CHIEF JUSTICE ROBERTS: So the order  
7 that you only -- only make your wife pregnant  
8 or what all the -- all the other examples, you  
9 say that's fine? We're --

10 MS. JACOBY: Yes. Our position is  
11 that that's enforceable. And I recognize that  
12 sounds like a very harsh result, but I don't  
13 think it's a real-world concern that this --

14 JUSTICE GORSUCH: A -- a racist  
15 sentencing judge?

16 MS. JACOBY: Again, our position is  
17 that it is enforceable. There are a few --

18 JUSTICE GORSUCH: A -- a sexist  
19 sentencing judge?

20 MS. JACOBY: Yes.

21 JUSTICE GORSUCH: Someone who is  
22 biased against religious minorities?

23 MS. JACOBY: Yes. The appeal waiver  
24 is enforceable.

25 JUSTICE GORSUCH: All of that -- all

1 of that stands?

2 MS. JACOBY: Because the -- the -- the  
3 point is that at the time that we're deciding  
4 whether to enforce the appeal waiver, all we  
5 have is a claim that there has been this  
6 particular type of error. And what the -- what  
7 the defendant has given up --

8 JUSTICE GORSUCH: Why wouldn't that --  
9 why wouldn't that bring --

10 MS. JACOBY: -- as part of the bargain  
11 is the right to bring that claim.

12 JUSTICE GORSUCH: -- the sort of  
13 disrepute on the federal judiciary that Judge  
14 Posner talked about, if you held a trial with  
15 12 orangutans was his example, that that would  
16 have to be resolved. And I think we would all  
17 agree with that, right? But, here, you say any  
18 sentencing error of any kind.

19 MS. JACOBY: So, to be clear, an  
20 appeal waiver is not an agreement to receive an  
21 unlawful sentence. You couldn't agree to  
22 receive trial by 12 orangutans. That would be  
23 an unlawful bargain. It is an agreement that  
24 the final decisionmaker --

25 JUSTICE GORSUCH: Why isn't this an

1 unlawful bargain?

2 MS. JACOBY: It's an agreement that  
3 the final decisionmaker on your sentence will  
4 be a district court rather than a court of  
5 appeals, and that is a bargain that the law  
6 tolerates.

7 JUSTICE GORSUCH: It's a district  
8 court who says I'm going to let an orangutan  
9 pick a sentence out of a hat?

10 MS. JACOBY: Well, again, it -- it --

11 JUSTICE GORSUCH: And you would say,  
12 no, no right to appeal that, right?

13 MS. JACOBY: The -- the district court  
14 remains oath-bound. It is a bargain that at  
15 the time you're entering into it, all you are  
16 agreeing to is that the district court will be  
17 the final decisionmaker.

18 JUSTICE GORSUCH: Yeah.

19 MS. JACOBY: That is not a bargain  
20 against the law. The law already tolerates the  
21 possibility of even egregious sentences going  
22 unreviewed because it has given defendants the  
23 choice whether to bring an appeal or not. If  
24 the law did not tolerate that, we would have a  
25 system of automatic appeals, as many states do,

1 for example, for capital cases.

2 JUSTICE SOTOMAYOR: Counsel, can I --  
3 you talk about opening the floodgates, but  
4 you're the one who's proposing a theory that no  
5 circuit has ever accepted. Yours is even more  
6 limited than the Fifth Circuit. You're saying  
7 only IAC as it relates to a knowing --  
8 knowingly or not knowingly enter a plea is  
9 cognizable.

10 The statutory maximum, you're saying,  
11 is not cognizable either unless the plea  
12 agreement tells you that the judge will  
13 sentence within the statutory maximum because  
14 the logic of your argument is, if I agree, if I  
15 say in the plea agreement the judge can  
16 sentence you any way he wants, that would not  
17 be cognizable, correct?

18 MS. JACOBY: So -- so our position,  
19 yes, is that if in the plea agreement you  
20 expressly say I am waiving my right to appeal  
21 on the grounds that the statute -- that my  
22 sentence is above --

23 JUSTICE SOTOMAYOR: Now every other  
24 circuit has something broader than the Fifth  
25 Circuit. Virtually all of them have something

1 for constitutional errors of the nature that  
2 Justice Gorsuch was call -- talking about  
3 either under a miscarriage-of-justice rubric or  
4 under a plain error or unconstitutional  
5 violation.

6 So this is not floodgates that are  
7 opening. Whatever is being appealed now is  
8 pretty narrow. It -- it's a small fraction of  
9 the plea agreements are being appealed, and  
10 those that are, there's an even smaller  
11 fraction where there's any time being spent on  
12 them. So waiving a flag talking about  
13 floodgates opening seems rather exaggerated by  
14 the government.

15 MS. JACOBY: So the burden that we  
16 experience in the circuits right now really  
17 depends on the way that this exception is  
18 described in the circuits. In the circuits  
19 that have open-ended exceptions for, you know,  
20 all constitutional claims, the U.S. attorney's  
21 offices do report that to be a significant  
22 burden because it's quite easy to characterize  
23 even garden-variety claims as a due process  
24 violation, as I think this case illustrates.

25 In case -- in circuits that more

1 carefully circumscribe their exceptions to two  
2 or three discrete situations, it is -- it is  
3 admittedly less of a burden, but the problem is  
4 that whether we get the benefit of our bargain,  
5 which was to not have to litigate an appeal,  
6 just turns entirely on the defendant's choice  
7 because, if the defendant chooses to raise a  
8 miscarriage-of-justice exception --

9 JUSTICE SOTOMAYOR: Well, if you  
10 don't -- if you're not happy with the bargain,  
11 do what she -- what you're threatening to do,  
12 which is go ahead and prosecute them.

13 MS. JACOBY: But, again, our -- our  
14 whole purpose of --

15 JUSTICE SOTOMAYOR: Your -- your --  
16 your -- your --

17 MS. JACOBY: -- entering into the  
18 appeal waiver is that we didn't -- we wanted  
19 finality and we didn't want to have to keep  
20 litigating.

21 JUSTICE SOTOMAYOR: Well, but the  
22 problem with finality is that you're basing it  
23 on the good faith of a third actor, meaning  
24 you're -- you're depending on a district court  
25 judge to not -- or they are, a district court

1 judge to follow their constitutional and  
2 statutory obligations.

3 I would think it's unenforceable to  
4 enter a contract that says you are going to be  
5 sentenced by a judge who does not have to  
6 follow the law.

7 MS. JACOBY: That is -- that is very  
8 much not what an appeal waiver says.

9 JUSTICE GORSUCH: That's exactly what  
10 it says.

11 MS. JACOBY: An appeal waiver says --

12 JUSTICE SOTOMAYOR: Well, but  
13 that's -- that's exactly what you're saying.

14 MS. JACOBY: Not at all, Your Honor.  
15 An appeal --

16 JUSTICE SOTOMAYOR: That's exactly  
17 what you're saying, which is, if the judge uses  
18 impermissible race factors, impermissible sex  
19 factors, religious factors, that can be waived.  
20 That's saying that a judge -- you're entering a  
21 contract that says, if your judge is biased, if  
22 he doesn't follow the Constitution, if he  
23 breaks plain -- if he makes plain error  
24 judgments that are clear and undisputed,  
25 there's no remedy for you.

1 MS. JACOBY: So -- so, again, an  
2 appeal waiver is not saying you can be  
3 sentenced however you want by a judge. The  
4 judge is oath-bound. The judge has to follow  
5 the law all the time.

6 JUSTICE SOTOMAYOR: But that's what  
7 you're saying.

8 MS. JACOBY: The -- the appeal waiver  
9 is just saying the final decisionmaker is the  
10 district court, and, by the way, that was the  
11 system that existed for a hundred years in this  
12 country. We didn't have sentence --

13 JUSTICE KAGAN: Ms. Jacoby --

14 JUSTICE GORSUCH: If that -- if that  
15 really is --

16 JUSTICE KAGAN: Ms. Jacoby --

17 JUSTICE GORSUCH: Sorry.

18 JUSTICE KAGAN: -- just out of  
19 curiosity, what's your back-line position?

20 (Laughter.)

