No. 14-1306

IN THE

Supreme Court of the United States

CHRISTOPHER ERWIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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The Government does not dispute that in the vast majority of circuits, when a court of appeals concludes that a criminal appeal is barred by an appeal waiver, it enforces the plea agreement by dismissing the appeal. The Third Circuit, in contrast, held in this case that the Government may obtain vacatur of the judgment and a remand to allow the Government to ask for a higher sentence, even though the Government did not, and legally could not, file a cross-appeal. The Government acknowledges that the special statute governing criminal appeals did not authorize that relief. But it nonetheless claims that prosecutors may contract around that omission through terms of plea agreements, thereby conferring jurisdiction on the courts of appeals to modify judgments under circumstances and for reasons other than those set forth in the sentencing appeal statute. BIO 21-22. The brief in opposition thus confirms how starkly the Third Circuit has departed from established rules for criminal appeals and from the practices in other circuits, thereby demonstrating the need for this Court's review.

I. The Decision Below Contravenes Established Cross-Appeal Principles And The Statute Congress Enacted To Govern Criminal Appeals.

The Government's defense of the decision below is as radical and unfounded and the decision itself.

A. The Government May Not Seek Vacatur Of A Criminal Judgment Without Taking A Cross-Appeal.

The Government does not dispute that the only reason the Third Circuit vacated the judgment in this case, rather than simply dismiss the appeal, was to allow the Government to seek a higher sentence on remand.[1] The United States nonetheless insists that the line-level prosecutors who sought this relief were required neither to file a cross-appeal nor to obtain permission from the Attorney General or the Solicitor General's office. But its reasons for that conclusion do not withstand scrutiny.

1. First, the Government says that prosecutors need only cross-appeal when they seek modification of a criminal judgment on the ground that the original sentence was erroneous at the time it was entered. BIO 17. In this case, it says, the breach of the plea agreement took place after sentencing, so "there was no error in the judgment to correct," *id.*, and the Government therefore "did not 'attack the decree' of the district court," *id.* 18 n.2 (quoting *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015)).

The Government's characterization is wrong – it *did* attack the decree of the district court, arguing that the judgment was incorrect because it failed to punish petitioner for taking this appeal. But in any event, the cross-appeal rule does not turn on the

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[1] The Solicitor General has wisely abandoned any pretense that the vacatur and remand was for the benefit of anyone other than the Government. *See* BIO 17-19; Pet. 21-22.

reasons the Government gives for seeking modification of a judgment; instead, a cross-appeal is required whenever an appellee asks the court to modify in its favor, rather than affirm, the judgment. This Court has thus explained that without a cross-appeal, "an appellate court may not *alter* a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (emphasis added); *see also, e.g.*, 15A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3904 (2d ed. West 2015) (a cross-appeal is required by "any party who wishes to argue for *alteration* of the judgment" or "*modification* of the judgment" (emphases added)); *Nw. Airlines, Inc. v. Cty. of Kent*, 510 U.S. 355, 364 (1994) ("A cross-petition is required . . . when the respondent seeks to *alter* the judgment below." (emphasis added)). Which means that a party who does not cross-appeal "is bound by the decree in the court below," and cannot be heard "except in support of the decree from which the appeal of the other party is taken." *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191-92 (1937) (quoting *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40-41 (1871)).

Accordingly, an "appellee who does not take a cross-appeal may 'urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court.'" *Jennings*, 135 S. Ct. at 798 (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)). But, conversely, the Government must take a cross-appeal whenever it seeks modification, rather than affirmance, of a judgment, even if it does so for reasons that do not impugn the correctness of the district court's

decision. *See, e.g.*, *Morley Constr. Co.*, 300 U.S. at 191-92. For example, having failed to take a cross-appeal, the Government could not ask for a remand for resentencing on the ground that prosecutors forgot to ask for an applicable enhancement, even though such a request would not assert any error on the part of the district court.

The Government suggests that an exception to the usual rules is warranted because the grounds for an enhanced sentence here did not arise in time for it to file a cross-appeal. BIO 17. Even if courts (rather than Congress) were empowered to modify the cross-appeal rules in response to such difficulties, there is no practical impediment here: the alleged breach occurred when petitioner filed his notice of appeal (which is what he promised not to do, *see* Pet. App. 17a-18a & n.5), at which point the Government had thirty additional days to file a cross-appeal. *See* Fed. R. App. P. 4(b)(1)(B)(ii). If prosecutors thought that the appeal might fall within the manifest injustice exception, they could have filed a protective notice of appeal, waited to see petitioner's opening brief, and then withdrawn the cross-appeal if they believed the exception had been satisfied.[2]

2. The Government separately claims that a cross-appeal is not required so long as the court of appeals does not *direct* the district court to increase

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[2] Of course, as discussed below, the Government would face the additional problem that Congress has not authorized prosecutors to take a cross-appeal to seek enhanced punishment for violation of a plea agreement, but that just shows that the Third Circuit's decision is doubly flawed.

the sentence. BIO 18-19. Again, this is obviously wrong.

