No. 23-537

In the Supreme Court of the United States

FAISAL ASHRAF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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

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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.

This case interests Cato because the rule embraced by the court below empowers the government to insulate a defective guilty plea from judicial review by invoking an equally defective appeal waiver, which enables people to be convicted and punished for conduct that is not actually a crime. That is the very antithesis of the process the Founders envisioned and that they spelled out with such care and—one might have thought—clarity in the Bill of Rights.

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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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The year is 2025. Fulfilling a campaign pledge to seek "retribution" against perceived political enemies from his prior term in office, the newly inaugurated president instructs his acting attorney general to open investigations into dozens of outgoing administration officials, journalists, federal and state prosecutors, and even judges. Many are indicted and, though maintaining their innocence on the grounds that they did nothing illegal, some choose to avoid the risk of incarceration by availing themselves of no-jail-time plea offers that require only a (false) admission of guilt and the waiver of any right to appeal.

Whether those appeal waivers would be valid or invalid is a question that divides circuit courts and that this Court should answer immediately, for reasons that scarcely require further explication. Simply put, a system that enables the government to convict people for engaging in lawful conduct while shielding those defective convictions from appellate review is a dagger at the heart of civil society and the rule of law.

As explained below, the petition should be granted for three additional reasons besides the acknowledged circuit split that arbitrarily ensures appellate review of potentially defective pleas in some parts of the country but not others. Pet. Br. 15-16. First, given the outsize role of modern plea bargaining, any flaws in that process will have correspondingly momentous effects on criminal justice writ large. Second, public concern about the possible misuse of criminal law as a tool of partisan politics can and should be assuaged by ensuring scrupulous compliance with due process in

all aspects of the system, including plea bargaining. And third, this is a propitious time to clarify that the Constitution's case-or-controversy requirement applies equally to all judicial proceedings, including criminal prosecutions.

ARGUMENT

I. PLEA BARGAINING PLAYS AN OUTSIZED ROLE IN OUR LEGAL SYSTEM AND SHOULD BE SCRUTINIZED ACCORDINGLY.

If this Court had to pick just one thing to get right, it would not be the Bankruptcy Code, or intellectual property, or administrative law, or even the First Amendment—it would be plea bargaining. There are myriad reasons for this, including that plea bargaining is an ad hoc, extra-constitutional procedure that was unknown at the founding, involves untold amounts of coercion,[2] regularly produces false convictions,[3] and almost entirely displaces ordinary citizens from their constitutionally appointed role as the arbiters of who should be punished by the state and who should not.[4]

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[2] *See, e.g.*, H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2012); Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 736-38 (2020) (documenting perceptions of coercion by judges and other system actors).

[3] *See, e.g.*, Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. OF BOOKS (Nov. 20, 2014).

[4] *See, e.g.*, Aliza P. Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 884 (2019) (explaining that "[t]he jury is the centerpiece of the constitutional regulation of criminal punishment" and is "both an individual right of the accused and a structural institution of popular self-governance . . . described by some as a 'fourth branch' of government.").

But perhaps the most essential reason plea bargaining merits this Court's most exacting scrutiny is the sheer magnitude of the role it plays in our society. According to the FBI, there were roughly six million arrests in 2022, excluding traffic offenses.[5] Nearly 80 million Americans have a criminal record resulting from arrest or conviction,[6] about 19 million have a felony conviction,[7] and roughly 5.5 million were under supervision of adult correctional systems in 2020.[8] In short, tens of millions of people have contact with America's criminal justice system.

The vast majority of criminal convictions in America are obtained through guilty pleas. The U.S Sentencing Commission reports that 98.3 percent of federal convictions were obtained through guilty pleas in 2021.[9] State figures are variable and less precise, but a fair estimate is that 94 percent of non-federal convictions come from guilty pleas.[10] The American Bar Association's Plea Bargaining Task Force reports that "in the last decade, states like New York,

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[5] FBI CRIME DATA EXPLORER, ARREST OFFENSE COUNTS IN THE UNITED STATES, available at https://bit.ly/41qusrx (last visited Dec. 18, 2023).

[6] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), available at https://bit.ly/3Rwvg9P.

[7] *Id*.

[8] BUREAU OF JUST. STAT., TOTAL CORRECTIONAL POPULATION (May 11, 2021), available at https://bit.ly/41pZwrn.

[9] U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56, available at https://bit.ly/482XLmq.

[10] *See, e.g.*, Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), available at https://bit.ly/3GUQNDT.