21 MS. JACOBY: Sure. So we -- we  
22 think -- we think that if this Court is going  
23 to go the miscarriage-of-justice route, again,  
24 we don't really see a basis for that in  
25 contract law, but if you're -- if you're going

1 to go that route, our strong preference is that  
2 you follow the circuits that have, you know,  
3 basically done what the Fifth Circuit has done  
4 but just with one or two more exceptions that  
5 seem to capture some of the concerns that  
6 people have here.

7           So we like, for example, the Seventh  
8 Circuit's test. I would put a little bit of a  
9 gloss on it for precision, but what I would say  
10 are the three circumstances that would be  
11 qualifying as -- as a miscarriage of justice  
12 would be a sentence that's explicitly based on  
13 a constitutionally impermissible factor like  
14 race; two, a sentence or condition that is  
15 categorically unlawful for the statutory  
16 offense of conviction; and, three, a sentence  
17 reached without even a minimum of civilized  
18 procedure, that's the example of, you know, the  
19 orangutan sentences you.

20           JUSTICE KAGAN: Why would it not be  
21 sufficient to say miscarriage of justice on the  
22 assumption that everybody who's going to be  
23 applying that standard knows it's a high bar,  
24 has seen it before, has thought about it  
25 before? The idea of, you know, defining it

1 into three discrete situations is not usually  
2 what we do when we speak of miscarriages of  
3 justice, and yet, you know, everybody gets that  
4 it's a high bar.

5 MS. JACOBY: The problem with setting  
6 the high bar is not that we're concerned  
7 that -- that judges won't know what constitutes  
8 a miscarriage of justice. The problem is that  
9 defendants won't know and they may well think  
10 that their case does present the miscarriage of  
11 justice.

12 JUSTICE KAGAN: Well, maybe that's  
13 right.

14 MS. JACOBY: And then we have to  
15 litigate it, and that deprives us of the  
16 benefit of the bargain, which was to not have  
17 to litigate.

18 JUSTICE KAGAN: You know, that --  
19 that's right. But, if -- if that's the case,  
20 that kind of challenge can be easily dismissed.  
21 I mean, I guess I -- I wouldn't think that that  
22 would take very much of anybody's time.

23 MS. JACOBY: You know, we do end up  
24 having to brief the merits of these disputes  
25 because courts will sometimes just ask for more

1 briefing. It -- the -- the circuits that have  
2 this more open-ended waiver -- pardon,  
3 open-ended exception, they do report a more  
4 serious burden to litigate it.

5 So we do think that capturing the  
6 discrete kind of buckets of cases that do seem  
7 to give everyone concern, and I think those  
8 three do really capture the universe of what  
9 people are worried about, the, you know,  
10 categorically impermissible sentence or  
11 categorically impermissible condition, the  
12 sentenced by an orangutan, the race-based  
13 sentence --

14 JUSTICE KAVANAUGH: Well --

15 MS. JACOBY: -- I think that is the  
16 universe, and so just limiting it to those  
17 three and making very clear what those  
18 exceptions are and then applying them to this  
19 case rather than signaling to lower courts and  
20 litigants that this is a borderline case, I --  
21 I think would be far preferable.

22 JUSTICE KAVANAUGH: Did you say  
23 ineffective assistance of counsel is one of  
24 them?

25 MS. JACOBY: Yes, of course. I think

1 we're all taking as given that ineffective  
2 assistance of counsel is one, and the Seventh  
3 Circuit does say that.

4 JUSTICE KAVANAUGH: And -- and the  
5 sentence exceeding the statutory maximum?

6 MS. JACOBY: So -- so I want to be  
7 careful about how I define that.

8 JUSTICE KAVANAUGH: Because you used  
9 categorical rather than statutory, and I want  
10 to know what that --

11 MS. JACOBY: Yes. So what I'm getting  
12 at with that is I think what everyone is  
13 worried about when they're talking about this  
14 sort of statutory maximum thing is the idea,  
15 like, you pleaded guilty to an offense that  
16 carries 10 years and you get sentenced to 15.

17 So I'm trying to capture that. But  
18 what I'm trying to exclude are things that some  
19 courts have said are -- fall within the  
20 statutory maximum exception, which are things  
21 like whether your restitution was proximately  
22 caused by your conduct, whether certain prior  
23 offenses qualify as ACCA predicates. Courts  
24 have sometimes said that those fall within a  
25 statutory maximum exception on the idea that if

1 they're correct about their claim, your  
2 sentence exceeds what Congress has lawfully  
3 authorized.

4 And we think those types of claims are  
5 really what we have bargained to not have to be  
6 litigating. We have bargained that the final  
7 decisionmaker on those issues will be the  
8 district court.

9 JUSTICE KAVANAUGH: What about  
10 supervised release conditions? So I asked  
11 Ms. Blatt this.

12 MS. JACOBY: Yes.

13 JUSTICE KAVANAUGH: But supervised  
14 release conditions can be challenged on appeal  
15 notwithstanding an appeal waiver if?

16 MS. JACOBY: They are categorically  
17 unlawful for the statutory offense of -- of  
18 conviction, same as the sentence terms. So  
19 that falls in my second bucket as well.

20 JUSTICE KAVANAUGH: What does  
21 categorically unlawful when you're applying it  
22 to supervised release conditions mean?

23 MS. JACOBY: Right.

24 JUSTICE KAVANAUGH: I know what it  
25 means when you're talking about the

1 statutory --

2 MS. JACOBY: Right.

3 JUSTICE KAVANAUGH: -- sentence.

4 MS. JACOBY: I think that refers to  
5 the -- the type of condition that there's  
6 really never any justification for for this  
7 offense. I mean, like, the -- the -- a  
8 condition like you can never get pregnant  
9 during supervised release.

10 JUSTICE KAVANAUGH: Well, what -- is  
11 there a term that -- because we have to write  
12 an opinion --

13 MS. JACOBY: Right.

14 JUSTICE KAVANAUGH: -- that's going to  
15 capture this.

16 MS. JACOBY: That's why we think  
17 categorically unlawful is sort of the best that  
18 we can do. We don't want to have to be  
19 dealing --

20 JUSTICE KAVANAUGH: That's kind of --  
21 I don't think that captures it.

22 MS. JACOBY: I mean, the issue is we  
23 don't want to have to be dealing with questions  
24 like, you know, was this sufficiently justified  
25 on the record, is there enough stuff in the

1 record to support this, did the judge make  
2 enough fact findings? Those are exactly the  
3 kind of reasonableness issues that Petitioner  
4 says are out of bounds, and we don't want you  
5 to just be able to call it a due process claim  
6 and then all of a sudden we are doing those  
7 reasonable -- reasonableness inquiries when we  
8 have bargained not to.

9           And, again, I want to be clear, when  
10 we're bargaining for this, this is to the  
11 defendant's advantage. I mean, there's a  
12 reason that the defense bar does not want to go  
13 the route that Justice Jackson proposed of  
14 getting rid of all of these altogether because  
15 this is something of great value to the  
16 government, and so it is a bargaining chip --

17           JUSTICE JACKSON: No, I under --

18           MS. JACOBY: -- for the defendants.

19           JUSTICE KAVANAUGH: But then the --

20 oh.

21           JUSTICE JACKSON: Sorry. Are you --

22           JUSTICE KAVANAUGH: Go ahead.

23           JUSTICE JACKSON: I -- I appreciate  
24 that, but I guess what I'm a little surprised  
25 about with the government's hard-line position

1 is that I can't quite figure out whether you  
2 are sticking with the contracts idea or not.  
3 You've said many, many times that this is about  
4 the bargain and the government is bargaining  
5 not to litigate and that's what we really have  
6 to care about.

