No. 21-___

IN THE

Supreme Court of the United States

JAMAR E. PLUNKETT,

Petitioner,

v.

DAN SPROUL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plea agreement that is subject to more than one reasonable interpretation must be interpreted in the defendant's favor.

RELATED PROCEEDINGS

United States v. Plunkett, No. 13-cr-30003, U.S. District Court for the Southern District of Illinois. Judgment entered Jan. 24, 2014.

Plunkett v. United States, No. 15-cv-81, U.S. District Court for the Southern District of Illinois. Judgment entered June 16, 2017; order denying motion to alter or amend judgment entered Mar. 4, 2019.

Plunkett v. True, No. 19-cv-655, U.S. District Court for the Southern District of Illinois. Judgment entered Sept. 19, 2019; order denying motion to reconsider judgment entered June 22, 2020.

Plunkett v. Sproul, No. 20-2461, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Oct. 20, 2021; order denying petition for rehearing en banc entered Feb. 8, 2022.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is Jamar E. Plunkett.

Respondent is Dan Sproul.

There are no publicly held corporations involved in this proceeding.

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INTRODUCTION

Ten years ago, this Court recognized that "criminal justice" had become "for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). That is even more true today, with 98.3% of federal defendants—an all-time high—having pleaded guilty in 2021. *See* U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2021*, at 8 (Apr. 2022), https://tinyurl.com/5n6k68vb ("*Federal Criminal Cases FY 2021*"). The rise in guilty pleas has brought with it a rise in disputes about the interpretation of plea agreements. The terms of those agreements are "critically important"—to the prosecutors who draft them, to the judges who enforce them, and to the defendants who must live by them. *Class v. United States*, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting). And in a system where defendants have virtually no bargaining power to begin with, uncertainty regarding how an agreement will be interpreted breeds arbitrary and unfair results.

The federal courts of appeals have long applied a familiar contract rule—*contra proferentem*—when interpreting plea agreements. "[B]ased on . . . equitable considerations about the parties' relative bargaining strength," the *contra proferentem* rule provides that "ambiguity in a contract should be construed against the drafter." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019); *see Wooden v. United States*, 142 S. Ct. 1063, 1086 n.6 (2022) (Gorsuch, J., concurring in the judgment) ("[D]octrines like . . . *contra proferentem* have played an essential role in our law for centuries, resolving ambiguities where they persist.").

A plea agreement, however, is "no . . . ordinary contract." *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996) (quoting *United States v. Herrera*, 928 F.2d 769, 773 (6th Cir. 1991)). It is a document that effects a waiver of a defendant's constitutional rights, and so implicates "concerns that differ fundamentally from and run wider than those of commercial contract law." *Id.* (citation omitted). Moreover, the government "ordinarily has certain awesome advantages in bargaining power" as compared to the defendant. *Id.* at 559. Those critical distinctions thus counsel in favor of "temper[ing] the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards." *United States v. Lutchman*, 910 F.3d 33, 37 (2d Cir. 2018) (citation omitted). Rules like *contra proferentem*, accordingly, have special force in the context of plea agreements.

In the decision below, the Seventh Circuit paid lip service to *contra proferentem* but never actually applied the rule. The key interpretive question was whether the word "charges" in Petitioner Jamar Plunkett's plea agreement encompasses a sentence enhancement contained in the government's "Information Charging Prior Offenses," which allowed the government to enhance Plunkett's sentence if it proved the fact of his prior offense beyond a reasonable doubt. The Seventh Circuit acknowledged that Plunkett's interpretation—that the sentence enhancement *is* a charge—is "not entirely without merit." Pet.App.11a. Yet it failed to invoke the *contra proferentem* rule, instead adopting the government's interpretation of the word "charges."

If this case had arisen in most other courts of appeals, however, Plunkett likely would have prevailed under the *contra proferentem* rule. For example, the Fifth Circuit has applied that rule where a plea agreement "may reasonably be interpreted" in a defendant's favor—notwithstanding that "it may be possible to arrive at a contrary reasonable interpretation." *United States v. Escobedo*, 757 F.3d 229, 234 (5th Cir. 2014). The Third Circuit has relied on *contra proferentem* where an agreement is "capable of two reasonable interpretations." *United States v. Gebbie*, 294 F.3d 540, 551 (3d Cir. 2002). And the Eighth Circuit has likewise used the rule to decide among multiple reasonable interpretations. *See United States v. Sarchett*, 3 F.4th 1115, 1119 (8th Cir. 2021) ("Typically, when courts construe an ambiguous plea agreement such as this one, they construe the ambiguities against the government. We do so here." (citation omitted)). Although the Seventh Circuit purported to apply the same *contra proferentem* rule these courts applied, therefore, their decisions conflict with respect to when that rule kicks in.

In the absence of concrete guidance from this Court about how the *contra proferentem* rule applies to plea agreements, the applicability of the rule hinges on how deeply a particular court examines an alleged ambiguity. In the decision below, the Seventh Circuit declined to apply the rule because—after exhausting all available interpretive tools—it found the government's interpretation more reasonable than Plunkett's. But in other courts, the rule applies so long as the defendant's interpretation is at least reasonable (as Plunkett's undoubtedly is).

