No. 24-1063

In the Supreme Court of the United States

MUNSON P. HUNTER III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CATO INSTITUTE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, FAIR AND JUST PROSECUTION, CIVIL RIGHTS CORPS, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Cecillia D. Wang
Yasmin Cader
Brandon Buskey
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Fl.
New York, NY 10004

Matthew P. Cavedon
Counsel of Record
Daniel Greenberg
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(706) 309-2859
mcavedon@cato.org

(Additional counsel listed on inside cover)

Savannah Kumar
Thomas Buser-Clancy
Adriana Piñon
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Katherine Hubbard
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW, Suite 800
Washington, DC 20009
katherine@civilrightscorps.org

Preston Shipp
Estela Dimas
Octavia Carson
FAIR AND JUST PROSECUTION
pshipp@fairandjustprosecution.org
edimas@ fairandjustprosecution.org
ocarson@ fairandjustprosecution.org

John W. Whitehead
William E. Winters
RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
legal@rutherford.org

December 11, 2025

QUESTIONS PRESENTED

The questions presented are:

1. Whether the only permissible exceptions to a general appeal waiver are for claims of ineffective assistance of counsel or that the sentence exceeds the statutory maximum.

2. Whether an appeal waiver applies when the sentencing judge advises the defendant that he has a right to appeal and the government does not object.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, nonpartisan organization with more than 1.7 million members, founded in 1920 and dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has filed numerous briefs before this Court on issues concerning procedural protections in the criminal legal system, including *Glossip v. Oklahoma*, 604 U.S. 226 (2025); *Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012); and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The American Civil Liberties Union of Texas ("ACLU of Texas") is one of the largest ACLU state

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

affiliates in the nation. Founded in 1938, the ACLU of Texas works with communities, at the State Capitol, and in the courts to fulfill the promises of the Constitution for every Texan, no exceptions.

Fair and Just Prosecution ("FJP"), a project of the Tides Center, brings together elected prosecutors from around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility. The elected prosecutors with whom it works hail from urban and rural areas alike, and they collectively represent nearly 20 percent of our nation's population. FJP believes that prosecutors must reduce coercion and strengthen procedural safeguards in the plea bargaining process.

Civil Rights Corps (CRC) is a national civil rights non-profit legal organization dedicated to challenging systemic injustice in the American legal system. It works with individuals directly impacted by the legal system, their families and communities, activists, organizers, judges, and government officials to create a legal system that promotes equality and freedom. Since its founding in 2016, the organization has sought to end the criminalization of poverty, and has filed successful lawsuits in federal and state courts around the country challenging systemic practices that are unjust, unconstitutional, and that separate families.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its

President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Amici are concerned that the ruling below removes infringements on constitutional rights from judicial scrutiny and unduly limits judges' supervision of plea agreements.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although waivers of appellate rights are commonplace in criminal cases, this Court has never systematically addressed whether such waivers are constitutional.[2] *Amici* urge the Court to reverse the decision below to ensure that waivers of challenges to sentences remain within the bounds of the Constitution.

The posture of this case demonstrates why the Government's position and the Fifth Circuit's opinion are insufficiently protective of criminal defendants' core constitutional rights. In February 2024, Mr. Hunter entered a guilty plea to one federal count of aiding and abetting wire fraud.[3] He did so pursuant to a written plea agreement that included a provision waiving nearly all of his rights to a direct appeal (with the exception of claims based on ineffective assistance of counsel).[4]

Three months later, Mr. Hunter was sentenced.[5] At that time, he objected to a requirement that he take mental health medication while on supervised

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[2] Edmund A. Costikyan, Note, *Bargaining Life Away: Appellate Rights Waivers and the Death Penalty*, 53 COLUM. J.L. & SOC. PROBS. 365, 376 (2020).

[3] Cert. Pet. at 4.

[4] *Id.* at 5.