7 But, as Ms. Blatt points out, every  
8 contracts regime that I'm aware of has some  
9 exception where the court is looking at the  
10 fairness of the bargain, where there's some  
11 consideration of the, you know, different  
12 degrees of ability to negotiate, the fact that  
13 you might have people who are being coerced  
14 into accepting this kind of deal even though  
15 it's not knowing and voluntary.

16 The court is policing that. And the  
17 government's position here seems to be that we  
18 are not supposed to be caring about that; we  
19 just need to focus on the fact that the  
20 government has made this deal, that it's not  
21 going to want to litigate any more of these  
22 cases.

23 And so it kind of brings me to Justice  
24 Gorsuch's original point. Like, that seems  
25 kind of unconstitutional in a way that the

1 primary value here is to prevent the government  
2 from having to litigate appeals when we're  
3 talking about people's constitutional rights.

4 And so I'm just trying to understand,  
5 is it your position that notwithstanding the  
6 contracts-like nature of this endeavor, we are  
7 not to be treating this the way the courts  
8 ordinarily treat contracts, which is to  
9 consider these kinds of exceptions?

10 MS. JACOBY: So I'm really glad you  
11 asked this question because I think this is a  
12 really important point for us. Our position is  
13 not that contract defenses do not apply to plea  
14 agreements or to appeal waivers. It is that  
15 the contract defenses that Petitioner has  
16 raised here fail.

17 They fail because a subsequent  
18 sentence that a defendant receives under just  
19 ordinary principles of contract law, the ones  
20 that Petitioner has relied on here, do not make  
21 the agreement against public policy or  
22 unconscionable --

23 JUSTICE JACKSON: Right, but wouldn't  
24 you --

25 MS. JACOBY: -- or frustrated purpose.

1 JUSTICE JACKSON: -- have to do that  
2 at an individual level? Like, I don't know how  
3 you could categorically say we allow for these  
4 defenses, but they're never going to apply in  
5 this situation because something like the  
6 fairness of an agreement really takes into  
7 account what's going on with respect to that  
8 particular case.

9 MS. JACOBY: So --

10 JUSTICE JACKSON: This is why Justice  
11 Kagan is -- is -- is, I think, resisting the  
12 granular statement of what counts as a  
13 miscarriage of justice, because we could look  
14 at a particular case and say: This bargain,  
15 this scenario is unfair because it relates to  
16 the kinds of things that my colleagues have  
17 pointed out. Right?

18 MS. JACOBY: So -- so, if we're in  
19 contract world, and I'm going to bracket the  
20 miscarriage-of-justice world, which I think, if  
21 this Court's going down that road, it's not on  
22 the basis of contract doctrine; it's -- it's  
23 something else, some other kind of --

24 JUSTICE JACKSON: Wait. We can -- we  
25 can fold --

1 MS. JACOBY: -- policymaking. But --  
2 but --

3 JUSTICE JACKSON: No, no, no. Let's  
4 fold the miscarriage-of-justice concept into  
5 something like public policy because it's a --  
6 you agree that public policy is an exception,  
7 right, in -- under the contracts world? And  
8 one would think that if what is happening here  
9 is a miscarriage of justice, we -- we would say  
10 that that's against public policy.

11 So let's put it under that umbrella.  
12 Go forward.

13 MS. JACOBY: Sure. I'm happy to talk  
14 about public policy exception. Under contract  
15 doctrine -- again, I'm assuming we're in  
16 contract world. Under contract doctrine, the  
17 question is not whether the sentence is against  
18 public policy. The question is whether the  
19 agreement is against public policy.

20 JUSTICE JACKSON: Correct.

21 MS. JACOBY: And the -- the agreement  
22 to waive your right to appeal is not against  
23 public policy. It's not against --

24 JUSTICE JACKSON: Because?

25 MS. JACOBY: -- the public policy of

1 the appeal rights statute --

2 JUSTICE JACKSON: Because?

3 MS. JACOBY: -- because the policy of  
4 the appeal rights statute is one of defendant  
5 choice always. And it's not against the policy  
6 of the underlying, you know, say,  
7 constitutional amendment you say is violated.  
8 Take -- take, for example --

9 JUSTICE GORSUCH: Ms. Jacoby --

10 JUSTICE JACKSON: What about -- what  
11 about the Sentencing Reform Act, which says  
12 that appeals are important, that they  
13 incentivize the court and the parties to  
14 actually follow the law, follow the guidelines,  
15 not issue these egregious sentences, right?

16 We have a congressional policy that,  
17 in fact, revamps the entire sentencing system  
18 to allow for appeals. So to suggest that an  
19 appeal waiver is not against public policy, I  
20 think, runs up against all of that.

21 MS. JACOBY: But, again, our system  
22 still, even after the Sentencing Reform Act,  
23 leaves it as a matter of defendant choice  
24 whether to exercise that appeal. If Congress  
25 really thought that the appeal --

1 JUSTICE JACKSON: That's the question.  
2 That's the question today. That's my question  
3 that everybody else has given up --

4 MS. JACOBY: Right.

5 JUSTICE JACKSON: -- but I'm still  
6 working, right?

7 MS. JACOBY: If -- if --

8 JUSTICE JACKSON: My question is,  
9 should it be left as defendant choice given all  
10 of these problems? Given the fact that it  
11 doesn't seem to advance anything other than the  
12 government's interest in not wanting to  
13 litigate, you know, these kinds of issues,  
14 should it be left to defendant choice in this  
15 circumstance?

16 MS. JACOBY: It -- it definitely  
17 should given that Congress has left it to  
18 defendant choice. I don't see a basis for this  
19 Court to upend that. And then, as to the idea  
20 that all we're doing here is protecting the  
21 government's interest in finality, no. I mean,  
22 this is a bargaining chip for defendants.

23 The -- the appeal waiver is valuable  
24 for us, so, here, a deal with an appeal waiver  
25 was worth dropping nine charges for Petitioner.

1 I have no idea what a deal without an appeal  
2 waiver would be worth, but --

3 JUSTICE GORSUCH: Ms. -- Ms. --

4 MS. JACOBY: -- basic economic logic  
5 suggests it would be less. Different  
6 charges --

7 JUSTICE GORSUCH: Ms. Jacoby, two --

8 MS. JACOBY: Yes.

9 JUSTICE GORSUCH: -- two questions on  
10 that. One is your answers to Justice Jackson  
11 about the contract approach, as you're calling  
12 it, you argue you win under contract  
13 principles. You don't argue that they don't  
14 apply.

15 MS. JACOBY: Correct. Correct.

16 JUSTICE GORSUCH: So why doesn't this  
17 defendant get a remand --

18 MS. JACOBY: Because we win --

19 JUSTICE GORSUCH: -- to argue contract?

20 MS. JACOBY: -- we win categorically.

21 The subsequent sentence that the defendant  
22 receives --

23 JUSTICE GORSUCH: Yeah, but the -- if  
24 I --

25 MS. JACOBY: -- is never a basis to

1 find that the contract is against public  
2 policy.

3 JUSTICE GORSUCH: If I -- if I might?  
4 The Fifth Circuit hasn't addressed that  
5 question. Nobody has addressed that question.  
6 This Court hasn't addressed that question. Why  
7 wouldn't we remand to allow the court of  
8 appeals to address that question?

9 MS. JACOBY: I think what Petitioner  
10 has -- has asked this Court to do is to say  
11 that in some instances, an appeal waiver could  
12 be against public policy.

13 JUSTICE GORSUCH: No.

14 MS. JACOBY: And I'm asking the  
15 Court --

16 JUSTICE GORSUCH: No.

17 MS. JACOBY: -- to say it never could.

18 JUSTICE GORSUCH: No. No. What --  
19 what -- what Petitioner is asking us to say is  
20 that the Fifth Circuit's rule that there are  
21 two and only two bases is not correct and that  
22 I should be allowed to try a contract defense.  
23 And you say you've got good contract defenses.  
24 God bless you. How about litigating them?