The Court should resolve that confusion now. Every day, federal courts must adjudicate disputes over the meaning of plea agreements. With over 50,000 new plea agreements signed by federal defendants every year, this issue is not going away. And this case is the right vehicle for the Court to resolve it. The interpretive dispute in this case turns on a discrete and undisputed factual record—11 pages total between the plea agreement and Information Charging Prior Offenses. And because even the Seventh Circuit acknowledged the plausibility of Plunkett's interpretation, reversal is clearly warranted under a proper application of the *contra proferentem* rule. The petition should be granted.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 16 F.4th 248 and reproduced in Appendix A. The district court's June 22, 2020, memorandum and order denying reconsideration is not reported but is available at 2020 WL 3413001 and reproduced in Appendix B. The district court's September 19, 2020, memorandum and order dismissing Petitioner's habeas petition is not reported but is available at 2019 WL 4535119 and reproduced in Appendix C.

JURISDICTION

The Seventh Circuit entered judgment dismissing petitioner's appeal on October 20, 2021, App.A, and denied Petitioner's timely petition for rehearing en banc on February 8, 2022, App.D. On April 26, 2022, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including June 8, 2022. No. 21A645 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(b)(1)(C) provides as follows:

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall,

in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 851(a), (c)(1) provides as follows:

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable

period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

* * *

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the

> burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

STATEMENT

1. In 2013, a grand jury indicted Petitioner Jamar Plunkett for a single drug offense in violation of 21 U.S.C. § 841. Pet.App.2a. For that offense alone, Plunkett faced up to 20 years' imprisonment followed by a minimum of three years' supervised release. 21 U.S.C. § 841(b)(1)(C). If, however, Plunkett were deemed to have committed the offense "after a prior conviction for a felony drug offense has become final," he would face up to 30 years' imprisonment followed by a minimum of six years' supervised release. *Id.* Plunkett originally pleaded not guilty. Pet.App.2a.

Following Plunkett's not-guilty plea, the government filed an "Information Charging Prior Offenses" under 21 U.S.C. § 851. Pet.App.45a–46a. The information charged that Plunkett had a 2008 Illinois conviction that qualified as "a prior conviction for a felony drug offense [that] has become final." *Id.*; 21 U.S.C. § 841(b)(1)(C). As a result, the government filed the information "to subject [Plunkett] to the enhanced penalty provisions of . . . Section 841(b)(1)(C)"—that is, a statutory maximum of 30 years' imprisonment and a statutory minimum of six years' supervised release—"upon his conviction on the Indictment in this case." Pet.App.46a.

With the increased statutory maximum on the table, Plunkett revisited his plea decision. He ultimately signed—and the district court accepted—a guilty plea. Pet.App.2a–3a. Based on his criminal

history, including his 2008 Illinois drug offense, the plea agreement identified him as a career offender, reiterated the statutory maximum of 30 years' imprisonment, and set his advisory range under the Sentencing Guidelines at 188-to-235 months' imprisonment. Pet.App.4a–7a, 37a–40a. The government agreed to recommend a sentence at the low end of that range. Pet.App.2a.

As part of his plea agreement, Plunkett waived, with limited exceptions, "his right to contest any aspect of his conviction and sentence." Pet.App.9a. The agreement provided, however, that the "waiver of his right to appeal or bring collateral challenges" "shall not apply to . . . any subsequent change in the interpretation of the law by the United States Supreme Court or the United States Court of Appeals for the Seventh Circuit that is declared retroactive by those Courts and that renders [Plunkett] actually innocent of the charges covered herein." Pet.App.9a, 42a.

At Plunkett's change-of-plea hearing, the district court "informed Plunkett multiple times that he faced a statutory maximum sentence of thirty years' imprisonment." Pet.App.3a. Indeed, the district court went so far as to tell Plunkett, "Convince me I shouldn't just put you away for 30 years[.]" Transcript of Disposition at 10, *United States v. Plunkett*, No. 13-cr-30003 (S.D. Ill. Apr. 7, 2016), ECF No. 54. At the end of the hearing, the district court rejected the government's recommendation, sentencing Plunkett to 212 months' imprisonment and six years' supervised release. Pet.App.3a.

2. Plunkett initially did not appeal his conviction or sentence. But he subsequently filed a pro se motion under 28 U.S.C. § 2255, arguing that he had received ineffective assistance of counsel "because his lawyer did not correctly calculate his Guidelines sentencing range and did not appeal his sentence." Pet.App.4a. The district court denied the motion, citing Plunkett's "waiver of his appellate and collateral-attack rights," and denied Plunkett's motion for reconsideration. *Id.*

3. In 2019, Plunkett filed the 28 U.S.C. § 2241 petition at issue in this case. In that petition, he argued that this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016)—which the Seventh Circuit held retroactive in *United States v. Elder*, 900 F.3d 491 (7th Cir. 2018)—establishes that his 2008 Illinois drug offense does not qualify as a "felony drug offense" for purposes of his sentence enhancement. Pet.App.6a. And without that statutory enhancement, Plunkett's advisory Guidelines range would have been 140 to 175 months. Pet.App.6a n.1.

