No. 18-288

IN THE

Supreme Court of the United States

PHILLIP A. MEARING,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Due Process Institute is a non-profit, bipartisan, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as an *amicus curiae* before this Court in cases presenting important criminal justice issues, such as *Timbs v. Indiana*, No. 17-1091 (*certiorari* granted June 18, 2018) and *Turner v. United States*, No. 18-106 (petition for *certiorari* pending).

This case likewise presents important criminal justice issues worthy of this Court's plenary consideration. In the sections below, we discuss how this case implicates two related criminal justice issues of significant concern to the Due Process Institute: (1) the ever-expanding use of fines, fees forfeitures, and restitution awards in an unprincipled and often unjustifiable fashion, and (2) the widespread insertion by prosecutors of appellate waivers in guilty plea materials to insulate important issues from appellate review. When combined, these two circumstances set the stage for fundamental unfairness, as judicial review becomes unavailable to check indefensible restitution and/or forfeiture awards. This Court's jurisprudence, and basic principles of fairness and due process, reject such a proposition.

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[1] The parties were timely notified and have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

As Petitioner demonstrates, the issues raised by this case are important and recurring. The overwhelming majority of criminal cases end in guilty pleas, and those pleas have increasingly included appellate waivers that include issues as to "sentence." While some appellate waivers might, when properly understood by all parties and construed strictly, result in judicial economy, they also hold considerable potential for unfairness. This is especially so if such waivers are construed broadly to prevent review of fines, fees, forfeitures, and restitution awards that are patently unlawful, largely unforeseeable at the time of the plea, or that exceed statutory maximums.

The decision below presents precisely these circumstances: It arises in a context where a waiver was construed broadly to prevent appellate review of what appears to be highly suspect restitution and forfeiture awards that together exceed $29 million dollars. It was formulated by a trial court *sua sponte,* using (likely erroneous) legal principles that were not even suggested to it by the government. As *amicus* has described in other cases before this Court,[2] unjustifiable fines, fees, and forfeiture awards have become endemic in our criminal justice system, and it is incumbent on our appellate courts to restore some sense of balance. But instead of providing the meaningful appellate review that would have occurred in several circuits and likely invalidated this award, the Fourth Circuit followed

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[2] Brief of the DKT Liberty Project, Cato Institute, Goldwater Institute, Due Process Institute, Federal Bar Association Civil Rights Section, and Texas Public Policy Foundation as *Amici Curiae* in Support of Petitioners, *Timbs v. Indiana*, No. 17-1091 (*certiorari* granted June 18, 2018).

the minority rule, which construes appellate waivers as to "sentence" broadly to include all restitution awards, and further followed the minority rule in a separate circuit split involving whether such a waiver was enforceable even if the district court committed legal error in setting the amounts too high. We agree with Petitioner that the Fourth Circuit's decision is wrong, and that this Court's corrective intervention is necessary and warranted in this important area of the law.

ARGUMENT

Petitioner amply states the case for why this Court's review is warranted under Supreme Court Rule 10, and *amicus* will not restate the argument here. Instead, *amicus* writes solely to emphasize the reoccurring systemic nature of these issues in our modern criminal justice system.

I. UNPRINCIPLED FINES, FEES, AND FORFEITURE AWARDS HAVE BECOME ENDEMIC IN OUR CRIMINAL JUSTICE SYSTEM.

The backdrop against which this case arises is critically important. Both questions presented by the Petition involve substantial monetary obligations imposed against a criminal defendant, at a level that far exceeds any principled understanding of the "loss" caused by his conduct to the government/victim or the "proceeds" received by the defendant from his unlawful conduct. Question 1 stems from a more than $15 million restitution award purportedly designed to cover the government's "loss" from fraudulent conduct involving a defense contractor, but the "loss" amount

included invoices that the government/victim never received or paid and furthermore contained no offset for legitimate services that were indisputably provided to the government by the defendant as part of the contract. Question 2 stems from a more than $13 million forfeiture award, which was more than 3 times the net proceeds that the defendant had received from his fraud and was (despite the fact that the case contained no drug charges) calculated based on drug forfeiture statutes that were obviously inapplicable. The upshot is a combined financial penalty imposed upon a defendant in a criminal proceeding of approximately $29 million for conduct that likely involved less than $1 million in actual "loss" to the government/victim and less than $4 million in actual "proceeds" received by the criminal defendant. This penalty occurred, moreover, against the backdrop of a $250,000 statutory maximum fine.

