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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 a
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 could 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
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 would be could be
12 a right 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 Remory, 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 -- they're not like
16 ordinary contracts. And the -- imposing the
17 entire law of contracts here seems to me rather
18 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 the courts have generally said
23 miscarriage of justice, but all of -- at least
24 eight of them have said contract principles.

25 JUSTICE ALITO: What about the Sixth

1 Amendment right to a speedy trial?

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

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

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

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

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

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

24 JUSTICE GORSUCH: Ms. Blatt, I thought
25 the only thing before us was waiver of

1 sentencing errors.

2 MS. BLATT: Correct.

3 JUSTICE GORSUCH: Not anything else.

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

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

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

22 And it's not clear to me what benefit
23 he got from his plea waiver -- appeal waiver, I
24 should say, that would be proportionate and
25 have a nexus to that additional right foregone.

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

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

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

23 MS. BLATT: It -- the -- the sentence
24 seemed to me, 51 months and all the fines, I --
25 I don't think he -- because we're just -- I

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

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

9 JUSTICE GORSUCH: All right.

10 JUSTICE KAVANAUGH: In your --

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

16 MS. BLATT: Or any showing.

17 JUSTICE GORSUCH: Any showing.

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

25 JUSTICE GORSUCH: Well, I think we

1 already have. I mean, we've got a very --

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

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

7 MS. BLATT: It doesn't matter.

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

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

17 MS. BLATT: Yes. And --

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

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

1 turned around and have the plea agreement
2 breached.

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

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

11 JUSTICE JACKSON: Right.

12 JUSTICE BARRETT: So is your issue --

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

18 MS. BLATT: So --

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

25 So what else? And how do we identify

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

8 MS. BLATT: So --

9 JUSTICE KAGAN: -- and know that --

10 MS. BLATT: Yeah. And --

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

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

25 Now, once you get past clear error,

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

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

11 JUSTICE GORSUCH: Why --

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

22 MS. BLATT: Yeah.

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

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

2 JUSTICE JACKSON: -- but -- but there
3 are -- there are --

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

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

17 MS. BLATT: Mm-hmm.

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

25 MS. BLATT: So --

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

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

12 JUSTICE BARRETT: Ms. -- Ms. Blatt --

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

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

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

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

21 JUSTICE KAVANAUGH: Right.

22 MS. BLATT: And then --

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

25 MS. BLATT: Yes.

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

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

5 JUSTICE KAVANAUGH: Well, those are
6 three.

7 MS. BLATT: No, just two.

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

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

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

25 JUSTICE KAVANAUGH: Well, supervised

1 release conditions, I think, do present a
2 different bucket, and I just wonder --

3 MS. BLATT: They do.

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

6 MS. BLATT: Oh. Are just --

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

9 MS. BLATT: -- unconstitutional. You
10 can could say it exceeds the statute. The
11 statute is very broad about reasonably
12 necessary. Yeah, it's just got a lot of, you
13 know, yada, yada, yada about kinds of stuff.
14 But, when it gets to this kind of stuff, which
15 is just weird stuff like, you know, go to
16 church -- castration seems a little bit outside
17 the statute. One of them said the defendant
18 was getting so many women pregnant out of
19 wedlock -- this is a federal court -- and said,
20 if you're going to get someone pregnant, can
21 you please make it your wife? You know, you
22 just can't do that. Come on, that's silly.

23 CHIEF JUSTICE ROBERTS: Counsel, how
24 much --

25 MS. BLATT: It's just -- you just

1 can't do that. And that's unauthorized by the
2 supervised release statute.

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

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

14 JUSTICE GORSUCH: Ms. Blatt --

15 JUSTICE KAVANAUGH: And then you -- if
16 I could finish.

17 JUSTICE GORSUCH: Yeah. Please.

18 MS. BLATT: Sorry.

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

24 MS. BLATT: So, no, because you can
25 say, like, mandamus, clear and indisputable,

1 clearly established, plain error, the error has
2 to be obvious, clear.

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

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

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

14 JUSTICE KAVANAUGH: I'm not disputing
15 you.

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

17 JUSTICE KAVANAUGH: These are not
18 hostile questions.

19 (Laughter.)

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

23 JUSTICE KAVANAUGH: Yeah.

24 MS. BLATT: -- because there's an
25 appeal waiver.

1 JUSTICE KAVANAUGH: Yeah.

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

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

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

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

20 JUSTICE GORSUCH: Fourth Circuit's --
21 that's the Fourth Circuit standard.

22 MS. BLATT: I'm just trying to get
23 Justice Alito's vote, and what I'm trying to
24 say --

25 (Laughter.)

1 MS. BLATT: -- to Justice Alito is --
2 I care about the rest of you too, but --

3 JUSTICE ALITO: Thank you very much.
4 (Laughter.)

5 JUSTICE ALITO: It's very -- very few
6 advocates have that --

7 JUSTICE GORSUCH: I'll just stop then.
8 (Laughter.)

9 JUSTICE ALITO: -- goal.

10 JUSTICE SOTOMAYOR: Ms. Blatt --

11 MS. BLATT: Sorry.

12 JUSTICE SOTOMAYOR: -- I'm -- I'm
13 trying to figure out how we articulate this,
14 okay? You've come in with a simple proposition
15 that ordinary contract principles, defenses
16 should generally apply. There might be some --

17 MS. BLATT: The same standard the
18 government has.

19 JUSTICE SOTOMAYOR: The same standard
20 the government has. And that's not just
21 frustration of purpose because frustration of
22 purpose means both a procedural and substantive
23 component. And you may not have a procedural
24 component in this kind of waiver.

25 But I think the other defense are

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

6 MS. BLATT: Yeah. And there's
7 separation of powers issues. Yeah.

8 JUSTICE SOTOMAYOR: Exactly.
9 Unconscionability.

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

12 JUSTICE SOTOMAYOR: All right. But I
13 think --

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

16 JUSTICE SOTOMAYOR: I know, but I
17 don't either.

18 MS. BLATT: Okay.

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

23 MS. BLATT: Yes, and --

24 JUSTICE SOTOMAYOR: -- clear error.

25 MS. BLATT: Yes, and --

1 JUSTICE SOTOMAYOR: It subsumes
2 constitutional error.

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

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

14 MS. BLATT: Okay.

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

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

23 JUSTICE SOTOMAYOR: -- a known right.
24 You haven't argued that. It may be too much
25 water under the bridge, but there is a strong

1 argument, by the way, and it -- and it goes
2 back to something that Justice -- that Justice
3 Gorsuch was referring to -- on the sentencing
4 guidelines. The reports when the guidelines
5 came out said we're permitting appeal waivers
6 because appellate review of sentences is
7 essential to ensure that the guidelines are --
8 are applied properly and to provide case law
9 development -- development of the reasons for
10 sentencing outside the guidelines.

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

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

16 MS. BLATT: Let me break it down
17 and --

18 JUSTICE SOTOMAYOR: No, no, let me
19 just come down to --

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

21 JUSTICE SOTOMAYOR: Let me finish my
22 question, okay?

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

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

1 MS. BLATT: No, you're -- it's
2 wonderful what you're saying. Keep going.

3 (Laughter.)

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

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

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

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

12 CHIEF JUSTICE ROBERTS: Thank --

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

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

1 waive -- allow the court to sentence as part of
2 the presentence -- the agreement.

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

12 CHIEF JUSTICE ROBERTS: Well, that's
13 why I said --

14 MS. BLATT: So --

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

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

1 MS. BLATT: But that --

2 CHIEF JUSTICE ROBERTS: -- as an
3 ineffective assistance --

4 MS. BLATT: With all due respect --

5 CHIEF JUSTICE ROBERTS: Maybe I'll
6 finish the sentence.

7 MS. BLATT: Yeah. Okay, sorry.

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

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

22 CHIEF JUSTICE ROBERTS: Okay. Thank
23 you.

24 Justice Thomas?

25 Justice Alito?

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

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

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

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

17 JUSTICE ALITO: Okay. We're just
18 talking about the sentence.

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

24 JUSTICE ALITO: So anything that
25 couldn't -- wasn't known prior to the time of

1 sentence.

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

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

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

23 JUSTICE ALITO: What about guidelines
24 issues during the period when compliance with
25 the guidelines was mandatory?

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

4 JUSTICE ALITO: That's a sentencing
5 error.

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

8 JUSTICE ALITO: No?

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

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

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

22 JUSTICE ALITO: What if the guidelines
23 call for a sentence of six months'
24 imprisonment, but the -- but the judge says
25 that's woefully inadequate and anyway, they're

1 not mandatory, so --

2 MS. BLATT: Thirty years.

3 JUSTICE ALITO: Right.

4 MS. BLATT: The statutory maximum?

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

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

22 MS. BLATT: Yeah. You look to the
23 same that you would look every time you apply
24 contract law, including in Remory. You look to
25 the Restatements, you look to centuries of case

1 law.

2 JUSTICE ALITO: We look to the
3 Restatements?

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

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

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

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor, anything further?

24 Justice Kagan?

25 Justice Gorsuch?

1 Justice Kavanaugh?

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

6 MS. BLATT: Absolutely not.

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

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

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

20 MS. BLATT: Yeah. Not with -- I mean,
21 the easiest for me is just it was not within
22 the realm of plausibility of either party. So
23 I would take into account the government's
24 expectation that supervised release is no fun,
25 but you have these -- some of these conditions

1 and we've talked about them, it can't include
2 who you get pregnant with. That's just -- no.

