No. 23-1022

In the Supreme Court of the United States

NANCY MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE CATO INSTITUTE, THE WILSON CENTER FOR SCIENCE AND JUSTICE, THE HOWARD & DEBBIE JONAS FOUNDATION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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 Wilson Center for Science and Justice is a nonpartisan research and policy center at Duke University School of Law that works to advance criminal justice and equity through science and law. The Cetner includes legal scholars, who teach, write and research about constitutional criminal procedure, criminal law, and evidence, as well as research scientists, and policy analysts. They share a common view that plea bargaining should be carefully documented, studied, and it should be conducted in a constitutional, equitable, and fair manner. Further, the Center studies wrongful convictions and seeks to minimize errors in criminal cases. The lack of remedy on appeal for a guilty plea at issue in this case centrally implicates the Center's concern that serious miscarriages of justice can and do occur in cases in which persons plead guilty.

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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 *amici* funded its preparation or submission.

The Howard & Debbie Jonas Foundation is dedicated to advancing principles of democracy, justice, and fairness, as well as providing support to the needy in America and Israel. The foundation believes that every individual deserves the right to a fair trial and that justice should not be compromised through threats, coercion, or intimidation.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL's members, who practice in the criminal courts around the country have extensive experience with plea negotiations and a keen interest in the scope of waivers contained in those agreements.

This case interests *amici* 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 in the Bill of Rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[P]lea bargaining," this Court announced in 1971, "is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971). In the intervening half century, the federal courts have encouraged plea bargaining, but they have not ensured its proper administration. Among other things, some courts have permitted the government to convict people for engaging in lawful conduct while shielding those defective convictions from appellate review. This case presents an opportunity for the Court to correct that maladministration.

Besides the acknowledged circuit split that ensures appellate review of potentially defective pleas in some parts of the country but not others, Pet. Br. 7–14, there are three reasons why the petition should be granted. First, because plea bargaining so dominates the criminal justice system, it is especially important to resolve the uncertainty surrounding the legal status of appeal waivers in plea agreements. Second, waivers of the sort in this case—a waiver that precludes appellate review of convictions for conduct that is not criminal—are unenforceable under traditional contract-law principles that apply to plea bargaining. Finally, because of the circumstances under which they arise, plea agreements and appeal waivers must be construed narrowly against the government.

ARGUMENT

I. IT IS IMPERATIVE TO CLARIFY THE SCOPE AND VALIDITY OF APPEAL WAIVERS GIVEN THE PREVALENCE OF PLEA BARGAINING.

Plea bargaining is a central part of the criminal justice process. 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 are obtained through guilty pleas.[2] State figures are variable and less precise, but a fair estimate is that 97 percent of non-federal convictions come from guilty pleas.[3] The American Bar Association's Plea Bargaining Task Force reports that "in the last decade, states like New York, 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."[4] In short, and as this Court has recognized, "criminal justice today is for the most part a system of

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

[3] *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 510 (2004) (reporting a decrease in the rate of criminal trials from 8.5% in 1976 to 3.3% in 2002); John Gramlich, *Only 2% of federal criminal defendants went to trial in 2018, and most who did were found guilty*, PEW RSCH. CTR., (June 11, 2019), https://bit.ly/3JbUlD4 ("[J]ury trials accounted for fewer than 3% of criminal dispositions in 22 jurisdictions with available data.").

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

pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

Because "plea bargains have become so central to the administration of justice," *Missouri v. Frye*, 566 U.S. 134, 143 (2012), it is imperative to resolve questions about their permissible scope and validity. But since 2017, the Court has heard just two cases involving challenges to some aspect of the plea process,[5] whereas it has heard more than eleven cases involving criminal-trial rights[6]—including cases clarifying the right to confront witnesses at trial,[7] the right to jury unanimity,[8] and the defendant's right to maintain innocence.[9] And of the 63 cases set for argument this term, six involve criminal-trial issues and zero involve plea bargaining issues.[10] Consequently, many critical questions relating to plea bargaining remain unresolved.

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

[6] Criminal jury trials are certainly important, as evidenced in part by the fact that the Bill of Rights devotes more words to that subject than any other. But, as this Court has acknowledged, "In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 U.S. at 144.

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

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

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

[10] *McElrath v. Georgia*, 144 S. Ct. 651 (2024) (double jeopardy); *Smith v. Arizona*, No. 22-899 (confrontation); *Thornell v. Jones*, No. 22-982 (evidence); *Glossip v. Oklahoma*, No. 22-7466 (*Brady* issue); *Diaz v. United States*, No. 23-14 (expert testimony); *Erlinger v. United States*, No. 23-370 (jury requirement).

