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“A WAIVER OF THE TRIAL ITSELF”: THE CONSTITUTIONAL THREATS OF EXTENDING *UNITED STATES v. MEZZANATTO* AND CONTRACTUAL SOLUTIONS

Abstract: Prosecutors and criminal defendants resolve most cases through plea agreements. Often these agreements contain waivers of Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410, which prevent the admission of statements made during plea discussions into evidence at criminal trial. In 1995, the U.S. Supreme Court in *United States v. Mezzanatto* held that such waivers are enforceable for impeachment purposes. Numerous U.S. Circuit Courts of Appeals have extended this holding by permitting the use of these statements for the prosecution’s rebuttal and case-in-chief. This Note asserts that the extension of *Mezzanatto* threatens the constitutional rights of criminal defendants. It suggests that courts apply contract law principles to render waiver clauses unenforceable for rebuttal purposes and for the prosecution’s case-in-chief because they are contrary to public policy.

INTRODUCTION

Dino Mitchell was barely able to read, had received very little formal education, and had no knowledge of the legal system.¹ When a grand jury indicted him for conspiracy to transport stolen securities along with several co-conspirators, Mitchell opted to go to trial while the rest of his co-conspirators pled guilty.² But on his trial date, Mitchell entered a plea agreement.³ This agreement included a clause that waived protections under Federal Rule of Criminal Procedure (FRCP) 11(f) and Federal Rule of Evidence (FRE) 410.⁴

¹ *United States v. Mitchell*, 633 F.3d 997, 999 (10th Cir. 2011).

² *Id.* Mitchell and his co-conspirators were charged with the crime of conspiracy to transport stolen goods. *Id.*; see 18 U.S.C. §§ 371, 2314 (codifying the crimes of conspiracy to commit an offense or to defraud the United States, and transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting). A security is a financial tool that represents a monetary value, usually a stock or a bond. Will Kenton, *Security*, INVESTOPEDIA (Sept. 5, 2020), <https://www.investopedia.com/terms/s/security.asp> [<https://perma.cc/LUT8-CFD5>].

³ *Mitchell*, 633 F.3d at 999.

⁴ *Id.* The agreement contained the following clause:

[I]f I withdraw my plea of guilty, I shall assert no claim under . . . Rule 410 of the Federal Rules of Evidence, Rule 11(f) of the Federal Rules of Criminal Procedure . . . that the defendant’s statements pursuant to this agreement . . . should be suppressed or are inadmissible at any trial, hearing, or other proceeding.

Id.; see FED. R. CRIM. P. 11(f) (prohibiting guilty pleas and plea statements from being admitted into evidence under Federal Rule of Evidence (FRE) 410); FED. R. EVID. 410 (preventing the admission of

As a result of this waiver, any statements that Mitchell made during plea discussions would be admissible against him if the case ever went to trial.⁵

After entering his guilty plea, Mitchell secured a new attorney and filed a motion to withdraw his plea, arguing that his former attorney had compelled him to plead guilty.⁶ The district court granted Mitchell's motion and granted him a jury trial.⁷ Before the trial began, the government filed a motion in limine seeking to admit the statements that Mitchell had made during plea discussions for use in its presentation of evidence, or its "case-in-chief."⁸ The court granted the government's motion.⁹ The government relied heavily on Mitchell's statements in its case.¹⁰ Its opening statement stressed that Mitchell had admitted to the offense under oath, and included portions from the plea colloquy in which Mitchell admitted to specific facts of the charge.¹¹ The government went on to interrogate Mitchell about his guilty plea when he testified,

guilty pleas or plea statements into evidence). Mitchell also stated during the plea colloquy that he had pled guilty voluntarily. *Mitchell*, 633 F.3d at 999. Federal prosecutors commonly use these waivers. See *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (stating that waiver of the inadmissibility of plea discussions has become commonplace); Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 600–01 (2002) (noting the trend toward including FRE 410 and Federal Rule of Criminal Procedure (FRCP) 11(f) waivers).

⁵ See FED. R. CRIM. P. 11 (according with FRE 410); FED. R. EVID. 410 (prohibiting the use of guilty pleas and plea statements as evidence); *Mitchell*, 633 F.3d at 999 (providing language from the waiver clause in Mitchell's agreement).