The district court denied Plunkett's petition on preliminary review. In so doing, it construed Plunkett's challenge as a claim that his Guidelines range was erroneously calculated, which is not cognizable on collateral review under Seventh Circuit precedent. Pet.App.16a–17a. On Plunkett's motion for reconsideration, the district court acknowledged that Plunkett's challenge went to the erroneous calculation of his *statutory* maximum (which had the collateral effect of inflating his Guidelines range). Pet.App.18a. But the district court emphasized that Plunkett's sentence "was well within" even the 20-year maximum, and dismissed his petition on that basis. *Id.* The district court never addressed whether

Plunkett was entitled file his challenge in the first place in light of the waiver of appellate and collateral-attack rights contained in his plea agreement.

4. The Seventh Circuit dismissed Plunkett's appeal, relying exclusively on that purported waiver. The question, as the Seventh Circuit saw it, came down to the waiver's carve-out, which provided that the waiver "shall not apply to . . . any subsequent change in the interpretation of the law by the United States Supreme Court or the United States Court of Appeals for the Seventh Circuit that is declared retroactive by those Courts and that renders [Plunkett] actually innocent of the charges covered herein." Pet.App.9a, 42a. The Seventh Circuit noted that the government "d[id] not dispute that Plunkett challenges his sentence based on intervening statutory decisions from the Supreme Court and this Court that apply retroactively." Pet.App.9a. So, "[t]he determinative issue, therefore, [was] the meaning of the phrase 'actually innocent of the charges covered herein.'" Pet.App.10a.

The parties' positions on that question were straightforward. The government argued that the phrase "charges covered herein" "refers only to the underlying offense"—that is, the single drug offense—"to which Plunkett pleaded guilty in the agreement." *Id.* On that view, Plunkett's challenge would not fall within the carve-out, "because he would remain guilty—that is, *not* actually innocent—of his federal drug offense, regardless of whether he prevails on his challenge to his sentence." *Id.* Plunkett, by contrast, argued that "charges covered herein" included the recidivist sentence enhancement that the government charged in the Information Charging Prior Offenses.

Id. On that view, Plunkett did not waive his challenge, because *Mathis* and *Elder* rendered him "actually innocent" of the enhancement.

The Seventh Circuit acknowledged that it must "construe any ambiguities in the light most favorable to [Plunkett]." Pet.App.8a. (citation omitted). Nevertheless, it endorsed the government's interpretation of the waiver. Citing *Black's Law Dictionary*, the court reasoned that a "charge" is "a formal accusation of an offense as a preliminary step to prosecution"—and that "implies a connection to an offense, which would exclude a sentencing enhancement and which is in accord with common usage of the term." Pet.App.10a–11a. With that interpretation in mind, the Seventh Circuit concluded that "[t]he only 'charge[] covered [t]herein' is the charge for the [single drug offense]." *Id.* (alterations in original).

The Seventh Circuit acknowledged—and credited as "not entirely without merit"—Plunkett's reliance on the fact that the government's Information *Charging* Prior Offenses itself shows that the sentence enhancement was a charge. Pet.App.11a. But the Seventh Circuit rejected that argument because, in the court's view, the information "has no operative effect other than to provide the sentencing court with information relevant to its sentencing decision." *Id.* "It does not add a charge to the indictment, nor does it indicate that the government will seek to prosecute Plunkett for any additional offense." *Id.* In addition, the Seventh Circuit noted that another provision of the plea agreement refers to "additional charges *or* sentencing enhancement notices." Pet.App.12a. (emphasis added). Thus, the

Seventh Circuit reasoned, the plea agreement "recognizes charges and sentencing enhancements as distinct." Pet.App.11a. "[T]his appeal," it therefore held, "falls squarely into the category of appeals that Plunkett has waived his right to bring." Pet.App.12a.

5. The Seventh Circuit subsequently denied Plunkett's timely petition for rehearing en banc. App.D.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT ERRED IN FAILING TO APPLY THE *CONTRA PROFERENTEM* RULE.

The Seventh Circuit was wrong to interpret the phrase "charges covered herein" in Plunkett's plea agreement to exclude the sentence enhancement with which he was charged. The government has never disputed that Plunkett's sentence enhancement is "covered" by the plea agreement. So, the only question is whether that enhancement constitutes a "charge." In light of the *contra proferentem* rule, the answer to that question has to be "yes." Plunkett's interpretation of "charge" is consistent with the plain text of the plea agreement, the Department of Justice's longstanding view of charges under § 851, and this Court's own understanding of recidivism charges. Because Plunkett's interpretation is at least reasonable, the *contra proferentem* rule requires that it carry the day. The Seventh Circuit's contrary ruling rests on a number of interpretative errors and cannot be squared with the *contra proferentem* rule.

A. The plain text of the plea agreement—together with the Department of Justice's practice and this Court's precedent—illustrates that Plunkett's

interpretation of "charge" to encompass his sentence enhancement is, at the very least, reasonable.