25 MS. JACOBY: To -- to make it a

1 possibility that they try to raise a contract  
2 defense, I think Petitioner needs to show how  
3 any contract defense could in theory in the  
4 right case give relief here.

5 And there is no public policy that an  
6 appeal waiver violates based on the subsequent  
7 sentence that --

8 JUSTICE GORSUCH: But, if we're not  
9 prepared to decide that in the first instance  
10 because no court has passed on that question,  
11 do you object to a remand to have a court --

12 MS. JACOBY: We very strongly object  
13 to a remand, particularly because of what it  
14 would signal about the facts of this case. You  
15 could say it may be possible in some case, but  
16 we would really urge you not to suggest that it  
17 would be this case because this is the type of  
18 appeal that even the circuits that have broad  
19 standards, I think, perhaps excepting the Ninth  
20 Circuit, would categorically not find this a  
21 miscarriage of justice.

22 JUSTICE GORSUCH: And -- and then --

23 MS. JACOBY: And if you suggest  
24 otherwise, that -- that truly will open the  
25 floodgates and cause a big problem for the

1 United States.

2 JUSTICE GORSUCH: Because -- because  
3 an issue that hasn't been litigated should  
4 never be litigated. Okay. All right.

5 And -- and then you -- you -- you tout  
6 the benefits of these deals. Let's take this  
7 case as an example. The defendant here pled  
8 guilty to one count of stealing \$32,000. He  
9 was sentenced as if he was guilty of all the  
10 counts the government dropped and a half a  
11 million dollars' worth of -- of stolen money.

12 How -- if I think about this as an  
13 unconstitutional conditions possible problem,  
14 we normally say that there has to be some nexus  
15 between what you're giving up and what you get  
16 and some proportionality. And if he's being  
17 sentenced as if he committed all the crimes  
18 that weren't charged, it's pretty hard for me  
19 to see what benefit he's getting from an appeal  
20 waiver here. Can you help me with that?

21 MS. JACOBY: Absolutely. So, first of  
22 all, on uncondition -- on unconstitutional  
23 conditions, there is no constitutional right to  
24 an appeal. So --

25 JUSTICE GORSUCH: There's a statutory

1 right.

2 MS. JACOBY: Yes, but --

3 JUSTICE GORSUCH: And -- well, as a  
4 matter of --

5 MS. JACOBY: -- it's not an  
6 unconstitutional condition and it doesn't  
7 burden your constitutional rights.

8 JUSTICE GORSUCH: As a matter of due  
9 process, you're entitled to that statutory  
10 right.

11 MS. JACOBY: I mean, no, I think that  
12 you're just --

13 JUSTICE GORSUCH: Really? You just --

14 MS. JACOBY: -- constitutionalizing  
15 the appeal right if you say that as a matter of  
16 due process you're entitled to the statutory  
17 right.

18 JUSTICE GORSUCH: Oh, okay. Okay.  
19 All right. So --

20 MS. JACOBY: But -- but setting that  
21 aside, I think your second question is about --

22 JUSTICE GORSUCH: I -- I think maybe  
23 you better set that aside for my purposes at  
24 least.

25 MS. JACOBY: Understood. Setting that

1     aside, your second question, I think, is about  
2     if he got a good deal in the end here, if --  
3     if, in fact, the sentence is -- is one that his  
4     bargain to drop nine charges proved to be a  
5     good deal.

6             As -- as my friend has said, you know,  
7     he obviously thinks it ended up not being a  
8     good deal, but that is not a basis to undo a  
9     bargain and that's not a basis to find a  
10    bargain to be unconscionable.

11            Unconscionability isn't about harsh  
12    results later when it proves you made a bad  
13    deal. Unconscionability is about a deal that  
14    you made that at the time you made it is so  
15    one-sided no rational --

16            JUSTICE GORSUCH:  If --

17            MS. JACOBY:  -- person would enter  
18    into it, and that was not this deal.

19            JUSTICE GORSUCH:  If the government's  
20    position is a defendant can knowingly and  
21    voluntarily give up his appeal rights, I wonder  
22    what the government would say a defendant  
23    couldn't give up?  Could a defendant give up,  
24    for example, his right to go to church after  
25    his conviction or to own a gun after his

1 conviction --

2 MS. JACOBY: So --

3 JUSTICE GORSUCH: -- or his  
4 entitlement to federal unemployment benefits  
5 after his conviction?

6 MS. JACOBY: -- again, this comes back  
7 to my point that this is not -- an appeal  
8 waiver is not an agreement to be sentenced  
9 unlawfully. An agreement to be sentenced  
10 unlawfully would be against public policy --

11 JUSTICE GORSUCH: Oh --

12 MS. JACOBY: -- because performance --

13 JUSTICE GORSUCH: -- okay. Okay. Now  
14 that's a --

15 MS. JACOBY: -- of the agreement would  
16 be against public policy. This is --

17 JUSTICE GORSUCH: -- that's an  
18 interesting test. Okay. So, if it's an  
19 unlawful sentence, he should be able to appeal?

20 MS. JACOBY: Not at all.

21 JUSTICE GORSUCH: No?

22 MS. JACOBY: No, no, no, no, no. If  
23 the agreement is to receive an unlawful  
24 sentence, that is an agreement against public  
25 policy. But, here, the agreement is not to

1 receive an unlawful sentence. The agreement  
2 still contemplates that the judge is  
3 oath-bound.

4 JUSTICE GORSUCH: Right.

5 MS. JACOBY: It is an agreement that  
6 the final decisionmaker on your sentence is  
7 a --

8 JUSTICE GORSUCH: Will --

9 MS. JACOBY: -- district court --

10 JUSTICE GORSUCH: -- will be --

11 MS. JACOBY: -- and that is not an  
12 unlawful agreement. No public policy forbids  
13 the district court from being the final  
14 decisionmaker on your -- on your -- on your  
15 case.

16 JUSTICE GORSUCH: All right. Go  
17 ahead.

18 MS. JACOBY: That was the status quo  
19 for a hundred years.

20 JUSTICE JACKSON: What about -- what  
21 about --

22 JUSTICE BARRETT: Ms. Jacoby, can I --  
23 can I ask you a question, Ms. Jacoby -- Ms.  
24 Jacoby? I'm having a hard time tracking  
25 exactly what the government's position is. So

1 I asked Ms. Blatt, explain to me how these  
2 defenses that you're proposing fit within the  
3 contract analogy.

4 And, I don't know, I -- I sense some  
5 going back and forth about whether the contract  
6 analogy is a perfect fit so that all these  
7 defenses are available. And, if so, I'm not  
8 really sure how the miscarriage-of-justice  
9 back-line position fits in, unless we try to  
10 shoehorn it through public policy.

11 So explain to me what the government's  
12 theory is here.

13 MS. JACOBY: Sure. So Petitioner has  
14 litigated this as a contract doctrines case,  
15 saying that all these contract defenses apply.  
16 Our -- our position is, if -- if we're going on  
17 contract defenses, no, none of them applies.

18 JUSTICE BARRETT: Would you go on  
19 contract -- well, let me -- let me ask you that  
20 just as a matter of first principles, is it the  
21 government's position that this should be  
22 litigated as a contract case?

23 MS. JACOBY: I do think so. And I  
24 think that there's not really another source of  
25 law that Petitioner has identified to lodge

1 this miscarriage-of-justice exception. It's  
2 not contract principles.

3 JUSTICE BARRETT: No, no, no, no, the  
4 government. Like, do you think of this, do you  
5 think the Petitioner is right to litigate this?  
6 Because you've gone along with it --

7 MS. JACOBY: Yes, yes.

8 JUSTICE BARRETT: -- and you've said,  
9 if we're talking about contracts, it doesn't  
10 work. But do you think of this challenge as  
11 something to which the contract analogy should  
12 apply?

13 MS. JACOBY: I do think that this type  
14 of argument is one to which the contract  
15 analogy should apply. There's no  
16 constitutional right to an appeal, so I don't  
17 think it makes sense to say that there is a  
18 constitutional right to an appeal in certain  
19 egregious cases, so the Constitution isn't  
20 really a home for this doctrine.