Pennsylvania and Texas have all had trial rates of less than 3%" and "[s]ome jurisdictions in the country report not having had a criminal trial in years."[11] In short, as this Court has recognized, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

Notably, the amount of attention plea bargaining receives from this Court is inversely proportional to the magnitude of its role in the criminal justice system. Since 2017, the Court has heard just two cases involving challenges to some aspect of the plea process,[12] whereas it has heard more than eleven cases involving criminal trial rights such as the right to confront witnesses at trial,[13] the requirement of jury unanimity,[14] and the defendant's right to control trial strategy.[15] And of the 53 cases set for argument so far this term, five involve criminal-trial issues and zero involve plea bargaining issues.[16] Criminal jury trials are certainly important, as evidenced in part by the

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[11] AM. BAR ASS'N, 2023 PLEA BARGAIN TASK FORCE REPORT 36 n.2, available at https://bit.ly/487QEcn.

[12] *Garza v. Idaho*, 139 S. Ct. 738 (2019); *Class v. United States*, 583 U.S. 174 (2018).

[13] *Hemphill v. New York*, 142 S. Ct. 681 (2022); *Samia v. United States*, 143 S. Ct. 2004 (2023).

[14] *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

[15] *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

[16] *McElrath v. Georgia*, No. 22-721 (double jeopardy); *Smith v. Arizona*, No. 22-899 (confrontation); *Thornell v. Jones*, No. 22-982 (evidence); *Diaz v. United States*, No. 23-14 (expert testimony); *Erlinger v. United States*, No. 23-370 (jury requirement).

fact that the Bill of Rights devotes more words to that subject than any other. But from a purely practical standpoint, the institution of plea bargaining dwarfs trials and thus merits an amount of judicial attention—including from this Court—commensurate with the colossal role that it now plays in the machinery of American criminal justice.

II. PUBLIC CONCERNS ABOUT THE MISUSE OF CRIMINAL LAW CAN AND SHOULD BE ASSUAGED BY SCRUPULOUS ATTENTION TO DUE PROCESS.

America is experiencing a time of nearly unprecedented political polarization at the same time that public confidence in institutions—including the federal government—has dropped to historic lows.[17] Of particular concern is the growing perception that the criminal justice system has become a tool of partisan politics and a way for government officials, candidates, and others to thwart the aspirations of their opponents and deliver payback to perceived enemies.

Against that backdrop it is particularly important for courts to ensure that the process by which criminal convictions are obtained is transparent, fair, and faithful to the Constitution. Needless to say, a legal regime that enables the government to induce people to plead guilty for engaging in conduct that turns out to be lawful, and then prevents them from obtaining

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[17] Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), available at https://bit.ly/489dMra; *Public Trust in Government*: 1958-2023, PEW RSCH. CTR. (Sept. 19, 2023), available at https://bit.ly/4akWCIx.

appellate review of the ensuing conviction, would scarcely engender public confidence or support—particularly in a politically charged and high-profile prosecution.

Over the last five years, Americans have seen unprecedented prosecutions of high-profile politicians, officials, and their families. The fraught partisan nature of these cases has increased Americans' skepticism of the courts and prosecutors. And heavy partisanship has produced strong disparities in public opinion about the allegations of criminal misconduct related to public officials.[18]

In our nation's entire history, no president or former president has ever been charged with a crime, let alone prosecuted for one; but there are now multiple criminal and civil proceedings against the preceding president and members of his staff. Former President Trump faces 91 felony charges in courts of different jurisdictions; two of those cases were brought before elected prosecutors who are both members of the opposing political party.[19] Unsurprisingly Americans' perceptions regarding the substance of those prosecutions and possible motivations for initiating them reflects the strongly partisan environment of the times. Recent Ipsos polling shows that eight in ten Republican respondents say the

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18 Linley Sanders & Jonathan J. Cooper, *Americans are split along party lines over Trump's actions in federal and Georgia election cases, AP-NORC poll shows*, PBS (Aug. 16, 2023), available at https://to.pbs.org/48q1Fpm.

19 Politico Staff, *Tracking the Trump criminal cases*, POLITICO, available at https://politi.co/3GTOPne (last modified Dec. 6, 2023, 10:25 AM).

charges are "politically motivated," while only 16 percent of Democrat respondents say the same.[20]

The upshot is, people have become increasingly skeptical of the justice system, especially when it pursues cases against politically prominent (and polarizing) figures. For instance, after district attorney Fani Willis announced she was bringing criminal racketeering charges against President Trump and eighteen other defendants in Georgia, for example, U.S. Representative Jim Jordan launched an investigation into the substance and motivation of the prosecution. That investigation, in turn, was characterized by some of being itself politically motivated.[21]

The pending prosecutions of President Biden's son have likewise engendered controversy. In December 2023, Hunter Biden was charged with multiple counts of federal tax fraud, in addition to the gun-related charges he was already facing.[22] Americans' opinions of that prosecution are highly partisan, with 87 percent of Republican respondents supporting the

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[20] Chris Jackson et al., *American Division on Trump Indictment Deepens*, IPSOS (Apr. 9, 2023), available at https://bit.ly/4auD7x1.