⁶ *Mitchell*, 633 F.3d at 999. To withdraw a plea, a defendant must show a "fair and just reason" for doing so. *Id.* (first citing FED. R. CRIM. P. 11(d)(2)(B); then citing *United States v. Yazzie*, 407 F.3d 1139, 1142 (10th Cir. 2005) (en banc)). The district court denied Mitchell's initial motion. *Id.* A week later, Mitchell filed a motion to reconsider in which he submitted two letters from his former attorney evincing coercion. *Id.* The first letter had been sent to Mitchell's brother, instructing him to advise Mitchell to take the plea. *Id.* The second letter had been sent to Mitchell himself, highlighting the lower prison sentence he would be entitled to if he entered the plea agreement. *Id.* The letter ended with a note that Mitchell "would be a fool" not to accept the plea deal. *Id.*

⁷ See *id.* (stating that the constitutional right to a jury trial outweighed other considerations).

⁸ *Id.* at 1000. A motion in limine is a motion that occurs before trial and seeks to determine whether a piece of evidence will be admissible at trial. Robert E. Bacharach, *Motions in Limine in Oklahoma State and Federal Courts*, 24 OKLA. CITY U. L. REV. 113, 114 (1999). In its motion, the prosecution referred to Mitchell's waiver of FRE 410. *Mitchell*, 633 F.3d at 1000. Mitchell opposed the prosecution's motion, arguing that the use of his statements violated FRE 403. *Id.*; see FED. R. EVID. 403 (excluding evidence that is more prejudicial than probative). A case-in-chief encompasses all the evidence introduced from when the party presents its first witness to the point at which that party rests its case. *Case-in-chief*, BLACK'S LAW DICTIONARY (11th ed. 2019). By contrast, parties use rebuttal evidence to refute or to counter the opposing party's evidence. *Id.* at *Rebuttal Evidence*.

⁹ *Mitchell*, 633 F.3d at 1000. The court extended the rationale of *United States v. Mezzanatto*, which allowed plea statements to be used for impeachment purposes. See *id.* (stating that the rationale in *Mezzanatto* applied to the use of plea statements for the prosecution's case-in-chief).

¹⁰ See *id.* (highlighting the government's use of statements from the plea agreement and plea colloquy at trial).

¹¹ *Id.*

and also referred to his guilty plea in its closing argument.¹² The jury convicted Mitchell and sentenced him to twenty-seven months in prison followed by thirty-six months of supervised release.¹³

Mitchell's case likely would have played out differently in other federal courts.¹⁴ If the Supreme Court had reviewed this case after its *United States v. Mezzanatto* decision, the Court would have allowed Mitchell's plea statements to come into evidence only if he personally had testified contrary to his prior statements.¹⁵ If Mitchell's case came before the U.S. Court of Appeals for the Ninth Circuit today, his statements would have been allowed in for rebuttal purposes, meaning that they would be admitted if he presented a defense that contradicted his prior statements.¹⁶ But before the Tenth Circuit, Mitchell's breach of his plea agreement triggered the use of his statements for the prosecution's case-in-chief.¹⁷ Without direction from the Supreme Court, this lack of clarity between the circuit courts as to how prosecutors with valid FRE 410 waivers may use plea statements leads to vastly different outcomes for similarly situated defendants.¹⁸

Like Mitchell, most criminal defendants enter plea agreements with the government rather than risking the uncertainty of a jury trial.¹⁹ Congress en-

¹² *Id.* A plea colloquy is a discussion between the defendant and the judge that must occur before the defendant pleads guilty. Danielle M. Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 944 (2012). The Fifth Amendment and the Fourteenth Amendment's Due Process Clause require this conversation. *Id.* During the plea colloquy, the judge issues warnings, which inform the defendant of any immigration implications and affirm that the defendant is choosing to waive his or her right to a trial. *Id.*

¹³ *Mitchell*, 633 F.3d at 1000.

¹⁴ See *Mezzanatto*, 513 U.S. at 199, 210 (holding that plea statements can be used for impeachment purposes); *Mitchell*, 633 F.3d at 1006 (determining that plea statements can be used for the government's case-in-chief); *United States v. Newbert*, 504 F.3d 180, 181, 183 (1st Cir. 2007) (holding that the defendant did not breach his plea agreement in a case in which the defendant withdrew his guilty plea after evidence of his innocence came to light); *United States v. Rebbe*, 314 F.3d 402, 408–09 (9th Cir. 2002) (concluding that plea statements can be used for rebuttal purposes); *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (enforcing a plea waiver that allowed for plea statements to be used in the government's case-in-chief).

¹⁵ See *Mezzanatto*, 513 U.S. at 204–05, 210 (enforcing plea waiver for impeachment purposes only).

