No. 24-1063

# In the Supreme Court of the United States

MUNSON P. HUNTER III,
*Petitioner*,

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

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

## BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION 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.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

**Constitutional Provisions**

## INTEREST OF *AMICUS 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.

*Amicus* is 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

Despite appellate waivers' ubiquity, this Court has yet to squarely address their constitutionality.[2] This case presents a promising opportunity to ensure that they remain within the parameters of the

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

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

Constitution. In February 2024, Petitioner Munson P. Hunter III entered a guilty plea to one federal count of aiding and abetting wire fraud.[3] He did so pursuant to a written plea agreement containing a provision waiving nearly all of his rights to a direct appeal (the exception being for 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 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 district 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

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[3] Cert. Pet. at 4.

[4] *Id.* at 5.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 6.

[9] *Id.*

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]

*Amicus* agrees with this request. Unconstitutional sentences raise grave public concerns and should not be removed from judicial reviewability through plea bargaining. It is also imperative to confirm that 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 must 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.

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

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

[12] *Id.* at 4.

### A. Unconstitutional sentences raise serious public concerns.

To foreclose appellate review of unconstitutional sentences is to countenance profound public harms. *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).

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 against illegal sentences). For example, while the

constitutional right Mr. Hunter asserts here long predates his sentence, anti-retroactivity rules do not keep courts from invalidating unconstitutional sentences. *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)).

Bargained-for appellate waivers are no means of shielding unconstitutional sentences from judicial review. *Cf. Menna v. New York*, 423 U.S. 61, 62 (1975) (holding that a plea agreement does not insulate from review an unconstitutional conviction). "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) (citation omitted). No defendant could be thought to voluntarily authorize a district court to ignore the Constitution in 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 may challenge a sentence based on ineffective assistance of counsel or because it exceeds a *statutory* maximum.[13] That the Fifth Circuit considers limits enacted by Congress—but not by the people in their supreme law—a valid reason to overcome an appellate waiver is untenable. *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

[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—which casts further doubt on its validity. *United States v. Raynor*, 989 F. Supp. 43, 47 (D.D.C. 1997).

permissible statutory penalty for the crime or violates the Constitution."); *United States v. Marin*, 961 F.2d 493, 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]

Appellate waivers should be read less broadly than other negotiated surrenders of rights. The aim of a plea agreement is securing the conviction of a guilty person without the necessity of a trial.[15] Waivers of

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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).

certain evidentiary barriers to conviction sometimes further the pursuit of justice according to truth.[16] Appellate waivers do not. They further administrative efficiency only at the risk of maintaining unlawful convictions and sentences.[17] They also go beyond the yielding 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]

Money should not be the main justification for appellate scrutiny of unlawful sentences. "[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] Still, for the public, the system, and defendants alike, appellate waivers that leave in place unconstitutional and lawless sentences are a bad deal.

### B. Plea bargaining is no ordinary contractual negotiation.

In fact, it is somewhat strange to refer to a plea agreement as a "deal" in the first place. More accurately, it constitutes terms of surrender. Courts sometimes speak of plea negotiations as akin to the working-out of a business contract—one where

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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).

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 are not part of 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. In fact, defendants do not even choose to seek out this "transaction" in the first place. Nor can they 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.[26] Extreme imbalances of power mean it will often be economically irrational

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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] *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).

for a defendant not to yield to whatever the government demands.[27]

The imbalance of bargaining power is further skewed by information disparities. *See* Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 381 (2015) ("An individual defendant has relatively little experience in federal sentencing and likely no experience with the particular sentencing judge. . . . The government likely has a long history of observing the sentencing behavior of an individual judge."). Defendants are likelier to receive favorable terms the earlier they negotiate and the less they insist on receiving discovery. *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.*

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[27] 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/publications/criminaljustice/plea-bargain-tf-report.pdf.