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

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

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

19 MS. BLATT: Not under any contract
20 defense or any -- like, any public policy or
21 not miscarriage of justice because it's always
22 within the reasonable expectation that the
23 court could veer off from the guidelines and
24 impose under the statutory maximum. And this
25 is what the courts of appeals have held, so I'm

1 just parroting what's already been held.

2 JUSTICE KAVANAUGH: I -- I agree.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

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

14 MS. BLATT: Fair.

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

21 MS. BLATT: So I guess three
22 responses. One, as always, you're correct.
23 It's fair, only eight circuits have applied
24 contract law to plea agreements generally. And
25 they're not -- I think maybe only the Tenth

1 Circuit and the Second Circuit has talked about
2 this in terms of defense. So you're just a
3 hundred percent correct.

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

14 So we've already gone down that crazy,
15 you know, open-ended route. And so I --

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

21 So just because the Fifth Circuit said
22 this would be beyond reasonable expectations of
23 the bargain doesn't mean that that is, you
24 know, what we would have to say as the
25 rationale for that exception if we accepted it.

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

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

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

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

25 JUSTICE BARRETT: Yeah, but what about

1 the other ones? Like, what's the analogy for
2 miscarriage of justice or -- I mean, that --
3 that -- that is grounded, I think, in systemic
4 concerns, maybe constitutional concerns.

5 MS. BLATT: Correct.

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

11 MS. BLATT: Correct.

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

17 MS. BLATT: And I think --

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

21 MS. BLATT: Sure.

22 JUSTICE BARRETT: What rationale would
23 there be for us not taking every possible
24 contract defense that could come along or
25 limiting it to certain ones? I take it you

1 would say no, any contract defense from the
2 Restatement would be on the table.

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

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

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

20 But in all of these contract
21 analogies, you're looking at the term itself
22 and asking if the term itself is, say,
23 unconscionable. And you're not arguing here
24 that the term, that the waiver of the statutory
25 right to appeal, that term is not void against

1 public policy.

2 MS. BLATT: Correct.

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

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

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

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

4 JUSTICE BARRETT: Okay. Last
5 question. This is just a factual one.

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

10 MS. BLATT: Correct.

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

17 MS. BLATT: No. He just got out of
18 jail and he now is under an ordered mental
19 health treatment program. Now, there's
20 something slightly comical about that because
21 Mr. Hunter thinks he will go to hell and thinks
22 God has told him he can't take drugs, which is
23 why he doesn't drink. That conversation is
24 going to be a little difficult with the judge:
25 Okay, I really -- God tells me no, and whatever

1 that medical manual is says it's indicated.

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

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

10 MS. BLATT: You're correct.

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

15 MS. BLATT: Not really because if the
16 court says no --

17 JUSTICE BARRETT: But the court didn't
18 say no here. He didn't back.

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: So when I'm thinking
25 about this, I am mindful of the narrowness of

1 the question presented as you have set it
2 forth. You say whether the only permissible
3 exceptions to a general appeal waiver -- waiver
4 are for claims of an ineffective assistance of
5 counsel or that the sentence exceeds the
6 statutory maximum.

7 MS. BLATT: Correct.

8 JUSTICE JACKSON: I suppose we could
9 answer no --

10 MS. BLATT: Yes.

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

17 MS. BLATT: Yeah.

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

23 MS. BLATT: Correct. I mean, the
24 question presented is the Fifth Circuit is
25 obviously wrong; please reverse and let us try

1 to get a defense, but -- because there was
2 questioning about, well, what will that mean on
3 remand. But, no, you just need to say the
4 Fifth Circuit's rule is indefensible.

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

13 I would think that, based on our case
14 law and sort of standing principles about
15 knowing and voluntary waivers, that this Court
16 could perhaps avoid the concerns about picking
17 a particular set of waivers, which -- I mean --
18 excuse me -- exceptions, which ones, are they
19 contract principles or whatever, if we could
20 be, enough of us, persuaded that in a
21 circumstance where the defendant is pleading
22 guilty, and we know a sentencing hearing will
23 happen, it is not sufficiently knowing to have
24 a waiver of any errors that are going to happen
25 in that sentencing proceeding, that it's just

1 not an enforceable thing consistent with our
2 understanding of knowingness and voluntariness
3 with respect to the exercise of one's ability
4 to make a waiver.

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

12 JUSTICE JACKSON: And it's hard to see
13 clearly --

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

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

19 MS. BLATT: No, it's fine. I love
20 what you're saying. And nothing bad would
21 happen too.

22 JUSTICE JACKSON: You feel it's not
23 productive, but my job is to make sure that all
24 of the issues are being taken into account when
25 the court decides what they're going to do.

1 MS. BLATT: Oh, I think you can get
2 there.

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

11 MS. BLATT: Yeah.

12 JUSTICE JACKSON: Like, what's the
13 public policy interest in that?

14 MS. BLATT: My --

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

23 MS. BLATT: I mean, as I sit here, I
24 kind of like what you're saying, and I -- I
25 actually think it's a way of looking at it

1 because nobody brings these appeals. I think
2 from the government, just putting the
3 government hat on, they just don't like the
4 guideline appeals because people get -- you
5 know, they're advisory and the court goes above
6 it.

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

13 JUSTICE JACKSON: Thank you.

14 MS. BLATT: Okay? Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Jacoby.

18 ORAL ARGUMENT OF ZOE A. JACOBY

19 ON BEHALF OF THE RESPONDENT

20 MS. JACOBY: Mr. Chief Justice, and
21 may it please the Court:

22 Knowing and voluntary presentence
23 appeal waivers are enforceable bargains, and no
24 doctrine of contract law calls for a different
25 result based on the subsequent sentence that

1 the defendant receives.

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

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

22 In all events, this Court should make
23 clear that there is no exception that would
24 permit Petitioner's appeal, rather than simply
25 remanding as Petitioner suggests. No injustice

1 would be worked by dismissing Petitioner's
2 unripe due process claim, but remanding would
3 signal down on that score to lower courts and
4 litigants, opening the floodgates to
5 garden-variety waived appeals like
6 Petitioner's.

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

16 I welcome the Court's questions.

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

22 MS. JACOBY: Yes, I do think there is
23 a possibility that if this is -- you know, this
24 is an essential part of the bargain, and if we
25 are not getting our part of the bargain, then

1 we don't have to enforce our -- our end of the
2 bargain either.

3 I think Petitioner has argued that the
4 possibility that will, you know, reinstate the
5 dropped charges is enough of a disincentive to
6 stop the floodgates of dismissed appeals, but
7 -- sorry -- pardon -- of -- of waived appeals.

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

18 JUSTICE THOMAS: So in this case --

19 MS. BLATT: -- counterproductive.

20 JUSTICE THOMAS: -- though, just
21 confining it to this case, what's the
22 disincentive to allowing an appeal here?

23 MS. JACOBY: I mean, that is our whole
24 concern, is that if you open the -- the
25 floodgates to sort of a broad miscarriage of

1 justice exception, there isn't really a
2 powerful disincentive, and we will, in -- in
3 various cases, be deprived the benefit of our
4 bargain because we'll have to be litigating
5 whether this exception, amorphous exception, to
6 appeal waivers applies.

7 CHIEF JUSTICE ROBERTS: You're --

8 JUSTICE KAVANAUGH: You're asking --

9 CHIEF JUSTICE ROBERTS: I thought you
10 said that it wouldn't apply in particularly
11 egregious cases. Did I mishear that?

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

14 CHIEF JUSTICE ROBERTS: Correct that I
15 didn't -- but --

16 MS. JACOBY: Correct that you
17 didn't --

18 CHIEF JUSTICE ROBERTS: Correct that I
19 misheard it or that --

20 MS. JACOBY: Our front-line position
21 is that there should not be an exception for --
22 for even egregious miscarriage of justice
23 because the Petitioner has argued this case
24 based in contract doctrine and we don't think
25 there's a basis in contract doctrine for that.

1 If this Court goes the route of
2 wanting to have a -- a miscarriage exception
3 for reasons other than contract law, maybe some
4 kind of, you know, sort of federal common law
5 policymaking or constitutional, we would very
6 strongly urge this Court to define whatever
7 that exception would be very narrowly and to
8 make clear it doesn't apply here.

9 CHIEF JUSTICE ROBERTS: So all of the
10 hypotheticals that Ms. Blatt presented us,
11 you're comfortable defending all of those?

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

14 CHIEF JUSTICE ROBERTS: Well, you keep
15 saying front-line position.

16 MS. JACOBY: Yeah. Sure.

17 CHIEF JUSTICE ROBERTS: To me, that
18 conveys the notion that you're ready to
19 retreat.

20 MS. JACOBY: No, I -- I'm not -- I am
21 not ready to retreat. I'm not ready to
22 retreat. Our position is that the -- the
23 appeal waiver is enforceable.