Unfortunately, these sorts of unprincipled financial penalties are becoming endemic in our criminal justice system – whether they are labeled as restitution, forfeitures, fines, or fees. As Justice Thomas recently observed, "historical forfeiture laws were narrower in most respects than modern ones." *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017). One study has suggested that, as of 2017, 10 million people hold some type of "criminal debt" amounting to over $50 billion.[3] These staggering numbers have created a variety of problems of their own, often stemming from the perverse incentives they impose on the criminal justice system itself. "Abuses . . .

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[3] Karin D. Martin et al. *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create*, HARV. KENNEDY SCH. & NAT'L INST. JUST., Jan. 2017, at 4–5.

have resulted in a surge of efforts . . . to document and challenge the real, and often alarming, consequences of relying on criminal justice systems to create revenue."[4]

In particular, the expanding use of fines, fees, and forfeitures[5] has had a number of constitutional and policy implications for our criminal justice system.

First, the fact that the government actors who have the power to impose the fines, fees, and forfeitures often have a financial interest in keeping and spending them should implicate long-standing fundamental due process concerns inherent in self-interested governmental revenue schemes. *See id.* (noting the importance of the claim but also that petitioner's claim was untimely); *Connally v. Georgia*, 429 U.S. 245 (1977), *Tumey v. Ohio*, 273 U.S. 510 (1927). Second and relatedly, these governmental fee-generating systems create perverse incentives for police and prosecutors to implement policies that "directly conflict with public-safety needs" and undermine "the checks and balances otherwise afforded through normal budgeting practices."[6] Third, these revenue generating schemes "frequently target the poor and other groups least able to defend their interests . . .

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[4] Beth A. Colgan, *Fines, Fees and Forfeitures*, in REFORMING CRIMINAL JUSTICE, VOL. 4, 207–08 (Erik Luna ed., 2017).

[5] *Id.* at 205, n.1: "[W]hile restitution is not designed in the first instance to generate revenue for the government, because it has the capacity to offset other governmental expenses, it also can distort criminal justice incentives." And here, where the government is the victim, it amounts to much the same thing.

[6] *Id.* at 209–10 (citing multiple examples of where the focus of policing activity was changed to target more "profitable" crimes from a forfeiture perspective).

."[7] Unfortunately, criminal justice related debt in the forms of fines, fees, forfeitures, and restitution awards can "trigger a cascade of debilitating consequences, many of which undermine post-incarceration re-entry goals such as finding stable housing, transportation, and employment."[8] Finally, the increasing scope of these monetary awards has generated significant Eighth Amendment concerns, some of which are currently before the Court in *Timbs v. Indiana*, Case No. 17-1091, in which the Court has agreed to decide the threshold question of whether the Eighth Amendment's excessive fines clause is incorporated against the States under the Fourteenth Amendment's due process clause.

These constitutional and policy concerns are each implicated by the questions presented in the Petition. Regrettably, in a situation that is already ripe with abuse, the use of plea waivers could shield the great bulk of abuses from meaningful appellate review, threatening to make a bad situation even worse. The time has come for this Court to address some of these implications head on, in a context that, because of the widespread prevalence of guilty pleas in our system, arises with considerable frequency.

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[7] *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017); Beth A. Colgan, *Fines, Fees and Forfeitures*, in REFORMING CRIMINAL JUSTICE, VOL. 4, 213 (Erik Luna ed., 2017) (noting how forfeitures can cause people to "lose funds they depend upon to meet basic needs, vehicles upon which they depend for transportation to work or school, or the homes in which they live," and noting studies showing that "people may engage in criminal activity for the purpose of paying off unmanageable criminal debt.")

[8] Karin D. Martin et al. *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create*, HARV. KENNEDY SCH. & NAT'L INST. JUST., Jan. 2017, at 9.

II. IN THE ABSENCE OF ENFORCEABLE LIMITS, APPELLATE PLEA WAIVERS HOLD THE POTENTIAL FOR GRAVE INJUSTICE IN THE CONTEXT OF RESTITUTION AND FORFEITURE AWARDS.