21 And other than that, I think you would  
22 just be engaging in some kind of federal common  
23 law policymaking --

24 JUSTICE KAGAN: Well --

25 MS. JACOBY: -- where Congress

1 hasn't --

2 JUSTICE BARRETT: So then --

3 JUSTICE KAGAN: -- Ms. Jacoby --

4 JUSTICE BARRETT: So is the  
5 position -- oh, sorry. Can I just finish --

6 JUSTICE KAGAN: No, go ahead.

7 JUSTICE BARRETT: -- this one?

8 So is your position that the contract  
9 analogy applies, but none of the contract  
10 defenses work in this context?

11 MS. JACOBY: Correct.

12 JUSTICE BARRETT: Okay. So, when  
13 you're making this concession about, you know,  
14 potential miscarriage of justice, et cetera --

15 MS. JACOBY: Yes.

16 JUSTICE BARRETT: -- you're just kind  
17 of pulling that from the ether?

18 MS. JACOBY: That -- so, there, we're  
19 assuming that you -- you are kind of going  
20 outside of contract doctrines and you are  
21 trying to find some sort of policy or maybe  
22 constitutional backstop, some safety valve.  
23 And we think, if you are going down that road,  
24 the safety valve I proposed to Justice Kagan is  
25 the right one, but, again, we do not think that

1 that is the right way to go here.

2 JUSTICE BARRETT: Well, why isn't  
3 Justice Gorsuch right then? I mean, are we  
4 supposed to march through every single  
5 available contract defense for the Restatement  
6 and say this is why this couldn't apply here?  
7 This is why that couldn't apply here?

8 MS. JACOBY: Petitioner has come up  
9 with four potential defenses. None of them  
10 applies. I -- I think that you can just  
11 categorically say --

12 JUSTICE BARRETT: As to his case, but  
13 we're not --

14 MS. JACOBY: No, no, no,  
15 categorically, when a subsequent sentence --  
16 sorry, a subsequent sentence does not make an  
17 appeal waiver against public policy. It  
18 doesn't make it unconscionable. It doesn't  
19 make it a breach of the implied duty of good  
20 faith. It doesn't frustrate the shared purpose  
21 that goes to the essence of the bargain. Just  
22 categorically those defenses all fail.

23 If there are other defenses out there,  
24 it was on Petitioner to raise them, and he  
25 hasn't.

1 JUSTICE KAGAN: Is the --

2 JUSTICE GORSUCH: Didn't argue that.

3 Sorry.

4 CHIEF JUSTICE ROBERTS: Justice --

5 Justice Kagan?

6 JUSTICE KAGAN: Is -- is the premise  
7 of your answers to Justice Barrett that this  
8 Court has no power to establish rules intended  
9 to safeguard the integrity of the judiciary?

10 MS. JACOBY: That is not our position.

11 But the rules need to be lodged, I think, in  
12 some source of law. There's no congressional  
13 source of law. There's no, really,  
14 constitutional source of law given that there  
15 is not a constitutional right to appeal. So I  
16 don't think it makes sense to say --

17 JUSTICE KAGAN: No, I mean, that was  
18 my question. In other words, you're saying  
19 that we have to point to a statute, we have to  
20 point to a particular constitutional provision  
21 to set some boundary lines on what judges can  
22 do in a task that is supremely a judicial one.

23 MS. JACOBY: I think that --

24 JUSTICE KAGAN: That we can't just  
25 say, you know, there are some things that

1 judges can do that would be a miscarriage of  
2 justice and we -- we -- we -- we don't need to  
3 point to a statute to be able to create a rule  
4 that polices the judiciary to that extent.

5 MS. JACOBY: I think particularly  
6 because we are in the world of federal criminal  
7 law and federal criminal procedure, which is  
8 highly regulated by Congress and the Rules  
9 Committee, that's an especially, you know,  
10 dangerous place for this Court to be making  
11 policymaking, even though I understand that  
12 it's policymaking about what judges should do.

13 It's policymaking about which court  
14 should be the last word on certain types of  
15 cases, and I think that really is the province  
16 of Congress and the Rules Committee.

17 If you disagree with me and you are  
18 going down the road of -- of a miscarriage-of-  
19 justice exception, again, we strongly urge the  
20 Court to cabin it to the circumstances that  
21 really give everyone pause.

22 JUSTICE KAGAN: Well, whatever the  
23 miscarriage-of-justice exception says, whether  
24 it's less cabined, whether it's more cabined,  
25 you're saying that the only way that we can do

1 that is by referring to contract law principles  
2 or by finding -- which I don't think exist  
3 because people would have found it -- some  
4 statute that allows us to do that?

5 MS. JACOBY: Or constitutional  
6 principles or -- I -- I think you're maybe  
7 gesturing towards something to do with the  
8 supervisory powers of the courts or something  
9 like that. But this isn't really a good home  
10 for the supervisory powers because this isn't  
11 about supervising the conduct in the courtroom.

12 This is really about making rules  
13 about when certain -- you know, when a decision  
14 should be final, whether that's at the district  
15 court stage or the court of appeals stage.  
16 That's kind of bread-and-butter federal  
17 criminal procedure stuff that Congress deals  
18 with and the Rules Committee deals with.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas, anything further?

22 Justice Alito?

23 JUSTICE ALITO: Well, can't we say, to  
24 continue your colloquy with Justice Kagan, can  
25 we not say that a plea bargain has some

1 attributes of a contract, but it's not like an  
2 ordinary contract.

3 I don't know. Even the -- even the  
4 amici supporting Mr. Hunter say -- this is the  
5 Cato/ACLU brief, point 1-b, "plea bargaining is  
6 no ordinary contract negotiations."

7 So we can adopt a principle that is  
8 informed by contract law without taking a  
9 position that you now seem to be taking, which  
10 is this is just like any other contract and all  
11 of the contractual defenses that might be  
12 recognized are available here. I find your  
13 position really hard to understand.

14 You -- on the one hand, you say you  
15 don't want to be burdened with having to  
16 litigate a lot of -- a lot of appeals that are  
17 taken by defendants who have entered into a --  
18 entered into an appeal waiver. And then  
19 you're -- you're happy to have judges decide --  
20 don't you think that anything that -- any  
21 objection that a defendant might have could  
22 be -- could be characterized as unconscionable?

23 MS. JACOBY: If I -- if I --

24 JUSTICE ALITO: I mean, we  
25 occasionally see issues of unconscionability in

1 cases involving -- involving arbitration. And,  
2 boy, some state courts really go to town on --  
3 with the -- with the unconscionability  
4 argument. But you're happy to -- you're happy  
5 to deal with all those?

6 MS. JACOBY: I'm -- I'm definitely  
7 happy to say why categorically appeal waivers  
8 are not unconscionable if -- if that's the  
9 question.

10 If the question is whether there  
11 should be some -- some other rule that informs  
12 the court, yes, I agree plea bargains are not  
13 perfectly like contracts, so the -- the analogy  
14 doesn't hold in all respects. But you would  
15 have to say that there's a constitutional  
16 dimension.

17 I mean, there would have to be sort of  
18 some source of law that is informing what rule  
19 the court makes if it's not a contract rule.  
20 And there's not really a constitutional  
21 principle at -- at play here, and I'm not  
22 really sure another source of law.

23 So, no, I don't -- I want to be clear,  
24 we've been litigating this case as a contract  
25 case because that's how Petitioner has brought

1 this. If the Court wants to say that there are  
2 aspects that are not like a contract and other  
3 rules should apply, it would just need to  
4 ground those -- those rules, I think, in  
5 something. I'm happy to explain, though, why.

6 JUSTICE ALITO: Okay. Thanks.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, on the  
10 second question presented, there is a way of  
11 reading that transcript in which one could say  
12 the judge basically said, I'm going to impose a  
13 condition, come back to me later if you  
14 disagree. And then he mentions the right to  
15 appeal, that there was permission to appeal at  
16 least this -- this -- this condition.