24 CHIEF JUSTICE ROBERTS: So the order
25 that you only -- only make your wife pregnant

1 or what all the -- all the other examples, you
2 say that's fine? We're --

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

7 JUSTICE GORSUCH: A racist sentencing
8 judge?

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

11 JUSTICE GORSUCH: A -- a sexist
12 sentencing judge?

13 MS. JACOBY: Yes.

14 JUSTICE GORSUCH: Someone who is
15 biased against religious minorities?

16 MS. JACOBY: Yes. The appeal waiver
17 is enforceable.

18 JUSTICE GORSUCH: All of that -- all
19 of that stands?

20 MS. JACOBY: Because the -- the -- the
21 point is that at the time that we're deciding
22 whether to enforce the appeal waiver, all we
23 have is a claim that there has been this
24 particular type of error. And what the -- what
25 the defendant has given up --

1 JUSTICE GORSUCH: Why wouldn't that --
2 why wouldn't that bring --

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

5 JUSTICE GORSUCH: -- the sort of
6 disrepute on the federal judiciary that Judge
7 Posner talked about, if you held a trial with
8 12 orangutans was his example, that that would
9 have to be resolved. And I think we would all
10 agree with that, right? But, here, you say any
11 sentencing error of any kind.

12 MS. JACOBY: So, to be clear, an
13 appeal waiver is not an agreement to receive an
14 unlawful sentence. You couldn't agree to
15 receive trial by 12 orangutans. That would be
16 an unlawful bargain. It is an agreement that
17 the final decisionmaker --

18 JUSTICE GORSUCH: Why isn't this an
19 unlawful bargain?

20 MS. JACOBY: It's an agreement that
21 the final decisionmaker on your sentence will
22 be a district court rather than a court of
23 appeals, and that is a bargain that the case
24 law tolerates.

25 JUSTICE GORSUCH: It's a district

1 court who says I'm going to let an orangutan
2 pick a sentence out of a hat?

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

4 JUSTICE GORSUCH: And you would say
5 no, no right to appeal that, right?

6 MS. JACOBY: The -- the district court
7 remains oath-bound. It is a bargain that at
8 the time you're entering into it, all you are
9 agreeing to is that the district court will be
10 the final decisionmaker.

11 JUSTICE GORSUCH: Yeah.

12 MS. JACOBY: That is not a bargain
13 against the law. The law already tolerates the
14 possibility of even egregious sentences going
15 unreviewed because it has given defendants the
16 choice whether to bring an appeal or not. If
17 the law did not tolerate that, we would have a
18 system of automatic appeals, as many states do,
19 for example, for capital cases.

20 JUSTICE SOTOMAYOR: Counsel, can I --
21 you talk about opening the floodgates, but
22 you're the one who's proposing a theory that no
23 circuit has ever accepted. Yours is even more
24 limited than the Fifth Circuit. You're saying
25 only IAC as it relates to a knowing --

1 knowingly or not knowingly enter a plea is
2 cognizable.

3 The statutory maximum, you're saying,
4 is not cognizable either unless the plea
5 agreement tells you that the judge will
6 sentence within the statutory maximum because
7 the logic of your argument is, if I agree, if I
8 say in the plea agreement the judge can
9 sentence you any way he wants, that would not
10 be cognizable, correct?

11 MS. JACOBY: So -- so our position,
12 yes, is that if in the plea agreement you
13 expressly say I am waiving my right to appeal
14 on the grounds that the statute -- that my
15 sentence is above --

16 JUSTICE SOTOMAYOR: Now every other
17 circuit has something broader than the Fifth
18 Circuit. Virtually all of them have something
19 for constitutional errors of the nature that
20 Justice Gorsuch was call -- talking about
21 either under a miscarriage of justice rubric or
22 under a plain error or unconstitutional
23 violation.

24 So this is not floodgates that are
25 opening. Whatever is being appealed now is

1 pretty narrow. It -- it's a small fraction of
2 the plea agreements are being appealed, and
3 those that are, there's an even smaller
4 fraction where there's any time being spent on
5 them. So waiving a flag talking about
6 floodgates opening seems rather exaggerated by
7 the government.

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

18 In case -- in circuits that more
19 carefully circumscribe their exceptions to two
20 or three discrete situations, it is -- it is
21 admittedly less of a burden, but the problem is
22 that whether we get the benefit of our bargain,
23 which was to not have to litigate an appeal,
24 just turns entirely on the defendant's choice
25 because, if the defendant chooses to raise a

1 miscarriage-of-justice exception --

2 JUSTICE SOTOMAYOR: Well, if you
3 don't -- if you're not happy with the bargain,
4 do what she -- what you're threatening to do,
5 which is go ahead and prosecute them.

6 MS. JACOBY: But, again, our -- our
7 whole purpose of --

8 JUSTICE SOTOMAYOR: Your -- your --
9 your -- your --

10 MS. JACOBY: -- entering into the
11 appeal waiver is that we didn't -- we wanted
12 finality and we didn't want to have to keep
13 litigating.

14 JUSTICE SOTOMAYOR: Well, but the
15 problem with finality is that you're basing it
16 on the good faith of a third actor, meaning
17 you're -- you're depending on a district court
18 judge to not -- or they are, a district court
19 judge to follow their constitutional and
20 statutory obligations.

21 I would think it's unenforceable to
22 enter a contract that says you are going to be
23 sentenced by a judge who does not have to
24 follow the law.

25 MS. JACOBY: That is -- that is very

1 much not what an appeal waiver says.

2 JUSTICE GORSUCH: That's exactly what
3 it says.

4 MS. JACOBY: An appeal waiver says --

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

7 MS. JACOBY: Not at all, Your Honor.
8 An appeal --

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

19 MS. JACOBY: So -- so, again, an
20 appeal waiver is not saying you can be
21 sentenced however you want by a judge. The
22 judge is oath-bound. The judge has to follow
23 the law all the time.

24 JUSTICE SOTOMAYOR: But that's what
25 you're saying.

1 MS. JACOBY: The -- the appeal waiver
2 is just saying the final decisionmaker is the
3 district court, and, by the way, that was the
4 system that existed for a hundred years in this
5 country. We didn't have sentence --

6 JUSTICE KAGAN: Ms. Jacoby --

7 JUSTICE GORSUCH: If that -- if that
8 really is --

9 JUSTICE KAGAN: Ms. Jacoby --

10 JUSTICE GORSUCH: Sorry.

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

13 (Laughter.)

14 MS. JACOBY: Sure. So we -- we
15 think -- we think that if this Court is going
16 to go the miscarriage-of-justice route, again,
17 we don't really see a basis for that in
18 contract law, but if you're -- if you're going
19 to go that route, our strong preference is that
20 you follow the circuits that have, you know,
21 basically done what the Fifth Circuit has done
22 but just with one or two more exceptions that
23 seem to capture some of the concerns that
24 people have here.

25 So we like, for example, the Seventh

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

13 JUSTICE KAGAN: Why would it not be
14 sufficient to say miscarriage of justice on the
15 assumption that everybody who's going to be
16 applying that standard knows it's a high bar,
17 has seen it before, has thought about it
18 before? The idea of, you know, defining it
19 into three discrete situations is not usually
20 what we do when we speak of miscarriages of
21 justice, and yet, you know, everybody gets that
22 it's a high bar.

23 MS. JACOBY: The problem with setting
24 the high bar is not that we're concerned
25 that -- that judges won't know what constitutes

1 a miscarriage of justice. The problem is that
2 defendants won't know and they may well think
3 that their case does present the miscarriage of
4 justice.

5 JUSTICE KAGAN: Well, maybe that's
6 right.

7 MS. JACOBY: And then we have to
8 litigate it, and that deprives us of the
9 benefit of the bargain, which was to not have
10 to litigate.

11 JUSTICE KAGAN: You know, that --
12 that's right. But, if -- if that's the case,
13 that kind of challenge can be easily dismissed.
14 I mean, I guess I -- I wouldn't think that that
15 would take very much of anybody's time.

16 MS. JACOBY: You know, we do end up
17 having to brief the merits of these disputes
18 because courts will sometimes just ask for more
19 briefing. It -- the -- the circuits that have
20 this more open-ended waiver -- pardon,
21 open-ended exception, they do report a more
22 serious burden to litigate it.

23 So we do think that capturing the
24 discrete kind of buckets of cases that do seem
25 to give everyone concern, and I think those

1 three do really capture the universe of what
2 people are worried about, the, you know,
3 categorically impermissible sentence or
4 categorically impermissible condition, the
5 sentenced by an orangutan, the race-based
6 sentence --

7 JUSTICE KAVANAUGH: Well --

8 MS. JACOBY: -- I think that is the
9 universe, and so just limiting it to those
10 three and making very clear what those
11 exceptions are and then applying them to this
12 case rather than signaling to lower courts and
13 litigants that this is a borderline case, I --
14 I think would be far preferable.

15 JUSTICE KAVANAUGH: Did you say
16 ineffective assistance of counsel is one of
17 them?

18 MS. JACOBY: Yes, of course. I think
19 we're all taking as given that ineffective
20 assistance of counsel is one and -- and the
21 Seventh Circuit if I didn't say that.

22 JUSTICE KAVANAUGH: And -- and the
23 sentence exceeding the statutory maximum?

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

1 JUSTICE KAVANAUGH: Because you used
2 categorical rather than statutory, and I want
3 to know what that --

4 MS. JACOBY: Yes. So what I'm getting
5 at with that is I think what everyone is
6 worried about when they're talking about this
7 sort of statutory maximum thing is the idea
8 like you pleaded guilty to an offense that
9 carries 10 years and you get sentenced to 15.