One pressing question requiring this Court's attention is whether an appeal waiver bars a defendant from pursuing a claim that her plea rested on an inadequate factual basis. Appeal waivers are common provisions demanded by the government. A 2014 study of federal plea agreements found that "the majority of [standard district court plea] agreements" preclude all appellate and habeas petitions (even in cases where the prosecutor violates a statutory or constitutional prohibition, such as the right to discovery under Rule 16, or the right to *Brady* evidence of actual innocence under the Due Process Clause)."[11] There is also reason to believe that appeal waivers are becoming more prevalent.[12] These waivers preclude defendants from challenging their convictions based on any error, including errors that occur after they enter into their plea agreements and errors that result in the conviction of innocent defendants.

Appeal waivers do not simply affect the individual defendants who agree to their terms. They also have structural effects. They affect the development of law on appeal and thus create "an incomplete picture" of criminal justice issues that can mislead Congress and

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[11] Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 87 (2014).

[12] *See United States v. Townsend*, No. 19-20840, 2021 WL 777191, at *1 (E.D. Mich. Mar. 1, 2021), *rev'd In re United States*, 32 F.4th 584 (6th Cir. 2022) ("In the summer of last year, . . . the United States Attorney adopted a policy that radically altered customary local practice by requiring as a condition of all plea agreements under Federal Rule of Criminal Procedure 11(c) that every defendant waive all rights to appeal any aspect of the proceedings and forfeit most post-conviction rights.").

other institutions charged with setting America's penal policy.[13]

Appeal waivers also allow prosecutors and other government actors to insulate their own abuses during plea negotiations from judicial oversight. Past prosecutorial abuses to secure a plea include threatening to indict family members on unrelated charges,[14] requiring defendants to waive their right to ineffective assistance of counsel in plea bargaining,[15] and prohibiting defendants from seeking any information about their case under the Freedom of Information Act.[16]

Without an opportunity for appellate review, some prosecutorial plea-bargaining tactics may remain hidden—even from a prosecutor's supervising attorneys. For example, until quite recently, some

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[13] Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 251 (2005).

[14] *See, e.g.*, *United States v. McElhaney*, 469 F.3d 382, 384 (5th Cir. 2006) (refusing to vacate guilty plea of defendant who "contended that he had pleaded under duress, because the government had threatened his wife with prosecution for unrelated tax issues if he did not plead guilty" because "there is no 'intrinsic constitutional infirmity' in promising leniency to a third party in exchange for a guilty plea") (quoting *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979)).

[15] *See* Klein et al., *supra*, at 88 (documenting such waivers). The Department of Justice has since instructed federal prosecutors not to seek such waivers, while simultaneously insisting that such a waiver "is both legal and ethical." Memorandum of James Cole, Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), https://www.justice.gov/file/70111/download.

[16] *See, e.g.*, *Price v. U.S. Dep't of Just. Att'y Off.*, 865 F.3d 676 (D.C. Cir. 2017).

federal prosecutors were requiring defendants to waive their right to compassionate release as part of plea negotiations. Attorney General Merrick Garland found out about these waivers only when National Public Radio ran a story about them. His office subsequently issued a memorandum forbidding compassionate-release waivers.[17] Who knows how long the practice would have continued if not for the media attention it received?

II. A WAIVER OF THE RIGHT TO APPEAL THE FACTUAL BASIS OF A GUILTY PLEA IS UNENFORCEABLE UNDER THE DOCTRINES OF MUTUAL MISTAKE AND UNCONSCIONABILITY.

This Court has observed that "plea bargains are essentially contracts."[18] Consequently, ordinary principles of contract law guide determinations regarding the validity and enforceability of appeal waivers.[19] Two separate contract principles—mutual mistake and unconscionability—render the appeal waiver in this case unenforceable.

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[17] Carrie Johnson, *Justice Department ends limiting compassionate release in plea deals after NPR story*, NAT'L PUB. RADIO (Mar. 11, 2022), https://bit.ly/3vUjvmu.

[18] *Puckett v. United States*, 556 U.S. 129, 137 (2009).

[19] *United States v. Yooho Weon*, 722 F.3d 583, 588 (4th Cir. 2013) ("In determining whether an appellate waiver provision bars consideration of the issues raised in a particular appeal, we interpret the terms of the parties' plea agreement in accordance with traditional principles of contract law."); *United States v. Ortiz-Garcia*, 665 F.3d 279, 283 (1st Cir. 2011) ("To determine whether a defendant's claim falls within the scope of an otherwise valid waiver, we examine what the parties agreed to, interpreting the agreement under basic contract principles.").

The petitioner avers that she pleaded guilty to engaging in conduct that does not satisfy the elements of the charged crime. In refusing to allow her to appeal, the Tenth Circuit has, in effect, declared that an appeal waiver is enforceable against a criminal defendant even if no crime occurred. That conclusion is at odds with two traditional contract principles.