17 Why can't we read that colloquy as  
18 such?

19 MS. JACOBY: Because a district court  
20 doesn't have authority to modify the parties'  
21 agreement, so --

22 JUSTICE SOTOMAYOR: Well, then that  
23 goes to the silence that was the government's  
24 position there. All right.

25 What does that do to the ripeness

1 question that Justice Barrett had? Presumably,  
2 you would argue at any point in time that the  
3 waiver applies, correct?

4 MS. JACOBY: It -- that depends on the  
5 language of the agreement. Here, this  
6 agreement doesn't bar Petitioner from seeking  
7 modification of the condition of supervised  
8 release. So he could do that. The Fifth  
9 Circuit has said that an appeal from the denial  
10 of modification is covered by a waiver if it's  
11 the type of agreement that -- pardon -- the  
12 type of appeal that could have been brought  
13 from the beginning if -- if --

14 JUSTICE SOTOMAYOR: That's -- isn't  
15 that the -- the vicious circle you're putting  
16 this defendant in, isn't it?

17 MS. JACOBY: I -- I don't think we're  
18 putting the defendant in any circle.

19 JUSTICE SOTOMAYOR: The Fifth Circuit  
20 is.

21 MS. JACOBY: I think the defendant  
22 entered into an agreement, and this was the  
23 terms of the deal.

24 JUSTICE SOTOMAYOR: And so you're  
25 saying tough luck because the Fifth Circuit

1 won't let you do it, so we should let you do  
2 it? We should let you say --

3 MS. JACOBY: It is possible --

4 JUSTICE SOTOMAYOR: -- it's not right?

5 MS. JACOBY: -- I think, under the  
6 terms of the Fifth Circuit's doctrine that if  
7 the type of appeal that he brought were more as  
8 applied and not the type of thing he really  
9 could have brought from the beginning, given  
10 that this appeal waiver doesn't cover --

11 JUSTICE SOTOMAYOR: Let's go --

12 MS. JACOBY: -- appeals from a  
13 modification --

14 JUSTICE SOTOMAYOR: Now --

15 MS. JACOBY: -- it could be allowed.

16 JUSTICE SOTOMAYOR: -- you admitted  
17 that it would be unconscionable to contract to  
18 have a racist judge decide the case, correct?

19 MS. JACOBY: I -- I admitted it would  
20 be against public policy to say my -- my  
21 sentence will be decided on the basis of race.

22 JUSTICE SOTOMAYOR: But it's not, in  
23 fact, against public policy to have a racist  
24 judge sentence you?

25 MS. JACOBY: Yes, the sentence would

1 be against public policy. But the question is  
2 whether the agreement is against public policy.

3 And, again, the agreement is not to have --

4 JUSTICE SOTOMAYOR: But the -- but  
5 that's what you're -- you're --

6 MS. JACOBY: -- a racist sentence.  
7 The agreement is to have no appeal and that the  
8 agreement to have no appeal is not against any  
9 public policy.

10 JUSTICE SOTOMAYOR: Even though it  
11 involves, so -- a breach of the duty of good  
12 faith dealing, which applies to third parties  
13 that you delegate contract rights to.

14 MS. JACOBY: But a judge is not a  
15 delegee under -- under the agreement.

16 JUSTICE SOTOMAYOR: Oh, you can't have  
17 it both ways. He is either a judge acting in  
18 conformity with the law, or he is a delegee  
19 subject to the good faith and fair dealing  
20 condition. You want to pick and choose  
21 defenses.

22 MS. JACOBY: Not at all, Your Honor.  
23 He is a judge acting in good faith in the law,  
24 but a presumption of the entire appeal waiver  
25 is that the defendant might not think that the

1 sentence he ultimately receives is unlawful.

2 That is kind of the core --

3 JUSTICE SOTOMAYOR: Well --

4 MS. JACOBY: -- premise.

5 JUSTICE SOTOMAYOR: -- but it's not a  
6 question of unlawful because it's a question of  
7 whether he's violated statutory rights, whether  
8 he has used impermissible constitutional  
9 factors, whether he's violated statutory  
10 limitations, imposing restitution when the  
11 statute doesn't provide for it and the  
12 agreement doesn't contemplate it.

13 He's acted outside the bounds of  
14 expectation.

15 MS. JACOBY: The relevant expectation  
16 under contract doctrine -- again, I'm -- I'm  
17 assuming now we're in contract world. The  
18 relevant expectations are not the parties'  
19 expectations as to what sentencing outcome will  
20 occur. Contracts hold even when --

21 JUSTICE SOTOMAYOR: I -- I agree. I  
22 submit things --

23 MS. JACOBY: -- unforeseen and  
24 unexpected things happen. The relevant  
25 expectation is what -- how the parties expected

1 their agreement would operate, whatever the  
2 outcome at sentencing.

3 JUSTICE SOTOMAYOR: So why isn't it --  
4 and going back to Justice Kagan's question --  
5 we all assume that judges will act lawfully,  
6 not that they can't make errors in calculations  
7 but that they'll act lawfully and not  
8 unconstitutionally?

9 MS. JACOBY: We -- we do assume that,  
10 but the premise of the agreement here is that  
11 both sides might not think that the judge has  
12 acted lawfully, and if the defendant thinks  
13 that the judge hasn't acted lawfully, he can't  
14 appeal. That's kind of the whole premise of  
15 this agreement here. That is the assumption.

16 JUSTICE SOTOMAYOR: All right. Then  
17 we're going around in the circle we started  
18 with.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?  
20 Justice Gorsuch, anything further?

21 JUSTICE GORSUCH: You agree that some  
22 prospective waivers are just unenforceable, so,  
23 for example, you cannot prospectively waive  
24 your Title VII rights?

25 MS. JACOBY: Correct. Yes. This is

1 quite different, though. I mean, you can't  
2 prospectively waive your right to sue under  
3 Title VII, this Court has said, because the  
4 right to sue is basically integral to the  
5 substantive policy of Title VII. But the right  
6 to appeal is not integral to the substantive  
7 policy of any constitutional amendment or  
8 statutory amendment or anything like that.

9 JUSTICE GORSUCH: Except for  
10 Congress --

11 MS. JACOBY: And we know that because  
12 it didn't --

13 JUSTICE GORSUCH: -- granted a right  
14 to appeal, just as it granted a right to pursue  
15 Title VII remedies.

16 MS. JACOBY: Waiving the right to  
17 appeal also isn't against the policy of the  
18 right to appeal because that would just mean we  
19 could never have any statutory waivers.

20 JUSTICE GORSUCH: Well, we didn't have  
21 appeal waivers until about three minutes ago in  
22 Missouri.

23 MS. JACOBY: We also didn't have  
24 appeals for a hundred years, respectfully.

25 JUSTICE GORSUCH: Yeah. And we

1 also --

2 MS. JACOB: We didn't have sentencing  
3 appeals at all.

4 JUSTICE GORSUCH: And we also didn't  
5 have plea agreements before that if you really  
6 want to go back, counsel. So I'm not sure that  
7 works for you.

8 And then, with respect to contract in  
9 what you call contract world, you agree that at  
10 least in principle, a defendant would have  
11 contract defenses, correct?

12 MS. JACOBY: Yes.

13 JUSTICE GORSUCH: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16 JUSTICE KAVANAUGH: Let's see. I  
17 appreciate your having alternative arguments  
18 and a party having alternative arguments. I  
19 think that's helpful because you don't know  
20 where the nine of us are going to go. But then  
21 it's important to keep -- for me, to keep clear  
22 on what the alternatives are.