10 So I'm trying to capture that. But
11 what I'm trying to exclude are things that some
12 courts have said are -- fall within the
13 statutory maximum exception, which are things
14 like whether your restitution was proximately
15 caused by your conduct, whether certain prior
16 offenses qualify as ACCA predicates. Courts
17 have sometimes said that those fall within a
18 statutory maximum exception on the idea that if
19 they're correct about their claim, your
20 sentence exceeds what Congress has lawfully
21 authorized.

22 And we think those types of claims are
23 really what we have bargained to not have to be
24 litigating. We have bargained that the final
25 decisionmaker on those issues will be the

1 district court.

2 JUSTICE KAVANAUGH: What about
3 supervised release conditions? So I asked
4 Ms. Blatt this.

5 MS. JACOBY: Yes.

6 JUSTICE KAVANAUGH: But supervised
7 release conditions can be challenged on appeal
8 notwithstanding an appeal waiver if?

9 MS. JACOBY: They are categorically
10 unlawful for the statutory offense of -- of
11 conviction, same as the sentence terms. So
12 that falls in my second bucket as well.

13 JUSTICE KAVANAUGH: What does
14 categorically unlawful when you're applying it
15 to supervised release conditions mean?

16 MS. JACOBY: Right.

17 JUSTICE KAVANAUGH: I know what it
18 means when you're talking about the
19 statutory --

20 MS. JACOBY: Right.

21 JUSTICE KAVANAUGH: -- sentence.

22 MS. JACOBY: I think that refers to
23 the -- the type of condition that there's
24 really never any justification for for this
25 offense. I mean, like, the -- the -- a

1 condition like you can never get pregnant
2 during supervised release.

3 JUSTICE KAVANAUGH: Well, what -- is
4 there a term that -- because we have to write
5 an opinion --

6 MS. JACOBY: Right.

7 JUSTICE KAVANAUGH: -- that's going to
8 capture this.

9 MS. JACOBY: That's why we think
10 categorically unlawful is sort of the best that
11 we can do. We don't want to have to be
12 dealing --

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

15 MS. JACOBY: I mean, the issue is we
16 don't want to have to be dealing with questions
17 like, you know, was this sufficiently justified
18 on the record, is there enough stuff in the
19 record to support this, did the judge make
20 enough fact findings? Those are exactly the
21 kind of reasonableness issues that Petitioner
22 says are out of bounds, and we don't want you
23 to just be able to call it a due process claim
24 and then all of a sudden we are doing those
25 reasonable -- reasonableness inquiries when we

1 have bargained not to.

2 And, again, I want to be clear, when
3 we're bargaining for this, this is to the
4 defendant's advantage. I mean, there's a
5 reason that the defense bar does not want to go
6 the route that Justice Jackson proposed of
7 getting rid of all of these altogether because
8 this is something of great value to the
9 government, and so it is a bargaining chip --

10 JUSTICE JACKSON: No, I under --

11 MS. JACOBY: -- for the defendants.

12 JUSTICE KAVANAUGH: But the -- the --
13 oh.

14 JUSTICE JACKSON: Sorry. Are you --

15 JUSTICE KAVANAUGH: Go ahead.

16 JUSTICE JACKSON: I -- I appreciate
17 that, but I guess what I'm a little surprised
18 about with the government's hard-line position
19 is that I can't quite figure out whether you
20 are sticking with the contracts idea or not.
21 You've said many, many times that this is about
22 the bargain and the government is bargaining
23 not to litigate and that's what we really have
24 to care about.

25 But, as Ms. Blatt points out, every

1 contracts regime that I'm aware of has some
2 exception where the court is looking at the
3 fairness of the bargain, where there's some
4 consideration of the, you know, different
5 degrees of ability to negotiate, the fact that
6 you might have people who are being coerced
7 into accepting this kind of deal even though
8 it's not knowing and voluntary.

9 The court is policing that. And the
10 government's position here seems to be that we
11 are not supposed to be caring about that; we
12 just need to focus on the fact that the
13 government has made this deal, that it's not
14 going to want to litigate any more of these
15 cases.

16 And so it kind of brings me to Justice
17 Gorsuch's original point. Like, that seems
18 kind of unconstitutional in a way, that the
19 primary value here is to prevent the government
20 from having to litigate appeals when we're
21 talking about people's constitutional rights.

22 And so I'm just trying to understand,
23 is it your position that notwithstanding the
24 contracts-like nature of this endeavor, we are
25 not to be treating this the way the courts

1 ordinarily treat contracts, which is to
2 consider these kinds of exceptions?

3 MS. JACOBY: So I'm really glad you
4 asked this question because I think this is a
5 really important point for us. Our position is
6 not that contract defenses do not apply to plea
7 agreements or to appeal waivers. It is that
8 the contract defenses that Petitioner has
9 raised here fail.

10 They fail because a subsequent
11 sentence that a defendant receives under just
12 ordinary principles of contract law, the ones
13 that Petitioner has relied on here, do not make
14 the agreement against public policy or
15 unconscionable --

16 JUSTICE JACKSON: Right, but wouldn't
17 you --

18 MS. JACOBY: -- or frustrated purpose.

19 JUSTICE JACKSON: -- have to do that
20 at an individual level? Like, I don't know how
21 you could categorically say we allow for these
22 defenses, but they're never going to apply in
23 this situation because something like the
24 fairness of an agreement really takes into
25 account what's going on with respect to that

1 particular case.

2 MS. JACOBY: So --

3 JUSTICE JACKSON: This is why Justice
4 Kagan is -- is -- is, I think, resisting the
5 granular statement of what counts as a
6 miscarriage of justice, because we could look
7 at a particular case and say: This bargain,
8 this scenario is unfair because it relates to
9 the kinds of things that my colleagues have
10 pointed out. Right?

11 MS. JACOBY: So -- so, if we're in
12 contract world, and I'm going to bracket the
13 miscarriage-of-justice world, which I think, if
14 this Court's going down that road, it's not on
15 the basis of contract doctrine; it's -- it's
16 something else, some other kind of --

17 JUSTICE JACKSON: Wait. We can -- we
18 can fold it --

19 MS. JACOBY: -- policymaking.

20 JUSTICE JACKSON: No, no, no. Let's
21 fold the miscarriage-of-justice concept into
22 something like public policy because it's a --
23 you agree that public policy is an exception,
24 right, in -- under the contracts world? And
25 one would think that if what is happening here

1 is a miscarriage of justice, we -- we would say
2 that that's against public policy.

3 So let's put it under that umbrella.
4 Go forward.

5 MS. JACOBY: Sure. I'm happy to talk
6 about public policy exception. Under contract
7 doctrine -- again, I'm assuming we're in
8 contract world. Under contract doctrine, the
9 question is not whether the sentence is against
10 public policy. The question is whether the
11 agreement is against public policy.

12 JUSTICE JACKSON: Correct.

13 MS. JACOBY: And the -- the agreement
14 to waive your right to appeal is not against
15 public policy. It's not against --

16 JUSTICE JACKSON: Because?

17 MS. JACOBY: -- the public policy of
18 the appeal rights statute.

19 JUSTICE JACKSON: Because?

20 MS. JACOBY: Because the policy of the
21 appeal rights statute is one of defendant
22 choice always. And it's not against the policy
23 of the underlying, you know, say,
24 constitutional amendment you say is violated.
25 Take -- take, for example --

1 JUSTICE GORSUCH: Ms. Jacoby --

2 JUSTICE JACKSON: What about -- what
3 about the Sentencing Reform Act, which says
4 that appeals are important, that they
5 incentivize the court and the parties to
6 actually follow the law, follow the guidelines,
7 not issue these egregious sentences, right? We
8 have a congressional policy that, in fact,
9 revamps the entire sentencing system to allow
10 for appeals.

11 So to suggest that an appeal waiver is
12 not against public policy, I think, runs up
13 against all of that.

14 MS. JACOBY: But, again, our system
15 still, even after the Sentencing Reform Act,
16 leaves it as a matter of defendant choice
17 whether to exercise that appeal. If Congress
18 really thought that the appeal --

19 JUSTICE JACKSON: That's the question.
20 That's the question today. That's my question
21 that everybody else has given up --

22 MS. JACOBY: Right.

23 JUSTICE JACKSON: -- but I'm still
24 working, right?

25 MS. JACOBY: If -- if --

1 JUSTICE JACKSON: My question is,
2 should it be left as defendant choice given all
3 of these problems? Given the fact that it
4 doesn't seem to advance anything other than the
5 government's interest in not wanting to
6 litigate, you know, these kinds of issues,
7 should it be left to defendant choice in this
8 circumstance?

9 MS. JACOBY: It -- it definitely
10 should given that Congress has left it to
11 defendant choice. I don't see a basis for this
12 Court to upend that. And then, as to the idea
13 that all we're doing here is protecting the
14 government's interest in finality, no. I mean,
15 this is a bargaining chip for defendants.