In this context, an appellate waiver is less likely to be a significant asset held by defendants than a term of adhesion imposed by prosecutors. 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 accepting them do not know whether or not they will be sentenced constitutionally. *United States v. Melancon*, 972 F.2d 566, 572 (5th Cir. 1992) (Parker, D.C.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.[28] But the Fifth Circuit's rule foreclosing appellate review of most kinds of *unconstitutional* sentences means a defendant cannot truly "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). He is instead left "entirely to the mercy of the sentencing court"—and these "are not immune from mistake or even occasionally from abuse of discretion." *Id.*

For this reason, a pre-sentencing waiver should not be enforced unless it identifies the particular constitutional rights the defendant accepts the risk of losing. "That limitation . . . avoids providing carte blanche to sentencing courts to trample constitutional rights during the all-important sentencing proceedings, and at the same assures that the defendant's quid pro quo for the prosecutor's plea agreement concessions is limited to specific circumstances contemplated in advance." *United States v. Atherton*, 106 F.4th 888, 896–97 (9th Cir. 2024); *see also Johnson*, 992 F. Supp. at 439 ("The waiver could be regarded as knowing only if it be

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

assumed that the appeal rights need not stand regardless of the grossness of the error . . . .").

Contract principles do not support appellate waivers blocking 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.[29]

At least sophisticated business entities can afford to pay expert counsel for help during negotiations. Many criminal defendants, though, negotiate with the government pro se, and many of those entitled to appointed counsel receive representation falling well short of that required by the Constitution.[30] Often, defendants face what, for any other kind of contract, would be deemed invalidating duress.[31] 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."[32] The notion of truly bilateral plea bargaining is a chimera.

In any event, defendants who waive their appellate rights still cannot be deemed "to have considered and accepted the risk of being subjected" to an unconstitutional sentence.[33] Unfortunately, though, immunity from appellate review increases the likelihood that such sentences will be imposed—

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[29] *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).

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

[31] *See also id.*

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

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

"whether from lack of effort spent on researching the law, from a decreased aspiration to get it right, or from seizing an opportunity to achieve the judge's view of justice even if that view runs counter to appellate precedent."[34] *See, e.g.*, *United States v. Smith*, No. 22-4338, 2025 U.S. App. LEXIS 8764, at *27–32 (4th Cir. Apr. 14, 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 likelier 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."[35] 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 the constitutional validity of convictions and to

[34] Bennardo, *supra*, at 373.

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

maintain consistency and reasonableness in sentencing decisions."), *rev'd*, 788 F.3d 1266 (10th Cir. 2015).[36]

To treat criminal defendants executing appellate waivers as the equivalent of businesses contemplating a merger is to fantasize. Contract law does not justify enforcing 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 remained silent.[37] "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. *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 statements like those given to Mr. Hunter have been held to do so. *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995); *United States v. Michelsen*, 141 F.3d 867, 874–

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

[37] *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").

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 waiver of the waiver. *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). After all, contract law allows for subsequent oral modification of a previous written agreement.[38]

The federal government recently claimed in effect that it can ignore judges' oral orders.[39] Thirty years ago, the Ninth Circuit made short shrift of that idea while invalidating an appellate waiver: "Litigants need to be able to trust the oral pronouncements of district court judges." *Buchanan*, 59 F.3d at 918. A similar reminder from this Court would be most timely.

## CONCLUSION

The decision below welcomes prosecutors to bargain for sentences that courts cannot

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[38] *See, e.g.*, Gregory Scott Crespi, *Clarifying the Boundary Between the Parol Evidence Rule and the Rules Governing Subsequent Oral Modifications*, 34 OHIO N. UNIV. L. REV. 71, 71 (2008).

[39] Josh Gerstein, *The Judge Who Tried to Stop the Deportation Planes Is Not Happy with the Trump Administration*, POLITICO (Mar. 17, 2025), https://tinyurl.com/ykusjnh6 ("Deputy Associate Attorney General Abhishek Kambli claimed . . . that the government was free to ignore the oral order. 'We believe that there was no order given' orally, Kambli said. 'An injunction is not ordered until it's in the written filing.'").

constitutionally impose. This Court should grant Mr. Hunter's petition and reverse the decision below.

Respectfully submitted,

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