[5] *Id.*

release.[6] Though the district court imposed this condition, it assured Mr. Hunter: "You have a right to appeal. If you wish to appeal, [your counsel] will continue to represent you."[7] Directly after this, the court invited any further comments from counsel.[8] The prosecutor responded: "Your Honor, I believe—well, no. I—no."[9]

Mr. Hunter then appealed to the Fifth Circuit, arguing that the medication condition violated his due-process rights.[10] The Fifth Circuit dismissed the appeal in a short *per curiam* opinion, applying circuit precedent holding that appellate waivers foreclose most constitutional challenges to sentences and that the district court's assurance did not grant Mr. Hunter any opportunity to appeal.[11] Mr. Hunter now asks this Court to reverse.[12]

Amici agree with this request. The prospect of unconstitutional sentences raises grave public concerns. Plea bargaining should not make those sentences invulnerable to judicial review. Further, this Court should also reverse in order to underscore

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[6] *Id.*

[7] *Id.*

[8] *Id.* at 6.

[9] *Id.*

[10] *Id.*; Washington v. Harper, 494 U.S. 210, 221–22 (1990).

[11] Cert. Pet. at 6–7 (citation omitted).

[12] *Id.* at 4.

how plea bargaining should work: Plea agreements can be modified through trial judges' oral statements, especially when accompanied by prosecutorial acquiescence.

ARGUMENT

I. PLEA AGREEMENTS SHOULD NOT PLACE UNCONSTITUTIONAL SENTENCES BEYOND APPELLATE SCRUTINY.

Plea bargaining should not be allowed to shield unconstitutional criminal sentences from appellate review. Unconstitutional sentences raise serious public concerns, and plea bargaining is no ordinary contractual negotiation.

A. Unconstitutional sentences raise serious public concerns.

To foreclose appellate review of unconstitutional sentences is to countenance profound public harms. The public's perception of the fairness and legitimacy of the criminal legal system as one that adheres to constitutional rules is vitally important. "[J]ustice must satisfy the appearance of justice." *Offut v. United States*, 348 U.S. 11, 14 (1954). Our legal system "depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445–46 (2015). When the justice system fails to provide an avenue to review and correct illegal sentences, it harms the public's perception of the justice system and the public's interest in a system that adheres to constitutional rules. *See United States v. Teeter*, 257 F.3d 14, 23 (1st

Cir. 2001) ("[P]ublic confidence in the judicial system[] may be adversely affected if [sentencing] errors go uncorrected."); *United States v. Rosa*, 123 F.3d 94, 98 (2d Cir. 1997) ("[T]he right to appeal serves important interests of both the criminal defendant and of the public at large, so . . . waivers of that right must be closely scrutinized and applied narrowly."); Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 2035 (2016) ("[W]hen a prosecutor encourages a criminal defendant to waive a constitutional claim, an important set of interests are not being represented in that negotiation: the interests of the general public . . . .").

The Constitution is no mere bargaining chip. It is a public pact between the government and the American people. It is the foundation of the federal government's criminal-justice powers and the final test of any criminal sentence's legal validity. *See* U.S. CONST. art. VI, cl. 2 (the Supremacy Clause); *Ex parte Siebold*, 100 U.S. 371, 377 (1879) (observing that if criminal laws "are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws").

An unconstitutional sentence is "not just erroneous"—it is "void." *Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016); *see also* Nikolaus Albright, Note, Class v. United States*: An Imperfect Application of the* Menna-Blackledge *Doctrine to Post-Guilty Plea*

Constitutional Claims, 78 MD. L. REV. 382, 386–87 (2019) (noting this rule's presence in nineteenth-century state supreme court decisions); *cf. Ex parte Siebold*, 100 U.S. at 376 ("An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."). A court "has no authority" to leave undisturbed a "sentence that violates a substantive rule." *Montgomery*, 577 U.S. at 203.