16 The -- the appeal waiver is valuable
17 for us, so, here, a deal with an appeal waiver
18 was worth dropping nine charges for Petitioner.
19 I have no idea what a deal without an appeal
20 waiver would be worth, but --

21 JUSTICE GORSUCH: Ms. -- Ms. --

22 MS. JACOBY: -- basic economic logic
23 suggests it would be less. Different
24 charges --

25 JUSTICE GORSUCH: Ms. Jacoby, two --

1 MS. JACOBY: Yes.

2 JUSTICE GORSUCH: -- two questions on
3 that. One is your answers to Justice Jackson
4 about the contract approach, as you're calling
5 it, you argue you win under contract
6 principles. You don't argue that they don't
7 apply.

8 MS. JACOBY: Correct. Correct.

9 JUSTICE GORSUCH: So why doesn't this
10 defendant get a remand --

11 MS. JACOBY: Because we win --

12 JUSTICE GORSUCH: -- to argue contract?

13 MS. JACOBY: -- we win categorically.
14 The subsequent sentence that the defendant
15 receives --

16 JUSTICE GORSUCH: Yeah, but the -- if
17 I --

18 MS. JACOBY: -- is never a basis to
19 find that the contract is against public
20 policy.

21 JUSTICE GORSUCH: If I -- if I might,
22 the Fifth Circuit hasn't addressed that
23 question. Nobody has addressed that question.
24 This Court hasn't addressed that question. Why
25 wouldn't we remand to allow the court of

1 appeals to address that question?

2 MS. JACOBY: I think what Petitioner
3 has -- has asked this Court to do is to say
4 that in some instances, an appeal waiver could
5 be against public policy.

6 JUSTICE GORSUCH: No.

7 MS. JACOBY: And I'm asking the
8 Court --

9 JUSTICE GORSUCH: No.

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

11 JUSTICE GORSUCH: No. No. What --
12 what -- what Petitioner is asking us to say is
13 that the Fifth Circuit's rule that there are
14 two and only two bases is not correct and that
15 I should be allowed to try a contract defense.
16 And you say you've got good contract defenses.
17 God bless you. How about litigating them?

18 MS. JACOBY: To -- to make it a
19 possibility that they try to raise a contract
20 defense, I think Petitioner needs to show how
21 any contract defense could in theory in the
22 right case give relief here.

23 And there is no public policy that an
24 appeal waiver violates based on the subsequent
25 sentence that --

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

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

15 JUSTICE GORSUCH: And -- and then --

16 MS. JACOBY: And if you suggest
17 otherwise, that -- that truly will open the
18 floodgates and cause a big problem for the
19 United States.

20 JUSTICE GORSUCH: Because -- because
21 an issue that hasn't been litigated should
22 never be litigated. Okay. All right.

23 And -- and then you -- you tout the
24 benefits of these deals. Let's take this case
25 as an example. The defendant here pled guilty

1 to one count of stealing \$32,000. He was
2 sentenced as if he was guilty of all the counts
3 the government dropped and a half a million
4 dollars' worth of -- of stolen money.

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

14 MS. JACOBY: Absolutely. So, first of
15 all, on uncondition -- on unconstitutional
16 conditions, there is no constitutional right to
17 an appeal. So --

18 JUSTICE GORSUCH: There's a statutory
19 right.

20 MS. JACOBY: Yes, but --

21 JUSTICE GORSUCH: And -- well, as a
22 matter of --

23 MS. JACOBY: -- it's not an
24 unconstitutional condition and it doesn't
25 burden your constitutional rights.

1 JUSTICE GORSUCH: As a matter of due
2 process, you're entitled to that statutory
3 right.

4 You're just --

5 JUSTICE GORSUCH: Really --

6 MS. JACOBY: -- constitutionalizing
7 the appeal right, if you say that as a matter
8 of due process you're entitled to the statutory
9 right.

10 JUSTICE GORSUCH: Oh, okay. Okay.

11 MS. JACOBY: But setting that aside, I
12 think your second question is about --

13 JUSTICE GORSUCH: I think maybe you
14 better set that aside, for my purposes at
15 least.

16 MS. JACOBY: Understood. Setting that
17 aside, your second question, I think, is about
18 if he got a good deal in the end here, if, in
19 fact, the sentence that is -- is one that --
20 his bargain to drop nine charges proved to be a
21 good deal.

22 As -- as my friend has said, you know,
23 he obviously thinks it ended up not being a
24 good deal but that is not a basis to undo a
25 bargain. And that's not a basis to find a

1 bargain to be unconscionable.

2 Unconscionability isn't about harsh
3 results later when it proves you made a bad
4 deal. Unconscionability is about a deal that
5 you made that at the time you made it, is so
6 one-sided no rational person would enter into
7 it and that was not this deal.

8 JUSTICE GORSUCH: If the government's
9 position is a defendant can knowingly and
10 voluntarily give up his appeal rights, I wonder
11 what the government would say a defendant
12 couldn't give up?

13 Could a defendant give up, for
14 example, his right to go to church after his
15 conviction or to own a gun after his
16 conviction?

17 MS. JACOBY: So --

18 JUSTICE GORSUCH: Or his entitlement
19 to federal unemployment benefits after his
20 conviction?

21 MS. JACOBY: Again, this comes back to
22 my point that this is not -- an appeal waiver
23 is not an agreement to be sentenced unlawfully.
24 An agreement to be sentenced unlawfully would
25 be against public policy.

1 JUSTICE GORSUCH: Oh --

2 MS. JACOBY: Because performance --

3 JUSTICE GORSUCH: -- okay. Okay.

4 Now, that's --

5 MS. JACOBY: -- of the agreement would
6 be against public policy. This is --

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

10 MS. JACOBY: Not at all.

11 JUSTICE GORSUCH: No?

12 MS. JACOBY: No, no, no, no, no. If
13 the agreement is to receive an unlawful
14 sentence, that is an agreement against public
15 policy. But here the agreement is not to
16 receive an unlawful sentence.

17 The agreement still contemplates that
18 the judge is oath bound.

19 JUSTICE GORSUCH: Right.

20 MS. JACOBY: It's an agreement that
21 the final decisionmaker on your sentence is a
22 --

23 JUSTICE GORSUCH: Will --

24 MS. JACOBY: -- district court --

25 JUSTICE GORSUCH: -- will be --

1 MS. JACOBY: -- and that is not an
2 unlawful agreement. No public policy forbids
3 the district court from being the final
4 decisionmaker on your -- on your -- on your
5 case.

6 JUSTICE GORSUCH: Go ahead.

7 MS. JACOBY: That was the status quo
8 for 100 years.

9 JUSTICE BARRETT: What about -- what
10 about, Ms. Jacoby -- can I ask you a question,
11 Ms. Jacoby -- Ms. Jacoby? I'm having a hard
12 time tracking exactly what the government's
13 position is. So I asked Ms. Blatt, explain to
14 me how these defenses that you're proposing fit
15 within the contract analogy.

16 And, I don't know, I -- I sense some
17 going back and forth about whether the contract
18 analogy is a perfect fit so that all these
19 defenses are available. And, if so, I'm not
20 really sure how the miscarriage of justice
21 back-line position fits in, unless we try to
22 shoehorn it through public policy.

23 So explain to me what the government's
24 theory is here.

25 MS. JACOBY: Sure. So Petitioner has

1 litigated this as a contract doctrines case
2 saying that all these contract defenses apply.
3 Our -- our position is if -- if we're going on
4 contract defenses, no, none of them applies.

5 JUSTICE BARRETT: Would you go on
6 contract -- well, let me ask -- let me ask you
7 that, just as a matter of first principles, is
8 it the government's position that this should
9 be litigated as a contract case?

10 MS. JACOBY: I do think so. And I
11 think that there's not really another source of
12 law that Petitioner has identified to lodge
13 this miscarriage of justice exception. It's
14 not contract principles.

15 JUSTICE BARRETT: No, no, no, no, the
16 government. Do you think of this, do you think
17 the Petitioner is right to litigate this?
18 Because you've gone along with it --

19 MS. JACOBY: Yes, yes.

20 JUSTICE BARRETT: -- and you've said
21 if we're talking about contracts, it doesn't
22 work.

23 But do you think of this challenge as
24 something to which the contract analogy should
25 apply?

1 MS. JACOBY: I do think that this type
2 of argument is one to which the contract
3 analogy should apply. There's no
4 constitutional right to an appeal, so I don't
5 think it makes sense to say that there is a
6 constitutional right to an appeal in certain
7 egregious cases, so the Constitution isn't
8 really a home for this doctrine.

9 And other than that, I think you would
10 just be engaging in some kind of federal common
11 law policymaking --

12 JUSTICE KAGAN: Well --

13 MS. JACOBY: -- where Congress
14 hasn't --

15 JUSTICE BARRETT: So then --

16 JUSTICE KAGAN: -- Ms. Jacoby --

17 JUSTICE BARRETT: So is the position
18 -- oh, sorry. Can I finish --

19 JUSTICE KAGAN: No, go ahead.

20 JUSTICE BARRETT: -- this one? So is
21 your position that the contract analogy applies
22 but none of the contract defenses work in this
23 context?

24 MS. JACOBY: Correct.

25 JUSTICE BARRETT: Okay. So when

1 you're making this concession about, you know,
2 potential miscarriage of justice, et cetera --

3 MS. JACOBY: Yes.

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

6 MS. JACOBY: That -- so there we're
7 assuming that you -- you are kind of going
8 outside of contract doctrines and you are
9 trying to find some sort of policy or maybe
10 constitutional backstop, some safety valve.
11 And we think if you are going down that road,
12 the safety valve I proposed to Justice Kagan is
13 the right one but, again, we do not think that
14 is the right way to go here.