As explained, in the absence of a cross-appeal an appellee may not request modification or alteration of the judgment. Vacating the judgment and remanding for resentencing is an alteration of the judgment, regardless of how much freedom the district court has to act on remand. Otherwise, line-level prosecutors with no cross-appeal authorization would always be free ask for a remand for de novo resentencing on any ground, including because the sentencing court erred or because prosecutors forgot to ask for an enhancement, changed their minds about supporting a downward departure, or just wanted to put on additional evidence to support a higher sentence. Indeed, the Government does not deny that its rule would have permitted prosecutors in *Greenlaw* to ask the court of appeals to vacate the sentence for de novo resentencing, at which point the Government would have pointed out the statutory minimum, which the district court almost certainly would have respected. But this Court rightly noted in *Greenlaw* that there "was no occasion for the Court of Appeals to *vacate* [Greenlaw's] sentence" *or* to "order the addition of 15 years to his sentence" in the absence of a cross-appeal. 554 U.S. at 254 (emphasis added).

B. There Is No Statutory Basis For Vacating A Final Criminal Judgment To Allow The Government To Seek Its Enhancement On Remand.

The Government openly acknowledges that nothing in the detailed statute governing criminal

appeals authorized it to file a cross-appeal or permitted the court of appeals to vacate and remand the judgment in this case. BIO 19-23. One would think that would be the beginning of a confession of error. Instead, the Government makes the remarkable claim that courts of appeals have broad discretion under 28 U.S.C. § 2106 to develop a parallel regime for entertaining Government requests to modify criminal judgments for reasons Congress omitted from the sentencing appeal statute. BIO 20-22.

The Government ignores that "the United States has no right of appeal in a criminal case, absent explicit statutory authority." *United States v. Scott*, 437 U.S. 82, 84-85 (1978). The only explicit statutory authorization for a Government request to modify a criminal sentence is the specific sentencing appeal statute. The Government's only answer is to say that plea for vacatur and remand did not amount to a cross-appeal. BIO 22. But, as discussed, any request to modify a judgment by an appellee is *by definition* a cross-appeal.

C. The Government's Arguments Fundamentally Disregard The Purposes Of The Cross-Appeal Rule And The Governing Statute.

At base, the Government's arguments fundamentally misconceive the purpose of the cross-appeal requirement and the statute governing criminal appeals.

The cross-appeal requirement "is not there to penalize parties who fail to assert their rights, but is meant to protect institutional interests in the orderly

functioning of the judicial system." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 481-82 (1999). The rule "advance[s] the interests of the parties and the legal system in fair notice and finality," including by providing the appealing defendant "fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence." *Greenlaw*, 554 U.S. at 252-53. The Government offers no explanation why such notice is any less important when the Government seeks modification of a criminal judgment on the basis of an alleged violation of an appeal waiver, rather than a sentencing error.

Moreover, in the sentencing appeal statute, Congress "entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed." *Id.* at 246. As the Government itself has explained to this Court, "a remand for resentencing is not cost free" to the Government or the courts. U.S. *Greenlaw* Br. 43. Requiring high-level approval of cross-appeals is intended "to ensure that the government has made a considered decision to draw upon [those] resources." *Id.* 19. In this case, the prosecutors imposed upon the judicial system precisely the costs Congress was concerned about by obtaining a remand for resentencing, without obtaining higher-level review.

At the end of the day, the sentencing appeal statute simply does not authorize the Government to ask for an increased sentence in response to the violation of an appeal waiver in a plea agreement. The Government offers various reasons why it

should. BIO 10-13. Those reasons are unconvincing. *See* Pet. 27-30. They are also beside the point because this Court has been clear that if "there is a serious need for appeals by the Government" in contravention of the existing rules, "it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." *Carroll v. United States*, 354 U.S. 394, 407 (1957).

II. The Decision Below Exacerbates A Circuit Conflict On A Question Of Recurring Importance.

The Government nonetheless claims that any error below should be allowed to persist because there is no genuine circuit conflict and because the question presented is not recurring or important. BIO 7-10. It is, again, wrong on all counts.

1. The Government claims that there is no circuit conflict because "[n]o court has held, contrary to the decision below, that dismissing the appeal is the sole remedy available to the government." BIO 8. That is not right and would not be a reason to deny certiorari even if it were.