1. Start with the plain text in question. The plea agreement refers to "charges covered herein." Pet.App.42a. Importantly, it says "charges" (*plural*), not "the charge" (*singular*). "[C]harge," in turn, is ordinarily defined as "[a] formal accusation of an offense as a preliminary step to prosecution," *i.e.*, a "criminal proceeding" where the defendant's guilt must be "proved beyond a reasonable doubt." *Charge*, Black's Law Dictionary (11th ed. 2019); *Prosecution*, Black's Law Dictionary, *supra*; *Reasonable Doubt*, Black's Law Dictionary, *supra*. Accordingly, "[t]he most natural reading," *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019), of the phrase "charges covered herein" is that it refers to multiple formal accusations covered in the plea agreement.

Consistent with that language, the plea agreement covers two charges. It begins with one undisputed charge: Plunkett's federal criminal indictment for his drug offense. Pet.App.34a–35a. The plea agreement then goes on to identify a second charge: that Plunkett's prior Illinois drug conviction "qualifie[d] as a prior conviction for a felony drug offense . . . under 21 U.S.C. § 841" and, as a result, exposed Plunkett to an enhanced "maximum term of 30 years' imprisonment." Pet.App.38a That natural understanding of Plunkett's sentence enhancement gives full effect to the plea agreement's reference to multiple "charges."

2. If there were any doubt that Plunkett's sentence enhancement qualifies as a "charge," the government's invocation of the enhancement by way

of an Information *Charging* Prior Offenses, Information at 2, should eliminate it. The title of that document confirms that the enhancement-related allegations it contains constitute a "charge." And the government's use of the word "charging" was no accident or anomaly. To the contrary, the government has used the same language in myriad other cases wherein it "charged" defendants across the country with prior offenses.[1]

Characterizing enhancement-related allegations as "charges," moreover, is consistent with the broader statutory scheme. Under § 851, a defendant convicted of certain federal drug offenses cannot be "sentenced to increased punishment" based on his prior convictions "*unless* . . . the United States attorney files an information . . . stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1) (emphasis added). An "information," in turn, is "[a] formal criminal *charge* made by a prosecutor without

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[1] *See, e.g.*, *United States v. Hicks*, No. 07-83, 2022 WL 1460330, at *1 (E.D. Pa. May 9, 2022); *Nelson v. United States*, No. 19-cv-3110, 2022 WL 315022, at *1 (C.D. Ill. Feb. 2, 2022); *United States v. Napper*, Nos. 17-00219-5, 18-00070, 20-1394, 20-1410, 2021 WL 3270086, at *2 (W.D. Pa. July 30, 2021); *United States v. Reyes*, No. 11cr1, 2021 WL 2154714, at *2 n.2 (D. Conn. May 26, 2021); *United States v. Quinn*, No. 10-20129-02-KHV, 2021 WL 1854192, at *3 (D. Kan. May 10, 2021); *Rodriguez v. Hudgins*, No. 20-CV-215, 2020 WL 8484852, at *1 (N.D. W. Va. Nov. 17, 2020); *United States v. Pierre*, 372 F. Supp. 3d 17, 20 (D.R.I. 2019); *Avila-Hernandez v. United States*, Nos. 16-3501-CV-S-BP, 13-03054-04-CR-S-BP, 2017 WL 11509775, at *1 (W.D. Mo. May 5, 2017); *see also United States v. Jackson*, 121 F.3d 316, 318 (7th Cir. 1997); *United States v. Craveiro*, 907 F.2d 260, 261 (1st Cir. 1990); *United States v. Gregg*, 803 F.2d 568, 569 (10th Cir. 1986) (all referencing criminal defendants "charged" with prior offenses).

a grand-jury indictment." *Information*, Black's Law Dictionary, *supra* (emphasis added); *see also* Fed. R. Crim. P. 7(c)(1) (an information contains a "*charge[]*" (emphasis added)). And if the criminal defendant challenges an information, then § 851 requires the court to hold a hearing at which the government "shall have the burden of proof *beyond a reasonable doubt* on any issue of fact." 21 U.S.C. § 851(c)(1) (emphasis added). In other words, an Information Charging Prior Offenses under § 851 is a formal accusation alleging the fact of a prior offense that the government must then prove beyond a reasonable doubt—*i.e.*, a "charge." *See supra* at 14.

Indeed, the Department of Justice has said exactly that in the course of issuing policies related to charging recidivist enhancements. Most notably, in 2013, Attorney General Eric Holder issued a memorandum on the heels of this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). The subject line of that memorandum? "Department Policy on *Charging* Mandatory Minimum Sentences and *Recidivist Enhancements in Certain Drug Cases*." Mem. from the Att'y Gen. to U.S. Att'ys & Assistant Att'y Gen. for the Crim. Div. on Dep't Pol'y on Charging Mandatory Minimum Sentences & Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), https://tinyurl.com/ztat29m9 (emphasis added). The following year, Attorney General Eric Holder issued another memorandum, this time targeting § 851 enhancements specifically. Mem. from the Att'y Gen. to Dep't of Just. Att'ys on Guidance Regarding § 851 Enhancements In Plea Negotiations (Sept. 24, 2014), https://tinyurl.com/5y5nkszj. The 2014 memorandum referred back to

the 2013 memorandum's "specific guidance for charg[ed] . . . recidivist enhancements in drug cases." *Id.* And it admonished prosecutors regarding "the charging policy" for § 851 enhancements. *Id.*

3. If all this were not enough to establish the reasonableness of Plunkett's interpretation, this Court has itself effectively acknowledged that a recidivist sentence enhancement is a charge. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court confronted a statute that—similar to § 841(b)(1)(C)—increased the statutory maximum for certain crimes where a defendant had previously been convicted of certain aggravated felonies. The question the Court confronted was whether the fact of a prior conviction must be charged in an indictment and sent to the jury. *See id.* at 239.