23 Your first one's the contract, no  
24 exceptions. Okay. The lower courts have not  
25 gone that way, have rejected it. Assume --

1 MS. JACOBY: Correct.

2 JUSTICE KAVANAUGH: -- I'm not going  
3 that way.

4 MS. JACOBY: Sure.

5 JUSTICE KAVANAUGH: Okay? Just me.

6 MS. JACOBY: Sure.

7 JUSTICE KAVANAUGH: Okay? So first  
8 alternative out for me. On the second  
9 alternative, I think you raise a good point,  
10 what source of law are we doing, but all the  
11 lower courts have been doing it, right? All  
12 the courts of appeals. And I -- could be  
13 federal common law, could be supervisory power,  
14 but it's there. And I think I'm just taking  
15 that as a given, and that is --

16 MS. JACOBY: Yeah, courts have done  
17 it. The way this has arisen is courts, you  
18 know, in the early 2000s, late '90s, often  
19 confronted with this would say, yes, these are  
20 okay, but, of course, we would never enforce it  
21 in X, Y, Z circumstances without really  
22 explaining why.

23 JUSTICE KAVANAUGH: It -- it -- but  
24 it's -- but there's a --

25 MS. JACOBY: But, yes, they have said

1 that. They have said that.

2 JUSTICE KAVANAUGH: At this point,  
3 I -- I take your technical point and maybe it's  
4 more than technical, where does that come from,  
5 but it's -- it's everywhere in the courts of  
6 appeals. My old court, all -- every court,  
7 right? And it might be interpreting the  
8 federal criminal rule, it might be supervisory  
9 power, it might be federal common law, it might  
10 be going to what an appeal is in the statute,  
11 to Justice Gorsuch's point, but it's there.

12 Then it's just what are the  
13 exceptions, right?

14 MS. JACOBY: Yes.

15 JUSTICE KAVANAUGH: Okay. So, if  
16 we're on that, it's just what are the  
17 exceptions and whether to identify a general  
18 miscarriage of justice or to list three or four  
19 and then to say they're not exclusive, correct?

20 MS. JACOBY: Correct.

21 JUSTICE KAVANAUGH: Okay.

22 MS. JACOBY: Correct.

23 JUSTICE KAVANAUGH: And there's a  
24 pretty good consensus of exceptions in most of  
25 the courts of appeals.

1 MS. JACOBY: Correct. Correct. And  
2 the ones that we've articulated I think track  
3 the --

4 JUSTICE KAVANAUGH: Like, in -- in  
5 other words, I think this is not so hard in the  
6 sense that there's a kind of defined list.  
7 What happened here is the list is shorter than  
8 what most of the courts of appeals have,  
9 correct?

10 MS. JACOBY: If this Court is going  
11 down that road, I think saying there's still a  
12 defined list; there's just, you know, two more  
13 bullets on the list --

14 JUSTICE KAVANAUGH: Exactly. Exactly.

15 MS. JACOBY: -- we can live with that  
16 as long as the last bullet isn't catch-all,  
17 know it when you see it if it's sufficiently  
18 egregious, because that is a real problem for  
19 us. If the bullets are just -- if you just say  
20 the Fifth Circuit has one too few bullets, two  
21 too few bullets, that makes sense. But, again,  
22 we don't think there are any bullets that could  
23 capture Petitioner's argument.

24 JUSTICE KAVANAUGH: Well, in the D.C.  
25 Circuit, we did have a bullet that said results

1 in a miscarriage of justice --

2 MS. JACOBY: Yeah.

3 JUSTICE KAVANAUGH: -- and I don't  
4 remember the place falling apart.

5 MS. JACOBY: So I do think that if  
6 this Court were to announce a standard like  
7 that, we would see kind of a flood of that.

8 JUSTICE KAVANAUGH: Okay.

9 MS. JACOBY: And there has also at  
10 this point been kind of enough common law, I  
11 guess, you know, built up around it that courts  
12 have denied those miscarriages enough that  
13 defendants may raise them less. But, if this  
14 Court were to announce that standard, we think  
15 defendants would raise them a lot.

16 And, again, I'm not suggesting courts  
17 would find miscarriages of justice constantly.  
18 The opposite. But that's the very problem.

19 JUSTICE KAVANAUGH: But it's going to  
20 come up.

21 MS. JACOBY: I mean, if we're looking  
22 for the needle in a haystack, but in every  
23 case, we're being deprived the benefit of our  
24 bargain, that's the problem.

25 JUSTICE KAVANAUGH: And the ultimate

1 benefit is the resource, right?

2 MS. JACOBY: Correct. I mean, we  
3 enter into 45,000 plea agreements a year, so --

4 JUSTICE KAVANAUGH: And, ultimately,  
5 it's a judge-protective thing too because the  
6 judges are -- yeah.

7 MS. JACOBY: Correct.

8 JUSTICE KAVANAUGH: I got -- got all  
9 that.

10 The amicus brief of the Association  
11 of -- of -- let's see, which one -- the  
12 Association of Federal Defenders says, if we  
13 are too strict on this, there are going to be  
14 fewer plea bargains, so the resource problem is  
15 actually going to be worse.

16 Do you want to respond to that very  
17 quickly? Because I'm using time.

18 MS. JACOBY: I -- I don't agree with  
19 that. I mean, the most common alternative to  
20 entering into a guilty plea pursuant to an  
21 agreement is not a trial; it's entering into a  
22 guilty plea without an agreement, where the  
23 United States gives no concessions and the  
24 defendant retains his right to appeal his  
25 sentence.

1           That's, I think, kind of the most  
2 common alternative that we have now and that's,  
3 I think, where things would get channeled. So  
4 I think we'll still have pleas, but those pleas  
5 will probably be less favorable to defendants  
6 because we're not giving the concessions.

7           JUSTICE KAVANAUGH: Thank you.

8           CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

10           JUSTICE BARRETT: Counsel, would the  
11 government be amenable to having defense  
12 counsel insert qualifications on the right to  
13 appeal and bargaining for the kinds of  
14 exceptions that some of the courts of appeals  
15 currently allow?

16           MS. JACOBY: Yes. I'm -- I'm very  
17 glad you raised that point. Defendants are  
18 always free to do that. I mean, again, I -- I  
19 want to be clear it's a very important term to  
20 us, so in some cases, we won't budge, and in  
21 many cases, we won't budge. But it's case by  
22 case, it's district by district, and we do  
23 enter into plea agreements with carveouts for  
24 constitutional claims, carveouts that limit the  
25 appeal waiver to only certain guidelines

1 ranges, all the rest. And we have in the  
2 appropriate cases entered into plea agreements  
3 with no sentencing appeal waiver at all.

4 JUSTICE BARRETT: So --

5 MS. JACOBY: So it really is a matter  
6 of defendant choice here.

7 JUSTICE BARRETT: So you've emphasized  
8 that if we're going to do something other than  
9 the contract analogy, we have to find some  
10 source of law in which to ground it, and you've  
11 been pressed about supervisory power.

12 I'm wondering whether, in addition to  
13 supervisory power, another rationale is that  
14 this isn't a pure contract agreement because it  
15 has to be accepted by a third party. The  
16 district judge has a role in the process.

17 And, hence, because the district judge  
18 has a role in the process, there have to be  
19 some parameters to what the district court does  
20 in that process.

21 And so our supervisory power over --  
22 it's not just purely between the government and  
23 the defendant. So our supervisory power over  
24 the third party in that process is a source of  
25 law that can justify some of these exceptions.

1 MS. JACOBY: I see that argument. I  
2 think that could make some sense. I -- I mean,  
3 I want to be clear, it's often the same judge  
4 that approves the plea deal as the one who  
5 sentences. It's not necessarily, but if you're  
6 just sort of saying the district court, not  
7 specific judge, I -- I -- I -- I see that  
8 point. And if that's how this Court wants to  
9 ground a series of exceptions, I -- I think  
10 that makes sense.

11 I -- I want to be clear, we're --  
12 we're -- we have gone sort of hard on the  
13 contract doctrine here because that's how  
14 Petitioner briefed this case, but I'm not  
15 trying to suggest that this Court lacks powers  
16 to --

17 JUSTICE BARRETT: But you would  
18 prefer -- I guess I'm still a little bit  
19 confused. When I asked you that before, like,  
20 are you only talking about it in terms of  
21 contract because the Petitioner did, you said  
22 no, you do think of it as a contract.