That is true regardless of obstacles that might otherwise limit judicial review. "[P]ersonal liberty is of so great moment" that a criminal sentence cannot be immunized against further judicial scrutiny. *Ex parte Siebold*, 100 U.S. at 377 (discussing habeas corpus). Additionally, the federal judiciary has "an independent interest" in guaranteeing that criminal proceedings "appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). Many other bars on appellate review, then, yield before an unconstitutional or otherwise unlawful sentence. *Rosales-Mireles v. United States*, 585 U.S. 129, 132 (2018) (holding that plain-error review under the Federal Rules of Criminal Procedure is available for illegal sentences). For example, while the constitutional right Mr. Hunter asserts here long pre-dates his sentence, anti-retroactivity rules do not keep courts from invalidating sentences that are based on unconstitutional substantive rules. *Montgomery*, 577 U.S. at 203; *see also Harper*, 494 U.S. at 221–22. "The

risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mireles*, 585 U.S. at 140. Indeed, "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise," and so leave defendants subjected to unconstitutional punishments? *Id.* (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th Cir. 2014) (Gorsuch, J.)).

Appellate waivers should not be allowed to shield unconstitutional sentences from judicial review. *Cf. Menna v. New York*, 423 U.S. 61, 62 (1975) (holding that a plea agreement does not insulate an unconstitutional conviction from review). "No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (quoting *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) (Posner, J.)). No defendant could voluntarily authorize a district court to ignore the Constitution when sentencing him—and any appellate waiver that purported to do so "would be facially void." *United States v. Hahn*, 359 F.3d 1315, 1344–45 (10th Cir. 2004) (en banc) (Murphy, J., dissenting); *see also id.* at

1331 (Lucero, J., concurring in part and dissenting in part) (describing an unlawful sentence as "not only manifestly outside the scope of the parties' reasonable expectations" in executing an appellate waiver, but also against "basic public policy"); *cf. United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995) ("[A] sentence tainted by racial bias could not be supported on contract principles, since neither party can be deemed to have accepted such a risk or be entitled to such a result as a benefit of the bargain.").

This principle is more widely accepted than the present dispute might suggest. Even the Fifth Circuit, whose ruling is at issue here, holds that a defendant who has executed an appellate waiver may challenge a sentence based on ineffective assistance of counsel or because it exceeds a *statutory* maximum.[13] The notion that a congressional statute may overcome an appellate waiver—but the Constitution may not—is indefensible. *See* U.S. CONST. art. VI, cl. 2; *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) ("A sentence is illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution."); *United States v. Marin*, 961 F.2d 493,

[13] United States v. Barnes, 953 F.3d 383, 388–89 (5th Cir. 2020); *see also* United States v. Keele, 755 F.3d 752, 757 n.3 (5th Cir. 2014); United States v. Hollins, 97 Fed. App'x 477, 479 (5th Cir. 2004) (per curiam) (collecting cases). As such, Mr. Hunter's appellate waiver understates the rights he undisputedly has—an infirmity which casts further doubt on its validity. United States v. Raynor, 989 F. Supp. 43, 47 (D.D.C. 1997).

496 (4th Cir. 1992) ("[A] defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. For example, a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor . . . ."); *cf. United States v. Carter*, 87 F.4th 217, 225 (4th Cir. 2023) (noting circuit precedent declining to enforce appellate waivers to shield well-established violations of constitutional rights).[14]

Waivers of the right to appeal should be scrutinized more closely than other negotiated surrenders of rights. Plea agreements are supposed to secure conviction of the guilty without the necessity of a trial.[15] Waivers of some barriers to conviction, such as evidentiary objections and suppression motions,

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[14] *Accord* United States v. Wells, 29 F.4th 580, 584, 587 (9th Cir. 2022); Vowell v. United States, 938 F.3d 260, 267–68 (6th Cir. 2019); United States v. Guillen, 561 F.3d 527, 531 (D.C. Cir. 2009); United States v. Caruthers, 458 F.3d 459, 471–72 & n.5 (6th Cir. 2006) (collecting cases and rationales), *overruled on other grounds by* Cradler v. United States, 891 F.3d 659, 671 (6th Cir. 2018), *validity reaff'd in relevant part by Vowell*, 938 F.3d at 264–67; United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005); United States v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995); *Yemitan*, 70 F.3d at 748; United States v. Jacobson, 15 F.3d 19, 22–23 (2d Cir. 1994).