A divided Court said "no," but all nine Justices recognized that a charge under a recidivism statute is, in fact, a charge. The majority noted that "a *charge* under a recidivism statute does not state a separate offense, but goes to punishment only." *Id.* at 244 (emphasis added) (citation and alteration omitted). For their part, the dissenting Justices resisted the idea that a prior conviction "*charged* in an 'information'" need not go to the jury, but they agreed that the early precedents cited by the majority stood for that proposition "since the recidivism *charge* goes to the punishment only." *Id.* at 258–59 (Scalia, J., dissenting) (emphases added) (quotation marks omitted). So, notwithstanding their disagreement about whether the fact of a prior conviction must appear in the indictment and go to the jury, all nine Justices characterized a sentence enhancement under a recidivism statute as a "charge."

In sum, the plain text of Plunkett's plea agreement, the government's own characterizations of sentence enhancements, and the opinions in *Almendarez-Torres* all suggest that Plunkett's sentence enhancement is one of two "charges covered" in his plea agreement. Because that phrase is at least ambiguous—and Plunkett's interpretation at least reasonable—the *contra proferentem* rule required interpreting it in Plunkett's favor and allowing his challenge to proceed.

B. The Seventh Circuit, however, reached the opposite conclusion through a series of interpretive errors and by effectively disregarding the *contra proferentem* rule.

First, although the Seventh Circuit cited the same *Black's Law Dictionary* definition of "charge" cited above, it opined that that definition "*implies* a connection to an offense." Pet.App.11a. That implication, it continued, "would exclude a sentencing enhancement and . . . is in accord with common usage of the term." *Id.* Consistent with that offense-based interpretation of "charge," the court held that "[t]he only 'charge[] covered" by Plunkett's plea agreement "is the [federal drug] charge." *Id.*

The Seventh Circuit took implication too far and effectively rewrote the plea agreement by deleting the "s" in "charges" to make that term singular. Only by rewriting "charges covered herein" as "the charge covered herein" does the Seventh Circuit's conclusion—that there is only one charge covered in the plea agreement—follow. Tinkering with the text in that way violates Contract Interpretation 101. *See, e.g.*, *Gilliam v. Nev. Power Co.*, 488 F.3d 1189, 1195

(9th Cir. 2007) ("[I]t is a familiar principle of contract law that unless a contract is voidable, we 'must enforce it as drafted by the parties, according to the terms employed, and may not make a new contract for the parties or rewrite their contract while purporting to interpret or construe it.'" (quoting 11 Williston on Contracts § 31:5, at 299 (4th ed. 1999)).

Second, the Seventh Circuit downplayed the significance of the government's Information Charging Prior Offenses. According to the Seventh Circuit, that document had "no operative effect" other than to "merely" "provide the sentencing court with information relevant to its sentencing decision." Pet.App.11a. "It [did] not add a charge to the indictment," the Seventh Circuit continued, "nor [did] it indicate that the government will seek to prosecute Plunkett for any additional offense." *Id.* So, in the court's view, the government's own use of charging language in invoking Plunkett's prior offense made no difference.

That reasoning fundamentally misunderstands a § 851 charge. An information—a term of art in criminal law—is not merely informational. As described above, the Information Charging Prior Offenses the government filed in this case was the statutory prerequisite to subjecting Plunkett to a sentence enhancement. Without it (followed by proof beyond a reasonable doubt), his sentence could not lawfully have been enhanced. Contrary to the Seventh Circuit's suggestion, therefore, the Information Charging Prior Offenses had *critical* "operative effect" leading up to the plea agreement. That filing was the only reason the government was able to threaten an enhanced statutory maximum,

and the only reason the district court was able to say "Convince me I shouldn't just put you away for 30 years." Transcript of Disposition at 10, *Plunkett*, *supra*.

It does not matter that, as the Seventh Circuit observed, the Information Charging Prior Offenses "does not add a charge *to the indictment*." Pet.App.11a (emphasis added). As this Court held in *Almendarez-Torres*, the government is not "require[d] . . . to charge . . . an earlier conviction[] in the indictment." 523 U.S. at 226–27. But that in no way suggests that the Information Charging Prior Offenses does not itself contain a charge. Nor does it matter that the Information Charging Prior Offenses "does [not] indicate that the government will seek to prosecute Plunkett for any additional offense." Pet.App.11a. The Seventh Circuit was, of course, correct that "[a] charge under a recidivism statute does not state a separate offense"—it "goes to punishment only." *Almendarez-Torres*, 523 U.S. at 244 (citation omitted). But that distinction does not make the charge any less of a charge.