The dramatic increase in fines, fees, and forfeitures has occurred side-by-side with another important trend in the criminal justice system: the increasing use of appellate waivers that purport to shield all post-sentencing issues from appellate review. Such appellate "sentence" waivers were uncommon before the Sentencing Reform Act of 1984, but "rose to popularity in the 1990s and are today common components of plea agreements in many federal districts."[9]

Despite the concerns they raise and without fully analyzing the risks they engender, the courts of appeals have found appellate plea waivers to be generally enforceable in the sentencing context.[10] Importantly, however, because sentencing proceedings have yet to arise at the time of the plea,

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[9] Kevin Bennardo, *Post-Sentencing Appellate Waivers,* 48 U. MICH. J. L. REFORM 347, 348 (2015).

[10] *See, e.g.*, *United States v. Guillen*, 561 F.3d 527, 529–31 (D.C. Cir. 2009); *United States v. Hahn*, 359 F.3d 1315, 1318, 1324–28 (10th Cir. 2004) (*en banc*) (*per curiam*); *United States v. Andis*, 333 F.3d 886, 889–92 (8th Cir. 2003) (*en banc*); *United States v. Teeter*, 257 F.3d 14, 21–23 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 560–62 (3d Cir. 2001); *United States v. Schmidt*, 47 F.3d 188, 190–92 (7th Cir. 1995); *United States v. Ashe*, 47 F.3d 770, 775–76 (6th Cir. 1995); *United States v. Yemitan*, 70 F.3d 746, 747–48 (2d Cir. 1995); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992); *United States v. Wiggins*, 905 F.2d 51, 52–53 (4th Cir. 1990); *United States v. Navarro-Botello*, 912 F.2d 318, 321–22 (9th Cir. 1990).

the courts of appeals have been hesitant to construe these waivers as broadly including egregious and unforeseeable occurrences. Instead, most courts of appeals carve out limits in areas of special concern to the integrity of the criminal justice system. For example, as Petitioner demonstrates, a majority of courts of appeals has refused to construe waivers of the ability to appeal the "sentence" to include the ability to appeal a restitution award. *See* Pet. at 10-14. Likewise, many courts of appeals refuse to construe such waivers to include a challenge to a sentence that exceeds the statutory maximum and have applied that precedent in the context of excessive financial awards like the one here. *See* Pet. at 14-18. But, as Petitioner also notes, some courts of appeals (including the Fourth Circuit in this case) reject such limitations on appellate waivers, holding that a "sentence" waiver prohibits appellate review of even the most egregious issues in the restitution and forfeiture context.

It is important for this Court to resolve this divide.[11] As discussed in the previous section, forfeiture awards have been used with ever-increasing frequency and present serious opportunities for abuse and distortion of incentives

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[11] The Court has recently had before it two cases that touch on the intersection of guilty pleas and appellate review. Last term, in *Class v. United States*, No. 16-424, 583 US __ (2018), the Court held that a guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. This term, the Court has granted *certiorari* in *Garza v. Idaho*, No. 17-1026, to decide whether the presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applies when a criminal defendant instructs trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement includes an appeal waiver.

for the government. Moreover, like virtually all criminal justice issues, restitution and forfeiture awards arise most often in connection with guilty pleas. As this Court has explained, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L. J. 1909, 1912 (1992)); *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (noting that, at the time, pleas accounted for 95% of state and federal convictions). Current estimates place the number at closer to an astonishing 97% of cases resolved through plea bargaining.[12]

As a result, the questions presented by this Petition arise frequently. Indeed, given the increasing use of forfeiture and restitution awards, and the prevalence of appellate plea waivers in a criminal justice system that depends heavily on guilty pleas, they are virtually an every-day occurrence. In those circumstances, it is damaging to the integrity of our system to have such wide disparities between those circuits that provide no meaningful appellate checks on these awards in cases involving guilty pleas, and the circuits that provide such checks. Given that plea waivers themselves are drafted and negotiated by government actors with a self-interest in keeping even an unjustifiable forfeiture award, it is imperative that this Court provide a uniform answer to whether meaningful appellate checks exist or

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[12] *See, e.g.*, Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent On Plea Bargaining*, THE ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.

whether they do not. We urge the Court to do so, and to compel at least some limited appellate review in circumstances such as these.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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