15 JUSTICE BARRETT: Well, why isn't
16 Justice Gorsuch right then? I mean, are we
17 supposed to march through every single
18 available contract defense for the restatement
19 and say this is why this couldn't apply here?
20 This is why that couldn't apply here?

21 MS. JACOBY: Petitioner has come up
22 with four potential defenses. None of them
23 applies. I -- I think that you can just
24 categorically say --

25 JUSTICE BARRETT: As to his case, but

1 we're not --

2 MS. JACOBY: No, no, no,
3 categorically, when a subsequent sentence --
4 sorry, a subsequent sentence does not make an
5 appeal waiver against public policy. It
6 doesn't make it unconscionable. It doesn't
7 make it a breach of the implied duty of good
8 faith. It doesn't frustrate this shared
9 purpose that goes to the essence of the
10 bargain. Just categorically those defenses all
11 fail.

12 If there are other defenses out there,
13 it was on Petitioner to raise them, and he
14 hasn't.

15 JUSTICE KAGAN: Is the --

16 JUSTICE GORSUCH: Didn't argue that.
17 Sorry.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: Is the premise of your
20 answers to Justice Barrett that this Court has
21 no power to establish rules intended to
22 safeguard the integrity of the judiciary?

23 MS. JACOBY: That is not our position.
24 But the rules need to be lodged, I think, in
25 some source of law.

1 There's no congressional source of
2 law. There's no, really, constitutional source
3 of law, given that there is not a
4 constitutional right to appeal. So I don't
5 think it makes sense to say --

6 JUSTICE KAGAN: Well, I mean, that was
7 my question. In other words, you're saying
8 that we have to point to a statute, we have to
9 point to a particular constitutional provision
10 to set some boundary lines on what judges can
11 do in a task that is supremely a judicial one.

12 MS. JACOBY: I think that --

13 JUSTICE KAGAN: That we can't just
14 say, you know, there are some things that
15 judges can do that would be a miscarriage of
16 justice and we -- we -- we don't need to point
17 to a statute to be able to create a rule that
18 polices the judiciary to that extent.

19 MS. JACOBY: I think particularly
20 because we are in the world of federal criminal
21 law and federal criminal procedure, which is
22 highly regulated by Congress and the Rules
23 Committee, that's an especially, you know, a
24 dangerous place for this Court to be making
25 policymaking, even though I understand that it

1 is policymaking about what judges should do.

2 It's policymaking about which court
3 should be the last word on certain types of
4 cases. And I think that really is the province
5 of Congress and the Rules Committee.

6 If you disagree with me and you are
7 going down the road of a miscarriage of justice
8 exception, again, we strongly urge the Court to
9 cabin it to the circumstances that really --

10 JUSTICE KAGAN: Well, whatever the
11 miscarriage of justice exception says, whether
12 it's less cabined, whether it's more cabined,
13 you're saying that the only way that we can do
14 that is by referring to contract law principles
15 or by finding -- which I don't think exists
16 because people would have found it -- some
17 statute that allows us to do that?

18 MS. JACOBY: Or constitutional
19 principles or -- I -- I think you're maybe
20 gesturing towards something to do with the
21 supervisory powers of the courts or something
22 like that. But this isn't really a good home
23 for the supervisory powers because this isn't
24 about supervising the conduct in their
25 courtroom.

1 This is really about making rules
2 about when certain -- you know, when a decision
3 should be final, whether that's at the district
4 court stage or the court of appeals stage.
5 That's kind of bread and butter federal
6 criminal procedure stuff that Congress deals
7 with and the Rules Committee deals with.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas, anything further?

11 Justice Alito?

12 JUSTICE ALITO: Well, can't we say, to
13 continue your colloquy with Justice Kagan, can
14 we not say that a plea bargain has some
15 attributes of a contract but it's not like an
16 ordinary contract.

17 I don't know even the -- even the
18 amici supporting Mr. Hunter say -- this is the
19 CATO ACLU brief, point 1-b, "plea bargaining is
20 no ordinary contract negotiations."

21 So we can adopt a principle that is
22 informed by contract law without taking a
23 position that you now seem to be taking, which
24 is this is just like any other contract and all
25 of the contractual defenses that might be

1 recognized are available here. I find your
2 position really hard to understand.

3 On the one hand, you say you don't
4 want to be burdened with having to litigate a
5 lot of -- a lot of appeals that are taken by
6 defendants whose entered into a -- entered into
7 an appeal waiver. And then you're happy to
8 have judges decide -- don't you think that
9 anything that -- any objection that a defendant
10 might have could be -- could be characterized
11 as unconscionable?

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

13 JUSTICE ALITO: And we occasionally
14 see issues of unconscionability in cases
15 involving -- involving arbitration. And, boy,
16 some state courts really go to town on -- with
17 the -- with the unconscionability argument, but
18 you're happy to -- you're happy to deal with
19 all those?

20 MS. JACOBY: I'm -- I'm definitely
21 happy to say why categorically appeal waivers
22 are not unconscionable, if -- if that's the
23 question.

24 If the question is whether there
25 should be some other rule that informs the

1 court, yes, I agree plea bargains are not
2 perfectly like contracts, so the -- the analogy
3 doesn't hold in all respects. But you would
4 have to say that there's a constitutional
5 dimension.

6 I mean, there would have to be sort of
7 some source of law that is informing what rule
8 the court makes, if it's not a contract rule.
9 And there's not really a constitutional
10 principle at -- at play here. And I'm not
11 really sure another source of law.

12 So, no, I don't -- I want to be clear,
13 we have been litigating this case as a contract
14 case because that's how Petitioner has brought
15 this. If the Court wants to say that there are
16 aspects that are not like a contract and other
17 rules should apply, it would just need to
18 ground those rules, I think, in something. I
19 am happy to explain, though, why.

20 JUSTICE ALITO: Okay. Thanks.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: Counsel, on the
24 second question presented, there is a way of
25 reading that transcript in which one could say

1 the judge basically said I'm going to impose a
2 condition, come back to me later if you
3 disagree.

4 And then he mentions the right to
5 appeal, that there was permission to appeal at
6 least this -- this -- this condition. Why
7 can't we read that colloquy as such?

8 MS. JACOBY: Because a district court
9 doesn't have authority to modify the parties'
10 agreement. So --

11 JUSTICE SOTOMAYOR: Well, then that
12 goes to the silence that was the government's
13 position there. All right.

14 What does that do to the ripeness
15 question that Justice Barrett had? Presumably,
16 you would argue at any point in time that the
17 waiver applies, correct?

18 MS. JACOBY: It -- that depends on the
19 language of the agreement. Here this agreement
20 doesn't bar Petitioner from seeking
21 modification of the condition of supervised
22 release. So he could do that. The Fifth
23 Circuit has said that an appeal from the denial
24 of modification is covered by a waiver if it's
25 the type of agreement that -- pardon -- the

1 type of appeal that could have been brought
2 from the beginning. It's -- it's --

3 JUSTICE SOTOMAYOR: That's -- isn't
4 that the -- the vicious circle you're putting
5 this defendant in, isn't it?

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

8 JUSTICE SOTOMAYOR: The Fifth Circuit
9 --

10 MS. JACOBY: I think the defendant
11 entered into an agreement, and this was the
12 terms of --

13 JUSTICE SOTOMAYOR: And so you're
14 saying tough luck, because the Fifth Circuit
15 won't let you do it, so we should let you do
16 it? We should let you say --

17 MS. JACOBY: It is possible --

18 JUSTICE SOTOMAYOR: -- it some --

19 MS. JACOBY: -- I think, under the
20 terms of the Fifth Circuit's doctrine that if
21 the type of appeal that he brought were more as
22 applied and not the type of thing he really
23 could have brought from the beginning, given
24 that this appeal waiver doesn't cover --

25 JUSTICE SOTOMAYOR: But it still --

1 MS. JACOBY: -- appeal from
2 modification --

3 JUSTICE SOTOMAYOR: Yeah.

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

5 JUSTICE SOTOMAYOR: You admitted that
6 it would be unconscionable to contract to have
7 a racist judge decide the case, correct?

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

11 JUSTICE SOTOMAYOR: But it's not, in
12 fact, against public policy to have a racist
13 judge sentence you?

14 MS. JACOBY: Yes, the sentence would
15 be against public policy. But the question is
16 whether the agreement is against public policy.
17 And, again, the agreement is --

18 JUSTICE SOTOMAYOR: But the -- but
19 that's what you're --

20 MS. JACOBY: -- not to have a racist
21 sentence. The agreement is to have no appeal.
22 And that the agreement to have no appeal is not
23 against any public policy.

24 JUSTICE SOTOMAYOR: Even though it
25 involves, so -- a breach of the duty of good

1 faith dealing, which applies to third parties
2 that you delegate contract rights to.

3 MS. JACOBY: But a judge is not a
4 delegee under the agreement.

5 JUSTICE SOTOMAYOR: Oh, you can't have
6 it both ways. He is either a judge acting in
7 conformity with the law or he is a delegee
8 subject to the good faith and fair dealing
9 condition. You want to pick and choose
10 defenses.