First, an appeal waiver in a plea agreement for non-criminal conduct is unenforceable under the doctrine of mutual mistake. A mutual mistake exists when "both parties share a common assumption about a vital existing fact on which they based their bargain and that assumption is false."[20] Here, the parties were mistaken about whether the facts alleged in the indictment and recounted at the plea colloquy satisfied the elements of the crime of conviction. There can be little doubt that whether the petitioner's conduct was actually illegal is a "basic assumption on which both parties made the contract."[21] If the petitioner's conduct did not satisfy the elements of the offense, the government never would have charged her,[22] and the petitioner never would have pleaded guilty and (purportedly) waived her appellate rights.[23]

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[20] JOSEPH M. PERILLO, CONTRACTS 328 § 9.26 (7th ed. 2014).

[21] 27 WILLISTON ON CONTRACTS § 70:12 (4th ed.).

[22] Indeed, it would have been professional misconduct for the prosecutor to bring such charges. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N) ("The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

[23] *See* Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 765 (2005) ("[I]t seems counterintuitive that the

Second, an appeal waiver in a plea agreement for non-criminal conduct is unenforceable under the traditional rule of unconscionability. Courts "have often refused to enforce some agreements when, in their sound discretion, the agreements have been deemed unconscionable."[24] There is little doubt that enforcing a plea agreement's appeal waiver against a legally innocent defendant is unconscionable.[25] Convicting a person who has not committed a crime offends the most basic notions of fairness and due process.[26] Agreeing to subject oneself to a criminal conviction—especially a conviction carrying a substantial term of imprisonment—is an agreement "'such as no man in his senses and not under delusion

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defendant could possibly have understood and given assent to a bargain that gave him no benefit whatsoever, especially because he contended innocence from the beginning. The case is a windfall for the prosecution.").

[24] 8 WILLISTON ON CONTRACTS § 18:1 (4th ed.).

[25] *See* Teeter, *supra*, at 765 (contending that a defendant who pleaded guilty despite his innocence could "successfully argue for relief under pure contracts law by showing that the agreement was unconscionable because of the penumbra of ignorance coupled with a harsh result.").

[26] In the context of criminal trials, these basic notions of fairness and due process are protected through the presumption of innocence and the requirement of proof beyond a reasonable doubt. *See, e.g.*, *In re Winship*, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. . . . The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'") (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

would make on the one hand, and as no honest and fair man would accept on the other.'"[27]

III. PLEA AGREEMENTS MUST BE NARROWLY CONSTRUED AGAINST THE GOVERNMENT.

As this Court has noted, the analogy between plea bargains and contracts "may not hold in all respects."[28] Indeed, plea agreements differ from ordinary contracts because they require the exercise of judicial power and because market forces cannot ensure fair terms. Consequently, federal courts routinely construe plea agreements, including any appeal waivers, narrowly against the prosecution.[29]

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[27] *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 155 (1750)).

[28] *Garza*, 139 S. Ct. at 744.

[29] *See, e.g.*, *Yooho Weon*, 722 F.3d at 588 ("Because appellate waiver provisions usually are drafted by the government, and because such provisions implicate a defendant's constitutional rights, we hold the government to a greater degree of responsibility for any ambiguities than the defendant, or even than the drafter of a provision of a commercial contract. Accordingly, we will enforce an appellate waiver provision against a defendant only if that provision is clearly and unambiguously applicable to the issues raised by the defendant on appeal.") (internal quotation marks and citations omitted); *United States v. v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014) ("In determining whether a waiver applies, this court employs ordinary principles of contract interpretation, construing waivers narrowly and against the Government."); *United States v. Chavez-Salais*, 337 F.3d 1170, 1173 (10th Cir. 2003) ("Like most waivers, a defendant's waiver of his right to appeal or collaterally attack his sentence is to be construed narrowly."); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) ("Plea agreements will be strictly construed and any ambiguities in

A plea bargain is more than a mere commercial transaction. Plea agreements also affect core public interests, which is why they require more than simply a meeting of the minds between the parties. A plea agreement requires an act of judicial power—namely, the entry of a judgment of conviction.[30] It is because plea agreements require an exercise of judicial power that judges retain the authority to reject them.[31] Indeed, because they possess the authority to reject plea bargains, some judges impose independent conditions that must be met before they will accept a plea agreement.[32]

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these agreements will be read against the Government and in favor of a defendant's appellate rights."); *United States v. Tang*, 214 F.3d 365, 368 (2d Cir. 2000) ("[S]pecifically in the context of claimed waivers of appellate rights . . . plea agreements are to be applied 'narrowly' and construed 'strictly against the Government.'") (quoting *United States v. Ready*, 82 F.3d 551, 556, 559 (2d Cir. 1996)).