Third, the Seventh Circuit reasoned that Plunkett's interpretation of "charge" to encompass the sentence enhancement is belied by another provision in the plea agreement that treats "charges and sentencing enhancements as distinct." Pet.App.11a. That provision states that, under certain conditions, "the Government is not bound by the provisions herein and may request that the Court impose on [Plunkett] any penalty allowable by law, including the filing of additional charges or sentencing enhancement notices . . . ." Pet.App.34a. Implicit in the Seventh Circuit's reasoning is that treating the

sentence enhancement as a charge would render the term "sentencing enhancement notices" in that provision redundant.

But "[r]edundancy is not a silver bullet." *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). In particular, "[r]edundancy in one portion of a [text] is not a license to rewrite or eviscerate another portion of the [text] contrary to its [terms]." *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020); *see Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute."). Yet, that is exactly what the Seventh Circuit did. It treated the "distinct concepts" in one provision ("additional charges or sentencing enhancement notices") as a license to rewrite language in another provision ("the charges covered herein"). The ordinary rules of textual interpretation do permit that wholesale rewriting of the plea agreement.

That is especially true in light of the *contra proferentem* rule, which requires courts to resolve ambiguity in plea agreements against the government. As even the Seventh Circuit effectively acknowledged, Plunkett's interpretation of "charge" is, at the very least, reasonable. Pet.App.11a. (recognizing that Plunkett's "argument is not entirely without merit"). And faced with two reasonable interpretations of an ambiguous term, the *contra proferentem* rule should control. For that reason, the Seventh Circuit's decision is wrong and requires reversal.

II. THE SEVENTH CIRCUIT'S APPLICATION OF THE *CONTRA PROFERENTEM* RULE CONFLICTS WITH OTHER CIRCUITS' DECISIONS.

The courts of appeals all claim to apply the same *contra proferentem* rule. *See, e.g.*, *Gebbie*, 294 F.3d at 552 ("[W]e, and numerous other courts of appeals, construe ambiguities in plea agreements against the Government." (collecting cases)); *United States v. Moreno-Membache*, 995 F.3d 249, 254 (D.C. Cir. 2021) ("Consistent with constitutional principles and the settled rule that contracts are construed against their drafters, we construe any ambiguities in the plea agreement against the government."); *United States v. Warren*, 8 F.4th 444, 448 (6th Cir. 2021) ("[W]e construe ambiguities against the government."). But the courts of appeals differ with respect to *how* that rule applies. In most circuits, a defendant need only establish that his interpretation of an ambiguous provision is a reasonable one in order to prevail under the *contra proferentem* rule. In the Seventh Circuit, however, that rule apparently applies (if at all) only when ambiguity remains after all other conceivable interpretative means have been exhausted. Because Plunkett likely would have prevailed in the other circuits, this conflict warrants this Court's review.

A. The case law is replete with examples of cases in which courts of appeals have applied the *contra proferentem* rule early in the interpretive process to favor the defendant's reasonable interpretation of an ambiguous plea agreement.

In *United States v. Sarchett*, 3 F.4th 1115, for example, the defendant pleaded guilty to a drug offense. A key fact at sentencing was whether he

resided at his girlfriend's house and was thus responsible for drug paraphernalia recovered there. *Id.* at 1118–19. The district court held that the defendant had stipulated to residing at his girlfriend's house, because the plea agreement stated that "police officers went to 'his girlfriend's residence' and that, upon arriving at the residence, they met with the girlfriend, 'who *also* lived at the residence.'" *Id.* at 1119 (emphasis added).

The Eighth Circuit relied on the *contra proferentem* rule and reversed. The district court, the Eighth Circuit reasoned, "apparently interpreted the agreement as saying that [the defendant] lived in the girlfriend's residence." *Id.* "[B]ut we think the presence of the word 'also' when describing the police's encounter with the girlfriend at the girlfriend's home is too roundabout a way of saying that." *Id.* The word "also" *could* have been intended to suggest that the defendant "lived there too." *Id.* Alternatively, however, the word could have meant that "a third person lived there," it could have suggested "merely . . . an additional fact about [the] girlfriend," or it could have been "inserted inadvertently." *Id.* In all events, the Eighth Circuit emphasized that courts must "construe the ambiguities [in a plea agreement] against the government." *Id.* So the defendant's interpretation carried the day.

The Fifth Circuit put the *contra proferentem* rule to similar use in *United States v. Escobedo*, 757 F.3d 229. There, the criminal defendant had signed a plea agreement that "waive[d] the provisions of Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence." *Id.* at 233. But the Fifth Circuit found that the waiver provision was

"ambiguous as to whether [the defendant] intended to waive his Rule 410(a) and 11(f) rights contemporaneously with his signing of the plea agreement, or, instead, intended to waive them only upon the district court's acceptance and activation of his guilty plea." *Id.* That distinction mattered because the defendant had withdrawn his guilty plea after he signed it but before the district court accepted it, and the government thereafter relied on that waiver to introduce otherwise-barred evidence at trial. *Id.* at 230.