Multiple courts of appeals have directly addressed the question of what a court should do when the Government claims that an appeal is barred by a waiver, and they have provided a single remedy: dismissal. For example, in *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam), the Tenth Circuit sitting en banc considered at length "how we should resolve appeals brought by defendants who have waived their appellate rights in a plea agreement." *Id.* at 1324. The court developed

a test for enforceability of appeal waivers and "a new intra-Court procedure" for resolving waiver allegations. *Id.* at 1325. The new procedure required the Government to file a "Motion for Enforcement of the Plea Agreement," which would stay briefing in the case until a panel considered the motion. *Id.* at 1328. The motion, and the defendants' response, are limited to addressing "the three-prong enforcement analysis" for deciding whether appeal waivers are enforceable. *Id.* That necessarily precludes briefing the additional question whether the breach exposes the defendant to further punishment and whether the panel should, as "an appropriate exercise of the court's discretion," BIO 12, remand for resentencing. The court further held that if "the panel finds that the plea agreement is enforceable, *it will summarily dismiss the appeal*." *Hahn*, 359 F.3d at 1328 (emphasis added). The Government may think that the Tenth Circuit did not mean what it said, and that something other than dismissal may be permitted. But the fact that Tenth Circuit panels have uniformly applied the rule as written proves otherwise. *See also, e.g.*, *United States v. Buchanan*, 131 F.3d 1005, 1008-09 (11th Cir. 1997) (per curiam) (establishing special regime for dismissal of waived appeals).

In any event, the Government does not deny that the vast majority of circuits *in fact* provide only the remedy of dismissal. That disparity in actual practice provides a compelling need for this Court's intervention. After all, the point of resolving circuit conflicts is to ensure consistency in real world practice, not to attain some intellectually satisfying doctrinal uniformity. The Government's suggestion

that every other circuit will eventually adopt the remand remedy, and thereby restore national uniformity, is utterly implausible. First, to the extent some circuits have not directly rejected the remand sanction, it is because federal prosecutors in those circuits have not asked them to consider it. And, critically, the Government makes no pretense that it *will* ask them to do so in the future. Instead, the Solicitor General seems content to leave this entire area up to individual U.S. Attorney offices. Second, even setting that aside, there is no reasonable prospect that every other circuit would eventually embrace the Third and Seventh Circuits' position because, as discussed, it so plainly flies in the face of this Court's settled cross-appeal decisions and the design of the sentencing appeal statute.

2. The Government does not dispute that the existing disparate treatment of waived appeals is unfair and contrary to congressional design. Instead, it simply claims that the arbitrariness is unimportant because it will arise infrequently. BIO 9. That claim is unfounded.

First, the Third Circuit made clear that it intends its new remedy to replace the previously "ordinary" response to waived appeals, BIO 8 (quoting Pet. App. 14a), in order to create a deterrent to what it perceives as a persistent, recurring problem. *See* Pet. App. 26a n.10, 32a. That the Government has been cautious in seeking that relief while this petition has been pending is unsurprising and uninformative. There is every reason to predict that Government will change its tune if this petition is denied, particularly now that the Solicitor General has publicly blessed the procedure.

But even if additional prison time for breach of appeal waivers is meted out with the freakish inconsistency the Government predicts, the mere possibility of such sanction will affect the appeals calculus for hundreds, if not thousands, of defendants every year for the foreseeable future. *See* Pet. 17-18.

The Government attempts to diminish that prospect by claiming that defendants can contract around the problem in their plea deals. BIO 9. For this, the Government cites a single plea deal under which there is no breach if a court decides that the appeal involved an "issue that a reasonable judge may conclude is permitted" by the agreement or the miscarriage of justice exception. *Id.* (quoting BIO App. 5a). But even if the Government were willing to agree to such language in all plea agreements – which it notably does *not* promise – this proviso offers little protection. Presumably, a judge who finds that an appeal is waived will also find that a reasonable judge (*e.g.*, herself) could *not* find any issue in the case permitted by the agreement or the miscarriage of justice exception. That the Government trumpets such vague and meager protection as a solution only serves to demonstrate its unwillingness to loosen its grip on this potent weapon for deterring criminal appeals.[3]

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[3] The Government also includes its usual makeweight objection that the case is interlocutory. BIO 7. But this Court regularly grants certiorari to decide questions regarding appellate jurisdiction on an interlocutory basis. *See, e.g.*, *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015); *Koon v. United States*, 518 U.S. 81, 90-91 (1996); *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 40-41 (1995); *United States v. Ruiz*,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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536 U.S. 622, 626 (2002) (interlocutory review of criminal case on Government petition); *United States v. R.L.C.*, 503 U.S. 291, 296 (1992) (same). The Government does not claim that anything on remand will shed light on the question presented. Moreover, if the Government genuinely believed that petitioner was likely to end up with the same (or a lower) sentence, it would not have bothered to ask for the remand. Finally, although it states that petitioner can raise this issue again on final judgment, the Government would undoubtedly claim that any such appeal is in violation of the appeal waiver and, therefore, could trigger yet *another* remand for yet *further* enhancement to his sentence.