[15] Christopher Slobogin & Kate Weisburd, *Illegitimate Choices: A Minimalist(?) Approach to Consent and Waiver in Criminal Cases*, 101 WASH. U. L. REV. 1913, 1944 (2024).

sometimes admit more truth into the system and thereby further the pursuit of justice.[16] But appellate waivers do not. They do further administrative efficiency, but at the risk of securing and appeal-proofing unlawful convictions and sentences.[17] They also go beyond the release of trial rights that is "implicit in the core bargain required for a defendant to plead guilty."[18] It is appropriate to subject such waivers to more searching scrutiny.[19]

Doing so may even yield benefits for the government. While Mr. Hunter does not challenge the length of his sentence, other defendants do. Unlawful sentences are often costly to the public. One study found that three Michigan attorneys who challenged unlawful sentences arising from guilty pleas saved their state "at least $855,000 in incarceration costs."[20] The study further determined that "the average state direct appeal saves around $14,700 in reduced incarceration," while costing just over half that

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[16] *Id.*

[17] *Id.* at 1945.

[18] Kay L. Levine et al., *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401, 1408 (2024); *see also Raynor*, 989 F. Supp. at 48.

[19] Levine et al., *supra*, at 1408.

[20] Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561, 582 (2013).

amount to pursue.[21] It concluded that the costs of direct appeals "are offset to a very significant extent by savings the state realizes in reduced incarceration."[22] These effects are compounded by the possibility that sentencing errors "may well undermine the willingness of criminals to obey the law," contributing to further social harms.[23]

"[E]ven the suggestion of a judicial system" without appellate review "would strike most people as offensive to our most deeply felt conceptions of procedural fairness."[24] For the public, the system, and defendants alike, appellate waivers that leave unconstitutional and lawless sentences in place are a bad deal.

B. Plea bargaining is no ordinary contractual negotiation.

In any event, referring to the outcome of plea negotiations as a "deal" lacks precision. More accurately, that arrangement constitutes terms of surrender to the government's effort to deprive an individual of liberty. Courts sometimes speak of plea negotiations as akin to the working-out of a business

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[21] *Id.* at 599; *see also Rosales-Mireles*, 585 U.S. at 140 (noting the "relative ease" of correcting sentencing errors).

[22] Kim, *supra*, at 599.

[23] *Id.* at 603.

[24] Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 161 (1995).

contract—one where defendants can wield an appellate waiver as "a powerful bargaining tool."[25] But it is important to recall the many ways in which plea bargaining differs from the world of business. *See, e.g.*, Jackson, J., Tr. Oral Arg. at *61, *Mallory v. Norfolk S. Ry.*, 600 U.S. 122 (2023) (No. 21-1168) (questioning the legitimacy of appellate waivers: "the Court apparently doesn't ask the question, is an unconstitutional condition happening in that circumstance?"). Prosecutions by the Department of Justice hardly take place in a free market. Prosecutors alone decide the "price" a defendant will pay for his acts. They have no competitors to which defendants can turn for better terms. Defendants in criminal cases are trapped in a system that insists they make a "deal" when they have no bargaining power.[26] In fact, approximately 97% of federal convictions and 94% of state felony convictions

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[25] King v. United States, 41 F.4th 1363, 1370 (11th Cir. 2022); *see also* Levine et al., *supra* at 1454 (criticizing the belief that "as long as defendants receive full information about the courses of action open to them, they are autonomous actors making choices they believe are in their best interest").