[30] *See* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 720 (2018) (identifying "the ability 'to render dispositive judgments'" as one of three features of "what constitutes the judicial power") (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)).

[31] *See, e.g.*, FED. R. CRIM. P. 11(c)(3); *see also United States v. Aigbekaen*, No. CR JKB-15-0462, 2022 WL 3106949, at *20 (D. Md. Aug. 3, 2022) (describing the court's "general practice" of refusing to accept plea agreements that select a particular sentence or that agree a certain sentencing guideline does or does not apply).

[32] *See, e.g.*, Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE·NOVO 138, 141 (2016) (describing a standing order in every criminal case which "*sua sponte*, directs the government to produce to defendant in a timely manner—including during the plea bargaining stage—any evidence in its

The judicial power being exercised—the imposition of a judgment of conviction—is one of the greatest and most dangerous powers belonging to government actors. The Founders recognized the threat that this power posed to liberty. They sought to restrain that power by dividing government between three separate branches.[33] And they imposed further restrictions on the power by recognizing multiple individual rights for criminal defendants. Indeed, the Bill of Rights devotes more words to the subject of criminal adjudication than any other, ensuing that criminal defendants receive multiple procedural protections at trial.

By their nature, plea bargains do not provide criminal defendants with the procedural protections that trials afford. That is why, unlike the execution of an ordinary contract, the entry of a guilty plea pursuant to a plea agreement "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969). Narrowly construing plea agreements is consistent with this approach.

The economics of plea bargaining also counsel in favor of narrow construction. The fairness of contracts between private parties is ensured, in part, through

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possession that is favorable to defendant and material either to defendant's guilt or punishment"); Carissa Byrne Hessick, *Judges and Mass Incarceration*, 31 WM. & MARY BILL RTS. J. 461, 472 n.55 (2022) (describing a similar routine order from another federal district judge).

[33] THE FEDERALIST NO. 47 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.").

the operation of market forces. If a price is too high, for example, a party can seek to purchase a good or a service from another vendor. But plea bargaining is not subject to market forces. There is no "market" for plea bargains. The prosecutor has a monopoly, and thus she may set the "price" in the plea agreement. The defendant cannot approach another prosecutor to obtain a better deal; she must either accept the prosecutor's offer or reject it and proceed to trial.

Not only do prosecutors have a monopoly over the "price" in the plea agreement, but they also create the market for criminal punishment by bringing criminal charges against the defendant in the first place. A defendant cannot opt out of this market. She may only decide whether to accept the price proposed in the plea offer or risk the higher price of criminal punishment by proceeding to trial.

Besides setting the "price" for the plea agreement, the prosecutor often has significant control over the alternative "price" of a trial through the selection of charges and the stacking of multiple counts.[34] Prosecutors' control over the "price" of a plea agreement allows them to set a price that no rational defendant would refuse—even an innocent one.[35] Imagine, for example, a defendant is facing a ten-year sentence if convicted at trial, and the parties agree that there is a 50% chance of conviction. If the

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[34] *See generally* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015)

[35] *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. OF BOOKS (Nov. 20, 2014), https://bit.ly/3KC6EHa ("[A] defendant's decision to plead guilty to a crime he did not commit may represent a 'rational,' if cynical, cost-benefit analysis of his situation.").

prosecutor offers the defendant a plea agreement with a two-year sentence, the defendant would be irrational—in the literal sense of that word—to reject such an agreement because the expected punishment in that situation is 5 years (due to there being a fifty percent chance at a 10-year sentence).[36] Indeed, one defendant who rejected a plea bargain in such a situation was subject to multiple competency evaluations because the prosecutor, defense attorney, and judge all thought he must be crazy to reject the plea bargain and proceed to trial.[37] "[T]here is [even] some evidence that the pressure of the situation may cause an innocent defendant to make a less-than-rational appraisal of his chances for acquittal and thus decide to plead guilty when he not only is actually innocent but also could be proven so."[38]

In sum, plea bargains are not merely a contract; they are also an invocation of the judicial power to enter judgment. And unlike ordinary contracts, market forces do not operate as a constraint on bargaining. Consequently, plea bargains, including any appeal waivers, should be narrowly construed against the government.

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. at 364, the

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[36] CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 37 (2021) (explaining the economics of expected punishments and plea bargains).

[37] *See United States v. Tigano*, 888 F.3d 602 (2d Cir. 2018).

[38] Rakoff, *supra*.

petition should be granted. This Court should clarify that inherently defective appeal waivers cannot shield invalid guilty pleas from appellate review.

Respectfully Submitted,

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