The Fifth Circuit found nothing in the plea agreement that "clearly and unambiguously" resolved the issue either way. *Id.* at 234. The agreement, the court reasoned, "may reasonably be interpreted" in the defendant's favor. *Id.* And although "it may be possible to arrive at a contrary reasonable interpretation of the plea agreement," *id.*, the *contra proferentem* rule controlled. "[B]ecause the agreement is ambiguous[,] it must be construed reasonably in [the defendant's] favor." *Id.*; *see id.* at 233 ("We construe a plea 'agreement like a contract, seeking to determine the defendant's reasonable understanding of the agreement and construing ambiguity against the government.'" (quotation marks omitted)).

Similarly, in *United States v. Gebbie*, 294 F.3d 540, the Third Circuit looked to the *contra proferentem* rule early on in the interpretive process. The ambiguity at issue in the *Gebbie* plea agreements was that two paragraphs "indicate[d] only [that] the U.S. Attorneys for the Southern and Northern Districts of Ohio [were] bound" by the agreements, while another paragraph "indicate[d] that all U.S.

Attorneys [were] bound." *Id.* at 551. That was enough for the Third Circuit to conclude that the agreements were "capable of two reasonable interpretations." *Id.* And after a brief paragraph on the unhelpful nature of the available extrinsic evidence, the Third Circuit turned to the *contra proferentem* rule: "Applying that principle, we will construe the ambiguity against the Government and hold that Paragraph 11 of [the] plea agreements" binds *all* U.S. Attorneys. *Id.* at 552.

The *contra proferentem* rule also controlled in *United States v. Zakharia*, 418 F. App'x 414 (6th Cir. 2011). There, the plea agreement waived the defendant's appeal rights so long as "the sentence imposed did not exceed the maximum allowed by Part 3"—and "Part 3 specifie[d] a maximum only for a custodial sentence and expressly state[d] that there is no agreement as to fines." *Id.* at 421. The question, accordingly, was whether the waiver applied to the defendant's appeal of the *fine* imposed.

The Sixth Circuit acknowledged that the government offered a "reasonable reading"—that the defendant "waived his right to appellate review so long as his sentence did not exceed one year in custody" as specified in Part 3. *Id.* But the court said that the defendant's "contrary interpretation"—that he did not agree to waive an appeal of the fine—was "equally viable." *Id.* Faced with two reasonable interpretations, the Sixth Circuit applied the *contra proferentem* rule and "g[a]ve the benefit of the doubt to [the defendant]." *Id.*

In these cases and others, courts of appeals other than the Seventh Circuit have required only apparent ambiguity—and two reasonable interpretations—

before turning to the *contra proferentem* rule to resolve the meaning of a plea agreement.

B. The contrast between those cases and this one is stark. Rather than make a quick initial decision about whether Plunkett's plea agreement is ambiguous, the Seventh Circuit parsed dictionary definitions; sought to distinguish the legal effect of the government's Information Charging Prior Offense under 21 U.S.C. § 851; and compared the provision at issue with other parts of the plea agreement.

Moreover, the Seventh Circuit's decision is notable for what it does not say: It never disagrees that Plunkett's plea agreement "may reasonably be interpreted" his way, *Escobedo*, 757 F.3d at 234, or that his interpretation is as "viable" as the government's, *Zakharia*, 418 F. App'x at 421—findings that triggered application of the *contra proferentem* rule in the cases detailed above. That is because nothing in the plea agreement forecloses Plunkett's interpretation. *See also United States v. De la Fuente*, 8 F.3d 1333, 1339 (9th Cir. 1993) (noting that the rule would apply where "each party's proffered interpretation is neither clearly supported by the language of the agreement nor 'necessarily inconsistent with it either'"). To the contrary, the plain meaning of the text and other basic interpretive methodologies support it. *See supra* at 13–18.

This case, accordingly, unfolded much differently in the Seventh Circuit than it would have in others. Consistent with the authority above, most courts would have taken a quick look at the plea agreement, identified Plunkett's interpretation as a reasonable

one, and ruled in Plunkett's favor under the *contra proferentem* rule.

And the Seventh Circuit's approach in this case is not an outlier in that Circuit. In *United States v. Malone*, 815 F.3d 367 (7th Cir. 2016), the court analyzed "[t]he plain language of the agreement," "other parts of the plea agreement," and even the agreement's "integration clause" to insist that—notwithstanding the *contra proferentem* rule—the agreement supported the government's interpretation. *Id.* at 370–71. And in an even more remarkable analysis spanning six pages, the Seventh Circuit in *United States v. Rourke*, 74 F.3d 802 (7th Cir. 1996), rejected a defendant's interpretation (that "government" covers all government agencies), even though "the AUSA's use of the term 'the government' at the plea hearing was not as specific as it might have been, thus ill-advised, and in a given circumstance, might well be interpreted to refer to and include each of the governmental agencies involved." *Id.* at 806.

In short, while the Seventh Circuit purports to apply the same rule as its sister circuits, the end results in similar cases look very different.

III. THIS ISSUE IS RECURRING AND IMPORTANT.

These divergent approaches to ambiguous plea agreements have tremendous consequences for defendants, prosecutors, and courts across the country.