[26] Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations*, 54 AM. J. COMPAR. L. 199 (2006) (explaining that there are few to no regulations to protect defendants from this imbalance of power and that judges have only a limited part in overseeing plea negotiations); *see also* Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 729 (2020).

are obtained through imbalanced "deals."[27] Defendants cannot simply walk away. Should an agreement fail to materialize, the prosecutor commonly determines what the penalty will be by selecting the charges the defendant will face.[28] Extreme imbalances of power mean that it can be fundamentally irrational for a defendant not to yield to whatever the government demands, as confirmed in the empirical studies discussed by a fellow *amicus*. Br. of Plea Bargaining Inst. as Amicus Curiae in Support of Pet'r at 10 ("People, it turns out, plead guilty for many reasons, some of which have little or nothing to do with whether they committed the alleged offense.").[29]

The imbalance of bargaining power is further skewed by information disparities. The sooner defendants negotiate and the less vigorously they

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[27] Mark Motivans, FEDERAL JUSTICE STATISTICS, 2014 – STATISTICAL TABLES 17 (2017), *available at* https://bjs.ojp.gov/content/pub/pdf/fjs14st.pdf; Sean Rosenmerkel et al., FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 25 (2009), *available at* https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf.

[28] United States v. Perez, 46 F. Supp. 2d 59, 70 (D. Mass. 1999); *see also* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015).

[29] *See also* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 37 (2021); ABA CRIM. JUST. SEC., PLEA BARGAIN TASK FORCE REPORT 15 (2023), https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/reports/plea-bargain-tf-report.pdf.

insist on government disclosures, the more likely they are to receive favorable terms. *Perez*, 46 F. Supp. 2d at 70.

> [I]t would be wrong to present the bargain . . . as if it were a well worked out contract, in which the defendant is nonetheless trying to maintain an escape clause despite having done diligent research. The better analogy is with a commercial contracting party which has signed a letter of intent.

Id.

In this context, an appellate waiver is a term of adhesion imposed by prosecutors, not a compromise offered by defendants. Sotomayor, J., Tr. Oral Arg. at *39, *Class v. United States*, 583 U.S. 174 (2018) (No. 16-424) (". . . I know of many prosecutors' offices who routinely tell Judges if a defendant seeks to preserve an appeal right, they have not accepted responsibility."); *Perez*, 46 F. Supp. 2d at 69 (predicting that routinely compelled appellate waivers "would be the inevitable effect of a system in which only one side, the government, is a repeat player, and in which the government can play one defendant off another"); *Raynor*, 989 F. Supp. at 49.

A particularly severe knowledge deficit is built into pre-sentencing appellate waivers like Mr. Hunter's. Defendants yielding them do not know whether they will later be sentenced constitutionally. *United States*

v. Melancon, 972 F.2d 566, 572 (5th Cir. 1992) (Parker, Dist. J., concurring specially) ("What is really being waived is not some abstract right to appeal, but the right to correct an . . . illegal sentence. This right cannot come into existence until after the judge pronounces sentence; it is only then that the defendant knows what errors the district court has made—i.e., what errors exist to be appealed, or waived."); *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997) ("[T]he Court could not conclude in logic or justice that the defendant's waiver of the right to appeal an illegal or improper sentence is 'knowing' inasmuch as the sentence is not and cannot be known at the time of the plea.").

To be sure, appellate waivers normally let a defendant challenge a sentence as *statutorily* unauthorized.[30] But the Fifth Circuit's rule foreclosing appellate review of most kinds of *unconstitutional* sentences means a defendant cannot accurately "evaluate the predicted range" of punishments he may receive and so "assess in an informed manner whether he is willing to accept the risk" that comes with an appellate waiver. *Rosa*, 123 F.3d at 99 (discussing a waiver that covered statutorily excessive sentences). Instead, such defendants are left "entirely to the mercy of the sentencing court"—and these "are not immune from mistake or even occasionally from abuse of discretion." *Id.*

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[30] *Barnes*, 953 F.3d at 388–89; *Rosa*, 123 F.3d at 99.