11 MS. JACOBY: Not at all, Your Honor.
12 He is a judge acting in good faith in the law,
13 but a presumption of the entire appeal waiver
14 is that the defendant might not think that the
15 sentence he ultimately receives is unlawful.
16 That is kind of the core --

17 JUSTICE SOTOMAYOR: Well --

18 MS. JACOBY: -- premise.

19 JUSTICE SOTOMAYOR: -- but it's not a
20 question of unlawful, because it's a question
21 of whether he's violated statutory rights,
22 whether he has used impermissible
23 constitutional factors, whether he's violated
24 statutory limitations, imposing restitution
25 when the statute doesn't provide for it and the

1 agreement doesn't contemplate it.

2 He has acted outside the bounds of
3 expectation.

4 MS. JACOBY: The relevant expectation
5 under contract doctrine -- again, I'm -- I'm
6 assuming now we're in contract world. The
7 relevant expectations are not the parties'
8 expectations as to what sentencing outcome will
9 occur. Contracts hold --

10 JUSTICE SOTOMAYOR: I -- I agree. I
11 submit --

12 MS. JACOBY: -- even when unforeseen
13 and unexpected things happen. The relevant
14 expectation is what -- how the parties expected
15 their agreement would operate, whatever the
16 outcome at sentencing.

17 JUSTICE SOTOMAYOR: So why isn't it --
18 and going back to Justice Kagan's question --
19 we all assume that judges will act lawfully,
20 not that they can't make errors in
21 calculations, but that they'll act lawfully and
22 not unconstitutionally?

23 MS. JACOBY: We -- we do assume that,
24 but the premise of the agreement here is that
25 both sides might not think that the judge has

1 acted lawfully and if the defendant thinks that
2 the judge hasn't acted lawfully, he can't
3 appeal. That's kind of the whole premise of
4 this agreement here. That is the assumption.

5 JUSTICE SOTOMAYOR: All right. Then
6 we're going around in the circle we started
7 with.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 Justice Gorsuch? Anything further?

10 JUSTICE GORSUCH: You agree that some
11 prospective waivers are just unenforceable, so,
12 for example, you cannot prospectively waive
13 your Title VII rights.

14 MS. JACOBY: Correct. Yes. This is
15 quite different, though. I mean, you can't
16 prospectively waive your right to sue under
17 Title VII, this Court has said, because the
18 right to sue is basically integral to the
19 substantive policy of Title VII. But the right
20 to appeal is not integral to the substantive
21 policy of any constitutional amendment or
22 statutory amendment or anything like that --

23 JUSTICE GORSUCH: Except that Congress
24 --

25 MS. JACOBY: -- and we know that

1 because it didn't --

2 JUSTICE GORSUCH: -- granted a right
3 to appeal, just as it granted a right to pursue
4 Title VII remedies.

5 MS. JACOBY: Waiving the right to
6 appeal also isn't against the policy of the
7 right to appeal because that would just mean we
8 could never have any statutory waivers.

9 JUSTICE GORSUCH: Well, we didn't have
10 appeal waivers until about three minutes ago
11 and --

12 MS. JACOBY: We also didn't have
13 appeals for 100 years, respectfully.

14 JUSTICE GORSUCH: Yeah. And we also
15 --

16 MS. JACOB: We didn't sentencing
17 appeals at all.

18 JUSTICE GORSUCH: And we also didn't
19 have plea agreements before that, if you really
20 want to go back, counsel. So I'm not sure that
21 works for you.

22 And then with respect to contract in
23 what you call contract world, you agree that,
24 at least in principle, a defendant would have
25 contract defenses, correct?

1 MS. JACOBY: Yes.

2 JUSTICE GORSUCH: Okay. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: Let's see. I
6 appreciate your having alternative arguments,
7 and a party having alternative arguments, I
8 think that's helpful because you don't know
9 where the nine of us are going to go, but then
10 it's important to keep -- for me, to keep clear
11 on what the alternatives are.

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

15 MS. JACOBY: Correct.

16 JUSTICE KAVANAUGH: -- I'm not going
17 that way.

18 MS. JACOBY: Sure.

19 JUSTICE KAVANAUGH: Okay? Just me.

20 MS. JACOBY: Sure.

21 JUSTICE KAVANAUGH: Okay? So, first
22 alternative out for me. On the second
23 alternative, I think you raise a good point,
24 what source of law are we doing, but all the
25 lower courts have been doing it. Right? All

1 the courts of appeals. And I -- could be
2 federal common law, could be supervisory power,
3 but it's there. And I think I'm just taking
4 that as a given. But then --

5 MS. JACOBY: Yeah, courts have done
6 it. The way this has arisen is courts, you
7 know, in the early 2000s, late '90s, often
8 confronted with this would say, yes, these are
9 okay, but, of course, we would never enforce it
10 in X, Y, Z circumstances without really
11 explaining why.

12 JUSTICE KAVANAUGH: It -- it -- but --
13 but there's a --

14 MS. JACOBY: But, yes, they have said
15 that. They have said that.

16 JUSTICE KAVANAUGH: At this point, I
17 -- I take your technical point and maybe it's
18 more than technical, where does that come from,
19 but it's -- it's everywhere in the courts of
20 appeals. My old court, all -- every court,
21 right? And it might be interpreting the
22 federal criminal rule, it might be supervisory
23 power, it might be federal common law, it might
24 be going to what an appeal is in the statute,
25 to Justice Gorsuch's point, but it's there.

1 Then it's just what are the
2 exceptions, right?

3 MS. JACOBY: Yes.

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

9 MS. JACOBY: Correct.

10 JUSTICE KAVANAUGH: Okay.

11 MS. JACOBY: Correct.

12 JUSTICE KAVANAUGH: And there's a
13 pretty good consensus of exceptions in most of
14 the courts of appeals.

15 MS. JACOBY: Correct. Correct. And
16 the ones that we've articulated I think track
17 the --

18 JUSTICE KAVANAUGH: Like, in -- in
19 other words, I think this is not so hard in the
20 sense that there's a kind of defined list.
21 What happened here is the list is shorter than
22 what most of the courts of appeals have,
23 correct?

24 MS. JACOBY: If this Court is going
25 down that road, I think saying there's still a

1 defined list; there's just, you know, two more
2 bullets on the list --

3 JUSTICE KAVANAUGH: Exactly. Exactly.

4 MS. JACOBY: -- we can live with that
5 as long as the last bullet isn't catch-all,
6 know it when you see it if it's sufficiently
7 egregious, because that is a real problem for
8 us. If the bullets are just -- if you just say
9 the Fifth Circuit has one too few bullets, two
10 too few bullets, that makes sense. But, again,
11 we don't think there are any bullets that could
12 capture Petitioner's argument.

13 JUSTICE KAVANAUGH: Well, in the D.C.
14 Circuit, we did have a bullet that said results
15 in a miscarriage of justice --

16 MS. JACOBY: Yeah.

17 JUSTICE KAVANAUGH: -- and I don't
18 remember the place falling apart.

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

22 JUSTICE KAVANAUGH: Okay.

23 MS. JACOBY: And there has also at
24 this point been kind of enough common law, I
25 guess, you know, built up around it that courts

1 have denied those miscarriages enough that
2 defendants may raise them less. But, if this
3 Court were to announce that standard, we think
4 defendants would raise them a lot.

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

8 JUSTICE KAVANAUGH: But it's going to
9 come up.

10 MS. JACOBY: I mean, if we're looking
11 for the needle in a haystack, but in every
12 case, we're being deprived the benefit of our
13 bargain, that's the problem.

14 JUSTICE KAVANAUGH: And the ultimate
15 benefit is the resource, right?

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

18 JUSTICE KAVANAUGH: And, ultimately,
19 it's a judge-protective thing too because the
20 judges are -- yeah.

21 MS. JACOBY: Correct.

22 JUSTICE KAVANAUGH: I got -- got all
23 that. The amicus brief of the Association
24 of -- of -- let's see, which one -- the
25 Association of Federal Defenders says, if we

1 are too strict on this, there are going to be
2 fewer plea bargains, so the resource problem is
3 actually going to be worse.

4 Do you want to respond to that very
5 quickly because I'm using time.

6 MS. JACOBY: I -- I don't agree with
7 that. I mean, the most common alternative to
8 entering into a guilty plea pursuant to an
9 agreement is not a trial; it's entering into a
10 guilty plea without an agreement where the
11 United States gives no concessions and the
12 defendant retains his right to appeal his
13 sentence.

14 That's, I think, kind of the most
15 common alternative that we have now and that's,
16 I think, where things would get channeled. So
17 I think we'll still have pleas, but those pleas
18 will probably be less favorable to defendants
19 because we're not giving the concessions.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: Counsel, would the
24 government be amenable to having defense
25 counsel insert qualifications on the right to

1 appeal and bargaining for the kinds of
2 exceptions that some of the courts of appeals
3 currently allow?