[21] Richard Fausset & Danny Hakim, *Georgia Prosecutor Sharply Rebukes House Republican Investigating Her*, N.Y. TIMES (Sept. 7, 2023), available at https://bit.ly/4aGIERx.

[22] Glenn Thrush & Michael S. Schmidt, *Hunter Biden Charged with Evading Taxes on Millions from Foreign Firms*, N.Y. TIMES (Dec. 7, 2023), available at https://nyti.ms/3GTYnP6.

indictment, compared with only 42 percent of Democrats.[23]

Plea bargaining has and will continue to play a central role in at least some of these cases, and can be abused both to favor or punish political actors. Hunter Biden's proposed plea deal from an earlier stage of the proceedings, which would have given him immunity for "any other federal crimes relating to matters investigated by the United States" in return for pleading guilty to tax charges, fell apart after a judge asked basic questions about its implications.[24] Some have also questioned whether prosecutors are strategically over-charging Trump staffers to secure plea deals and cooperation, which they can use to bolster their efforts against more prominent defendants, including President Trump himself.[25]

As plea bargaining gets more public attention, and perceptions of high-profile criminal cases remain relentlessly partisan, it is crucial that courts adopt rules that guarantee a process that will stand up to public scrutiny. Upholding appeal waivers even when a supervening decision from this Court clarifies that the defendant committed no crime is difficult to square with people's intuitive perceptions of due process and

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[23] Taylor Orth, Carl Bialik, & Kathy Frankovic, *Hunter Biden's indictment gets more support than the impeachment inquiry into Joe Biden*, YOUGOV (Sept. 31, 2023), available at https://bit.ly/3GMCUaO.

[24] Michael S. Schmidt, Luke Broadwater & Glenn Thrush, *Inside the Collapse of Hunter Biden's Plea Deal*, N.Y. TIMES (Aug. 19, 2023), available at https://nyti.ms/475yTZK.

[25] Andrew C. McCarthy, *Jenna Ellis Guilty Plea Underscores the Absurdity of DA Fani Willis's RICO Case*, NAT'L REV. (Oct. 24, 2023), available at https://bit.ly/41qlCKl.

will only deepen public cynicism about the justice system's susceptibility to misuse.

III. THE COURT SHOULD CLARIFY THAT THE CONSTITUTION'S CASE-OR CONTROVERSY REQUIREMENT APPLIES EQUALLY TO CIVIL AND CRIMINAL MATTERS.

The Ninth Circuit's opinion rejecting Petitioner's appeal contains the extraordinary observation that Petitioner "was fully informed that his admitted conduct *might not constitute a crime*." Pet. App. 3a. (emphasis added). But if the conduct at issue *in fact* did not constitute a crime—which Petitioner plausibly contends that a supervening decision of this Court confirms—then another way to express that same point is that the government was fully aware that the district court might not have jurisdiction over this prosecution, because *where no crime has been committed there can be no case or controversy*.

"As this Court has explained, no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (cleaned up). Instead of computer crimes, imagine the government had charged Petitioner with air piracy for hijacking Santa's sleigh in flight; or with extortion for demanding protection money from the Easter Bunny; or conspiring with a Sasquatch to manufacture and distribute the drug Soma, from Aldous Huxley's *Brave New World*. If Petitioner were somehow induced to plead guilty to any of those crimes, the voluntariness or involuntariness of that plea would be beside the

point because the courts have no jurisdiction over factually baseless lawsuits—even where the defendant "has been informed" that the Easter Bunny (or Sasquatch or Santa) might not exist.

The government was aware of this potential defect when it proposed the guilty plea and sought to cure it through waiver by the Petitioner. But courts are independently obliged to determine whether subject-matter jurisdiction exists at all stages of the proceeding, and any jurisdictional defects must be addressed on appeal. *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). When a trial court acts without jurisdiction, its subsequent actions are void. *See, e.g., Steel Valley Auth. v. Union Switch & Signal Div., Am. Standard, Inc.*, 809 F.2d 1006, 1010 (3d Cir. 1987). Thus, "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

If, as Petitioner contends, the information failed to allege a federal crime, the district court lacked jurisdiction over this matter, and was without power to accept a guilty plea, enter a conviction, or pass sentence.

CONCLUSION

Because "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned," *In re Winship*, 397 U.S. 358, 364 (1970)—and because that admonition has seldom been more salient than it is in these turbulent, polarized times—the petition should be granted so this Court can clarify

that inherently defective appeal waivers cannot shield invalid guilty pleas from appellate review.

Respectfully Submitted,

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