Contract principles do not support the theory that appellate waivers may block review of unconstitutional sentences. As U.S. District Judge Nancy Gertner explained in refusing to accept an appellate waiver:

> [I]t would be quite odd for commercial parties to contract to submit a crucial element, such as price, to a mediator without retaining a right to appeal. . . . A court considering whether to enforce such a contract would rightly wonder what could drive a party to make such a deal.
>
> Now suppose that the court found out that the party which waived its right to appeal faced an alternative that was quite dire, say loss of a lifetime's worth of savings and investment. And suppose the court found out that the other party was a repeat player with vastly superior bargaining power who found parties like the first and played them off each other. At this point, the court should clearly entertain the possibility that this waiver of the right to appeal was unconscionably forced on the party signing it.

Perez, 46 F. Supp. 2d at 71.[31]

At least sophisticated business entities can afford to pay expert counsel for help during negotiations. Criminal defendants, though, may negotiate with the government through less skilled counsel, while others will do so pro se.[32] Often, defendants suffer from what, for any other kind of contract, would be deemed invalidating duress.[33] Even when they receive skillful representation, "defense participation in the drafting of [federal] plea agreements is typically only slightly greater than that exercised by the average consumer in the drafting of an installment sales contract."[34] The notion of truly bilateral plea bargaining is a chimera.

In any event, a court cannot deem defendants who waive their appellate rights "to have considered and accepted the risk of being subjected" to an unconstitutional sentence.[35] Unfortunately, though, bars to appellate review increase the likelihood that such sentences will be imposed—"whether from lack of effort spent on researching the law, from a decreased aspiration to get it right, or from seizing an

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[31] See also Carrie Leonetti, *More than a Pound of Flesh: The Troubling Trend of Unconscionable Waiver Clauses in Plea Agreements*, 38 OHIO ST. J. ON DISP. RESOL. 437 (2023).

[32] Levine et al., *supra*, at 1464.

[33] *See also id.*

[34] Calhoun, *supra*, at 196.

[35] Costikyan, *supra*, at 390.

opportunity to achieve the judge's view of justice even if that view runs counter to appellate precedent."[36] *See, e.g.*, *United States v. Smith*, 134 F.4th 248, 261–63 (4th Cir. 2025) (collecting nearly two dozen cases where a single district court imposed unlawful sentences believing "its conduct would be effectively shielded by an appeal waiver," and holding that this caused a "miscarriage of justice that cannot remain unaddressed"). Assuming unscrupulous prosecutors are aware of a particular judge's tendency to err in the direction of harshness, they are more likely to insist on an appellate waiver. Waivers will then apply "most coercively on those who have the greatest reason to appeal" and "function as the worst form of screening mechanism, removing from the system precisely the cases we would most want appealed."[37] If the government requires every negotiated guilty plea to have an appellate waiver, then less than 10% of convicted people will be able to appeal. The uniformity of constitutional jurisprudence—the promise that the Constitution stands as the supreme safeguard for every American's rights—will suffer as a result. *United States v. Vanderwerff*, No. 12-CR-00069, 2012 U.S. Dist. LEXIS 89812, at *14 (D. Colo. June 28, 2012) ("Indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure

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[36] Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 373 (2015).

[37] Calhoun, *supra*, at 167.

the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions."), *rev'd*, 788 F.3d 1266 (10th Cir. 2015).[38]

To treat criminal defendants accepting the prosecution's requirement that they waive their appellate rights as the equivalent of businesses working out the terms of a merger is a category error. Even so, contract law indicates the unenforceability of a waiver of the right to challenge an unconstitutional sentence.

II. PLEA AGREEMENTS CAN BE MODIFIED THROUGH JUDGES' ORAL STATEMENTS AND PROSECUTORS' ACQUIESCENCE.

Another infirmity affects Mr. Hunter's appellate waiver: His sentencing judge told him he could appeal and the Government's attorney effectively endorsed that statement by remaining silent when the district court asked whether he had any comment on the plea colloquy.[39] "Taken for its plain meaning—which is how criminal defendants should be entitled to take the statements of district court judges—" this statement gives Mr. Hunter the right to pursue his appeal.