Raw numbers illustrate the point. In fiscal year 2021, the overwhelming majority of federal defendants—98.3%—pleaded guilty. *See Federal Criminal Cases FY 2021*, *supra*, at 8; *Lafler*, 566 U.S. at 170 ("Ninety-seven percent of federal convictions

. . . are the result of guilty pleas."). That means that 57,631 defendants pleaded guilty in 2021 alone. U.S. Courts, *U.S District Courts – Judicial Business 2021*, https://tinyurl.com/funbt95w (last visited June 6, 2022). And although 2021 marked "an all-time high," guilty-plea rates have remained relatively "consistent for more than 20 years"—and have never fallen below 95.5% in that period. *Federal Criminal Cases FY 2021*, *supra*, at 8 & n.8. The reality, therefore, is that "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler*, 566 U.S. at 170; *see* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

Given the plea-based nature of our modern criminal justice system, "it is critically important that defendants, prosecutors, and judges understand the consequences of these pleas." *Class*, 138 S. Ct. at 807 (Alito, J., dissenting). In practice, however, the federal courts are inundated with disputes over claimed ambiguities in plea agreements. Indeed, a survey of recent federal court of appeals cases reveals a remarkable number of decisions confronting this exact problem. *See, e.g.*, *United States v. Estrada-Gonzalez*, 32 F.4th 607, 615 (6th Cir. 2022) ("Estrada-Gonzalez responds that we must interpret ambiguities in the plea agreement in his favor."); *United States v. Jackson*, 26 F.4th 994, 998 (D.C. Cir. 2022) ("Jackson argues that the plea agreement is ambiguous[.]"); *Sarchett*, 3 F.4th at 1119 (confronting a plea agreement's "too roundabout" language); *United States v. Cook*, No. 21-13739, 2022 WL

1515949, at *2 (11th Cir. May 13, 2022) ("Cook argues that the sentence-appeal waiver is ambiguous[.]"); *United States v. Collazo*, 856 F. App'x 380, 383 (3d Cir. 2021) ("He says his plea agreement is ambiguous[.]"). And in the myriad cases like these, courts must grapple with whether to apply the *contra proferentem* rule. *See, e.g.*, *Sarchett*, 3 F.4th at 1119.

The stakes, moreover, are exceptionally high. When a criminal defendant decides to plead guilty, he waives critical rights—including those protected by the Constitution. As this case demonstrates, that sometimes means waiving the right to appeal even where there is no dispute that an error occurred. *See supra* at 11; *see also, e.g.*, *United States v. March*, 336 F. App'x 218, 218 (3d Cir. 2009) ("Despite error in the Rule 11 colloquy, we will enforce the appellate waiver and affirm the judgment of sentence."). In such cases, properly interpreting the scope of an appellate waiver can quite literally spell the difference between incarceration and freedom.

That is why "the analogy [to ordinary contracts] may not hold in all respects." *Puckett v. United States*, 556 U.S. 129, 137 (2009). "[T]he defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law." *Ready*, 82 F.3d at 558 (citation omitted); *see also Lutchman*, 910 F.3d at 37 (reasoning that courts must "temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards" (citation omitted)). And relatedly, the bargaining-power motivations behind the *contra proferentem* rule are particularly salient in

the plea context, where the government "ordinarily has certain awesome advantages in bargaining power." *Ready*, 82 F.3d at 559; *see also United States v. Davenport*, 775 F.3d 605, 609 (3d Cir. 2015) (highlighting "the government's 'tremendous bargaining power' in negotiating such plea agreements"); *De la Fuente*, 8 F.3d at 1338 ("Construing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise.").

In addition to making good sense as a background principle of contract interpretation, therefore, a robust *contra proferentem* rule is particularly warranted in the plea context. The government has every opportunity to ensure that a plea agreement is unambiguous and thereby avoid this issue in the first place. But if the government fails to draft an agreement clearly, the defendant must receive the benefit of the doubt. *See, e.g.*, *De la Fuente*, 8 F.3d at 1338 ("[T]he government 'ordinarily must bear responsibility for any lack of clarity.'").

IV. THIS IS AN IDEAL VEHICLE FOR THE COURT TO CLARIFY THE APPLICATION OF THE *CONTRA PROFERENTEM* RULE TO PLEA AGREEMENTS.

This case presents an excellent opportunity for the Court to finally address the *contra proferentem* rule in the plea-agreement context.

First, the case turns on a discrete and undisputed factual record. The key facts are contained in 11 pages total, which include both the plea agreement and Information Charging Prior Offenses. There is no relevant extrinsic evidence. And there are no factual disputes that might interfere with this Court's ability

to lay out the proper analytical framework for applying the *contra proferentem* rule to plea agreements.

Second, Plunkett will prevail under any conceivable "ambiguity trigger" for the *contra proferentem* rule. *Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring). His interpretation of the term "charges" is plainly reasonable. *See supra* Section I. So, if the Court "temper[s]" the ordinary rule to account for the plea context's unique features, *Lutchman*, 910 F.3d at 37 (citation omitted), no further interpretive analysis is required to rule in his favor. And even if the Court were to hold that courts must "exhaust[] the tools of [textual] interpretation" before resorting to the *contra proferentem* rule, *Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring), Plunkett's interpretation would still carry the day over the government's, which would require rewriting the plea agreement, *see supra* Section I. Either way, the Seventh Circuit's decision is wrong, and reversal is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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