23 MS. JACOBY: Because there's no  
24 constitutional right to appeal and because  
25 Petitioner --

1 JUSTICE BARRETT: Yeah.

2 MS. JACOBY: -- hasn't briefed it as a  
3 supervisory power or on this theory that you've  
4 suggested, we do think the -- the most logical  
5 place would be if -- if the -- the avenue that  
6 you've suggested is -- is the power to  
7 supervise the accepting of the plea, I mean,  
8 I -- I think that that could make some sense as  
9 an avenue to accept these carveouts.

10 JUSTICE BARRETT: Okay. Thanks.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Jackson?

13 JUSTICE JACKSON: I just want to  
14 clarify one factual point that I thought you  
15 were exploring with Justice Barrett.

16 Are appeal waivers required in every  
17 district across this country? Aren't there  
18 some places -- my understanding was that this  
19 is not uniform.

20 MS. JACOBY: So, I mean, they're never  
21 required. It's a term of a voluntary contract.

22 JUSTICE JACKSON: No, I understand.  
23 But aren't there -- aren't there districts in  
24 which the background principle is not to put an  
25 appeal waiver in plea agreements?

1 MS. JACOBY: So I'm actually not sure  
2 if there are any U.S. Attorney's Offices that  
3 have a stock agreement, a stock plea agreement  
4 without an appeal waiver, but some are more  
5 willing to bargain to --

6 JUSTICE JACKSON: Yup. Good.

7 MS. JACOBY: -- to bargain it away  
8 than others.

9 JUSTICE JACKSON: All right. And one  
10 other thing. You have repeatedly honed in on  
11 the nature of the appeal waiver. You say an  
12 appeal waiver is an agreement to let the court  
13 be the final arbiter at sentencing.

14 Is that what the government's position  
15 is?

16 MS. JACOBY: Yes.

17 JUSTICE JACKSON: What I'm wondering  
18 is whether that same position would hold with  
19 respect to an agreement pertaining to the  
20 trial. So let me give you a hypothetical.  
21 Suppose we have a defendant who wants to go to  
22 trial, but he'd like to lessen his potential  
23 sentencing exposure in the event that he's  
24 found guilty.

25 Could he contract with the government

1 to prospectively waive his right to appeal any  
2 and all trial errors, errors, in other words,  
3 we're leaving it to the trial court to make all  
4 the calls with respect to evidence, et cetera,  
5 and I'm not going to as a matter of contract  
6 appeal any of those errors?

7 MS. JACOBY: I'm -- I'm not prepared  
8 to commit on all trial errors, but, of course,  
9 you can prospectively waive right to, for  
10 example, certain evidentiary objections. That  
11 was Mezzanatto.

12 JUSTICE JACKSON: Why wouldn't you  
13 commit it's the same principle?

14 MS. JACOBY: That's --

15 JUSTICE JACKSON: If -- if -- if the  
16 idea is that we can contract around making the  
17 trial judge be the final arbiter, which is what  
18 I understood you to have said --

19 MS. JACOBY: I see what you're saying.  
20 You're saying that there would just be no  
21 appeal, like, from the trial. Yes, I would  
22 think that would be okay.

23 JUSTICE JACKSON: And you would think  
24 that there would be no public policy interest  
25 of the court or the public in ensuring that

1 people get a fair trial?

2 MS. JACOBY: Again, I just -- I -- I'm  
3 really wary to get out ahead when we're talking  
4 about these trial issues which are outside the  
5 scope of this case.

6 JUSTICE JACKSON: No, I'm not -- I'm  
7 not asking you to get out ahead. I'm testing  
8 your principle that --

9 MS. JACOBY: Well --

10 JUSTICE JACKSON: -- there is no --  
11 I'm testing your principle that there is no  
12 problem with an agreement to prospectively  
13 appeal errors in a proceeding that will  
14 ultimately impact whether it's the trial or the  
15 sentencing.

16 You've said the reason why that's not  
17 a problem at sentencing is because the parties  
18 can agree to make the sentencing judge the  
19 final arbiter. So, if he makes a mistake or  
20 not, he believes that's the right answer, and  
21 you're not going to appeal that.

22 All I'm doing is transporting that  
23 same principle to the trial, and your concerns  
24 about it are precisely the concerns that I have  
25 with respect to the sentencing issue.

1 MS. JACOBY: I just don't know if  
2 there are issues at trial that are not waivable  
3 due to some external public policy that doesn't  
4 apply at sentencing.

5 JUSTICE JACKSON: Not the issue. The  
6 ability to appeal it. That's the point you  
7 keep making with respect to the sentence. So,  
8 regardless of how fundamental the error is, you  
9 say at sentencing, we can agree that the trial  
10 judge is going to make the final call or the  
11 sentencing judge.

12 And all I'm asking you is couldn't  
13 you, under your logic, do the same thing with  
14 respect to trials and wouldn't that be a  
15 problem from the standpoint of ensuring that  
16 people actually get a fair trial as a matter of  
17 public policy?

18 MS. JACOBY: I -- I don't think so,  
19 again, given that we didn't have the right to  
20 criminal appeals for a hundred years.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Rebuttal, Ms. Blatt.

25

1 REBUTTAL ARGUMENT OF LISA S. BLATT

2 ON BEHALF OF THE PETITIONER

3 MS. BLATT: Thank you.

4 Number one, just some data points.

5 1992 was the first court of appeals that said  
6 defendants can't be deemed to have sentenced at  
7 the -- entirely at the whim of the discretion  
8 of the district court. So that's Fourth  
9 Circuit.

10 2009, D.C. Circuit was the last  
11 circuit to recognize exceptions. So all 11  
12 circuits have weighed in, and I don't see the  
13 government running out of resources.

14 In terms of authority, they're  
15 completely separate doctrines. One is the  
16 contract doctrine and one is miscarriage of  
17 justice. In terms of the authority, it does, I  
18 think, come from an inherent equitable power.  
19 You could think of it as the government trying  
20 to seek specific performance. You could think  
21 of it as supervisory or inherent or, in terms  
22 of separation of powers, we're not going to let  
23 sentences bring the judiciary into disrepute.  
24 And this would be a sea change.

25 Number two, all the cases that I

1 mentioned were not hypotheticals. They were  
2 all real on pages in our reply brief and our  
3 opening brief about the castration, et cetera.

4           The Fourth Circuit case cited by Cato  
5 is a case where the district court 20 times  
6 missentenced the defendant knowing his conduct  
7 would be shielded by the appeal waiver. So  
8 this is a concern.

9           Number five, on remand, in terms of  
10 why we should get a remand, we haven't even  
11 briefed the unconstitutionality of this. The  
12 government says this is silly, but they've  
13 never asserted a justification for the  
14 mandatory medication condition. They've never  
15 even said why it's there.

16           If they're really worried about  
17 resources, how about just confessing error and  
18 let the defendant just serve out his supervised  
19 release. It's not that complicated.

20           Number five, in terms of the contract,  
21 how it is as a matter of law not unconscionable  
22 or frustration of purpose, this is hornbook  
23 contract law. Billions of contracts have  
24 open-ended terms. Quantities, discretion of a  
25 party, those are things that the parties don't

1 yet know is going to happen. So this happens  
2 all the time. You have an open-ended contract.  
3 That's what an appeal waiver is.

4 Also, I forgot counting how many times  
5 the government kept saying benefit of the  
6 bargain, deal, agreement. And all we're  
7 saying, it is beyond hypocritical to say the  
8 government is entitled to enforcement, yet  
9 as -- and using contract law. They literally  
10 brief their cases using contract law. It is  
11 inconceivable and hypocritical and embarrassing  
12 to say a criminal defendant has no contract  
13 defense at least when the government is seeking  
14 to enforce the contract. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 The case is submitted.

18 (Whereupon, at 11:40 a.m., the case  
19 was submitted.)

20  
21  
22  
23  
24  
25

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