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[38] *See also* Calhoun, *supra*, at 169.

[39] *See* Jack W. Campbell IV & Gregory A. Castanias, *Sentencing-Appeal Waivers: Recent Decisions Open the Door to Reinvigorated Challenges*, 24 CHAMPION 34, 35 (2000) (noting here "a split of authority deserving of [this] Court's attention").

United States v. Godoy, 706 F.3d 493, 495 (D.C. Cir. 2013).

After all, a sentencing court can modify a plea agreement in imposing a sentence, and courts have held that statements like those the judge made to Mr. Hunter do just that. *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995); *United States v. Michelsen*, 141 F.3d 867, 874–75 (8th Cir. 1998) (Bright, J., dissenting), *superseded by statute as recognized by United States v. Boneshirt*, 662 F.3d 509, 516 (8th Cir. 2011). Other courts have invalidated appellate waivers based on court statements during a plea colloquy. *United States v. Kaufman*, 791 F.3d 86, 88 (D.C. Cir. 2015); *United States v. Wood*, 378 F.3d 342, 347–48 (4th Cir. 2004); *Teeter*, 257 F.3d at 24–27; *United States v. Bushert*, 997 F.2d 1343, 1352–53 (11th Cir. 1993). Regardless of the procedural context, "we cannot expect a defendant to distinguish and disregard those statements of the court that deviate from the language of a particular provision in a lengthy plea agreement—especially where . . . neither the government nor defense counsel apparently noticed the error at the time." *United States v. Wilken*, 498 F.3d 1160, 1168 (10th Cir. 2007). Indeed, then-Judge Kavanaugh once noted in dissenting from the invalidation of an appellate waiver that proceedings following that case's plea colloquy clarified the waiver provision. *United States v. Brown*, 892 F.3d 385, 411 (D.C. Cir. 2018) (per curiam) (Kavanaugh, J., dissenting in part). Nothing similar happened here.

Further, when the district court told Mr. Hunter he had the right to appeal, the prosecutor declined to respond. *Godoy*, 706 F.3d at 495. This should operate as the Government's own modification of the waiver.[40] *Brown*, 892 F.3d at 397 (majority op.); *United States v. Hunt*, 843 F.3d 1022, 1028–29 (D.C. Cir. 2016); *Wood*, 378 F.3d at 349 ("[T]he Government's affirmative acquiescence in the court's explanation can serve to modify the terms of the plea agreement."); *Buchanan*, 59 F.3d at 918; *see also United States v. Felix*, 561 F.3d 1036, 1040–41 (9th Cir. 2009).

CONCLUSION

The decision below gives prosecutors the unfettered right to bargain for unconstitutional sentences. Such an absence of due process would be intolerable in any other area of law—and the sanctity of liberty demands even stronger safeguards. This Court should reverse.

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[40] If the Government did not intend to modify the waiver, then the prosecutor's failure to correct the court's misstatement was an abdication of the proper role and responsibility of a prosecutor in a criminal case. "The [prosecutor] is the representative not of any ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). Deceiving a defendant into believing he can appeal if he cannot in fact do so does not fulfill the prosecutor's overarching obligation to pursue justice.

Respectfully submitted,

Matthew P. Cavedon
Counsel of Record
Daniel Greenberg
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(706) 309-2859
mcavedon@cato.org

Cecillia D. Wang
Yasmin Cader
Brandon Buskey
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Fl.
New York, NY 10004

Savannah Kumar
Thomas Buser-Clancy
Adriana Piñon
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Preston Shipp
Estela Dimas
Octavia Carson
FAIR AND JUST PROSECUTION
pshipp@fairandjust prosecution.org
edimas@ fairandjust prosecution.org
ocarson@ fairandjust prosecution.org

Katherine Hubbard
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW, Suite 800
Washington, DC 20009
katherine@civilrightscorps.org

John W. Whitehead
William E. Winters
RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
legal@rutherford.org

December 11, 2025