4 MS. JACOBY: Yes. I'm -- I'm very
5 glad you raised that point. Defendants are
6 always free to do that. I mean, again, I -- I
7 want to be clear it's a very important term to
8 us, so in some cases, we won't budge, and in
9 many cases, we won't budge. But it's case by
10 case, it's district by district, and we do
11 enter into plea agreements with carveouts for
12 constitutional claims, carveouts that limit the
13 appeal waiver to only certain guidelines
14 ranges, all the rest. And we have in the
15 appropriate cases entered into plea agreements
16 with no sentencing appeal waiver at all.

17 JUSTICE BARRETT: So --

18 MS. JACOBY: So it really is a matter
19 of defendant choice here.

20 JUSTICE BARRETT: So you've emphasized
21 that if we're going to do something other than
22 the contract analogy, we have to find some
23 source of law in which to ground it and you've
24 been pressed about supervisory power.

25 I'm wondering whether, in addition to

1 supervisory power, another rationale is that
2 this isn't a pure contract agreement because it
3 has to be accepted by a third-party. The
4 district judge has a role in the process.

5 And, hence, because the district judge
6 has a role in the process, there have to be
7 some parameters to what the District Court does
8 in that process.

9 And so our supervisory power over the
10 -- it's not purely between the government and
11 the defendant. So our super -- supervisory
12 power over the third-party in that process is a
13 source of law that can justify some of these
14 exceptions.

15 MS. JACOBY: I see that argument. I
16 think that could make some sense. I -- I mean,
17 I want to be clear, it's often the same judge
18 that approves the plea deal as the one who
19 sentences. It's not necessarily, but if you're
20 just sort of saying the district court, not
21 specific judge, I -- I -- I -- I see that
22 point. And if that's how this Court wants to
23 ground a series of exceptions, I -- I think
24 that makes sense.

25 I -- I want to be clear, we're --

1 we're -- we have gone sort of hard on the
2 contract doctrine here because that's how
3 Petitioner briefed this case but I'm not trying
4 to suggest that this Court lacks powers --

5 JUSTICE BARRETT: But you would prefer
6 -- I guess I'm still a little confused when I
7 asked you that before, like are you only
8 talking about it in terms of contract because
9 the Petitioner did? You said no, you do think
10 of it as a contract?

11 MS. JACOBY: Because there's no
12 constitutional right to appeal. And Petitioner
13 --

14 JUSTICE BARRETT: Yeah.

15 MS. JACOBY: -- hasn't briefed it as a
16 supervisory power or on this theory that you've
17 suggested. We do think the -- the most logical
18 place would be if -- if the -- the avenue that
19 you've suggested is -- is the power to
20 supervise the accepting of the plea, I mean,
21 I -- I think that -- that could make some sense
22 as an avenue to accept these carveouts.

23 JUSTICE BARRETT: Okay, thanks.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: I just want to
2 clarify one factual point that I thought you
3 were exploring with Justice Barrett.

4 Are appeal waivers required in every
5 district across this country? Aren't there
6 some places -- my understanding was that this
7 is not uniform.

8 MS. JACOBY: So I mean they're never
9 required. It's a term of a voluntary contract
10 --

11 JUSTICE JACKSON: No, I understand.
12 But aren't -- aren't there districts in which
13 the background principle is not to put an
14 appeal waiver in plea agreements?

15 MS. JACOBY: So I'm actually not sure
16 if there are any U.S. Attorney's Offices that
17 have a stock agreement, a stock plea agreement
18 without an appeal waiver but some are more
19 willing to bargain to --

20 JUSTICE JACKSON: Yup. Good.

21 MS. JACOBY: -- to bargain it away
22 than others.

23 JUSTICE JACKSON: All right. And one
24 other thing. You have repeatedly honed in on
25 the nature of the appeal waiver. You say an

1 appeal waiver is an agreement to let the court
2 be the final arbiter at sentencing.

3 Is that what the government's position
4 is?

5 MS. JACOBY: Yes.

6 JUSTICE JACKSON: What I'm wondering
7 is whether that same position would hold with
8 respect to an agreement pertaining to the
9 trial?

10 So let me give you a hypothetical.
11 Suppose we have a defendant who wants to go to
12 trial but he'd like to lessen his potential
13 sentencing exposure in the event that he's
14 found guilty.

15 Could he contract with the government
16 to prospectively waive his right to appeal any
17 and all trial errors, errors, in other words,
18 we're leaving it to the trial court to make all
19 the calls with respect to evidence, et cetera,
20 and I'm not going to as a matter of contract
21 appeal any of those errors?

22 MS. JACOBY: I'm -- I'm not prepared
23 to commit on all trial errors, but of course
24 you can prospectively waive right to, for
25 example, certain evidentiary objections.

1 JUSTICE JACKSON: Why wouldn't you
2 admit it's the same principle? If -- if -- if
3 the idea is that we can contract around making
4 the trial judge be the final arbiter, which is
5 what I understood --

6 MS. JACOBY: I see what you're saying.
7 You're saying that there would be just no
8 appeal like from the trial. Yes, I would think
9 that would be okay.

10 JUSTICE JACKSON: And you would think
11 there would be no public policy interest of the
12 court or the public in ensuring that people get
13 a fair trial?

14 MS. JACOBY: Again, I just -- I -- I'm
15 really weary to get out ahead when we're
16 talking about these trial issues which are
17 outside.

18 JUSTICE JACKSON: No. I'm not -- I'm
19 not asking you to get out ahead. I'm testing
20 your principle that --

21 MS. JACOBY: Well --

22 Justice JACKSON: -- there is no --
23 I'm testing your principle that there is no
24 problem with an agreement to prospectively
25 appeal errors in a proceeding that will

1 ultimately impact whether it's the trial or the
2 sentencing.

3 You've said the reason why that's not
4 a problem at sentencing is because the parties
5 can agree to make the sentencing judge the
6 final arbiter. So if he makes a mistake or
7 not, he believes that's the right answer, and
8 you're not going to appeal that.

9 All I'm doing is transporting that
10 same principle to the trial and your concerns
11 about it are precisely the concerns that I have
12 with respect to the sentencing issue.

13 MS. JACOBY: I just don't know if
14 there are issues at trial that are not waivable
15 due to some external public policy that doesn't
16 apply at sentencing.

17 JUSTICE JACKSON: Not the issue. The
18 ability to appeal it. That's the point you
19 keep making with respect to the sentence. So
20 regardless of how fundamental the error is, you
21 say at sentencing, we can agree that the trial
22 judge is going to make the final call or the
23 sentencing judge.

24 And all I'm asking you is couldn't
25 you, under your logic, do the same thing with

1 respect to trials and wouldn't that be a
2 problem from the standpoint of ensuring that
3 people actually get a fair trial as a matter of
4 public policy?

5 MS. JACOBY: I -- I don't think so.
6 Again, given that we didn't have the right to
7 criminal appeals for 100 years.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, Ms. Blatt.

12 REBUTTAL ARGUMENT OF LISA S. BLATT

13 ON BEHALF OF THE PETITIONER

14 MS. BLATT: Thank you.

15 Number 1, just some data points. 1992
16 was the first court of appeals that said
17 defendants can't be deemed to have sentenced at
18 the -- entirely at the whim of the discretion
19 of the district court. So that's Fourth
20 Circuit.

21 2009, D.C. Circuit was the last
22 circuit to recognize ex excepting. So all 11
23 circuits have weighed in and I don't see the
24 government running out of resources.

25 In terms of authority, they're

1 completely separate doctrines. One is the
2 contract doctrine and one is miscarriage of
3 justice. In terms of the authority, it does, I
4 think, come from an inherent equitable power
5 that you could think of it as the government
6 trying to seek a specific performance, you
7 could think of it as supervisory or inherent or
8 in terms of separation of powers. We're not
9 going to let sentences bring the judiciary into
10 disrepute. And this would be a sea change.

11 Number 2, all the cases that I
12 mentioned were not hypotheticals. They were
13 all real on pages in our reply brief and our
14 opening brief about the castration, et cetera.

15 The Fourth Circuit case cited by CATO
16 is a case where the district court 20 times
17 missentenced the defendant knowing his conduct
18 would be shielded by the appeal waiver. So
19 this is a concern.

20 Number 5, on remand, in terms of why
21 we should get a remand, we haven't even briefed
22 the unconstitutionality of this. The
23 government says this is silly but they've never
24 asserted a justification for the mandatory
25 medication condition. They've never even said

1 why it's there.

2 If they're really worried about
3 resources, how about just confessing error and
4 let the defendant just serve out his supervised
5 release. It's not that complicated.

6 Number 5, in terms of the contract,
7 how it is as a matter of law, not
8 unconscionable or frustration of purpose, this
9 is hornbook contract law.

10 Billions of contracts have open-ended
11 terms. Quantities, discretion of a party,
12 those are things that the parties don't yet
13 know is going to happen. So this happens all
14 the time. You have an open-ended contract.
15 That's what an appeal waiver is.

16 Also I forgot counting how many times
17 the government kept saying benefit of the
18 bargain, deal, agreement. And all we're saying
19 it is beyond hypocritical to say the government
20 is entitled to enforcement yet as -- and using
21 contract law. They literally briefed their
22 case using contract law. It is inconceivable
23 and hypocritical and embarrassing to say a
24 criminal defendant has no contract defense at
25 least when the government is seeking to enforce

1 the contract. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel, the case is submitted.

4 (Whereupon, at 11:40 a.m., the case
5 was submitted.)

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Official - Subject to Final Review

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