¹⁶ See *Rebbe*, 314 F.3d at 402, 408–09 (admitting statements to rebut testimony, evidence, and arguments presented at trial).

¹⁷ See *Mitchell*, 633 F.3d at 1006 (allowing the use of plea waivers for the prosecution's case-in-chief).

¹⁸ See *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting) (criticizing the majority for failing to address the likely expansion of its holding to case-in-chief waivers, and stating that a case-in-chief waiver is effectively the waiver of a trial). Compare *Mitchell*, 633 F.3d at 1000 (holding that case-in-chief waivers are enforceable), and *Burch*, 156 F.3d at 1321 (same), with *Rebbe*, 314 F.3d at 402, 408–09 (allowing plea statements to be used for rebuttal purposes).

¹⁹ See John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://perma>

courages these agreements because they promote efficiency and save judicial resources.²⁰ They also often provide defendants with more favorable sentences.²¹ These agreements frequently include provisions that require defendants to waive certain rights.²² Although FRE 410 and FRCP 11(f) were designed to prevent statements made during plea discussions from being admitted as evidence at trial, prosecutors are increasingly including clauses that explicitly waive these protections.²³ In 1995, the Supreme Court in *Mezzanatto* held that waivers of FRE 410 and FRCP 11(f) are enforceable for impeachment purposes.²⁴ Circuit courts have extended this reading to allow prosecutors to admit plea statements into evidence for rebuttal and case-in-chief.²⁵ This expansion of *Mezzanatto* threatens the constitutional rights of defendants and the plea-bargaining system at large.²⁶

Part I of this Note examines the formation of plea agreements as contracts, provides background on the waiver clauses in those agreements, and discusses the seminal case on the subject, *Mezzanatto*.²⁷ Part II explores the various approaches that circuit courts have taken in their interpretations of the *Mezzanatto* decision, ranging from a refusal to enforce FRE 410 waivers, to the allowance of statements for rebuttal purposes, to the acceptance of the use of plea statements

cc/WE8N-WU7R] (stating that, in 2018, only 2% of criminal defendants went to trial, 90% of criminal defendants pleaded guilty, and the federal government dismissed the remaining 8% of cases).

²⁰ See *United States v. Mezzanatto* (*Mezzanatto I*), 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd*, 513 U.S. 196 (noting that the policy rationale behind the encouragement of plea agreements is to foster efficiency and to conserve judicial resources).

²¹ Joel Mallord, Comment, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683, 688 (2014). Because prosecutors wish to avoid the time and expense of trial, they incentivize defendants to enter plea agreements by offering more lenient sentences. *Id.* This can be done by offering not to bring additional charges, dropping existing ones, or by recommending a specific sentence range to the court. *Id.*

²² Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 (1992). These rights include the right to testify on one's own behalf, the right to a jury trial, and the right to an appeal. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (listing defendant's waivable rights); see also, e.g., *United States v. Smith*, 500 F.3d 1206, 1210 (10th Cir. 2007) (stating that a waiver of the right to appeal in a plea agreement is enforceable); *United States v. Hare*, 269 F.3d 859, 863 (7th Cir. 2001) (same).

²³ See FED. R. CRIM. P. 11 (complying with FRE 410); FED. R. EVID. 410 (prohibiting the admission of guilty pleas and plea statements into evidence); *Mezzanatto*, 513 U.S. at 216 (Souter, J., dissenting) (stating FRE 410 and FRCP 11(e)(6) waivers have become commonplace).

²⁴ 513 U.S. at 204–05, 210.

²⁵ See *id.* (holding that waivers allowing the use of plea statements for impeachment purposes are valid); see also, e.g., *United States v. Rebbe*, 314 F.3d 402, 408–09 (9th Cir. 2002) (allowing the use of plea statements for rebuttal purposes); *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (allowing plea statements to be used for the government's case-in-chief).

²⁶ See U.S. CONST. amend. VI (ensuring the right to a fair trial); *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring) (expressing concern that the use of plea statements for the government's case-in-chief could discourage defendants from entering into plea bargains).

²⁷ See *infra* notes 30–142 and accompanying text.

for the government's case-in-chief.²⁸ Part III argues that an expansive reading of *Mezzanatto* infringes upon the right of criminal defendants to a fair trial and, accordingly, proposes reform based in contract principles.²⁹

I. THE BASICS OF PLEA AGREEMENTS, CONTRACTS, AND WAIVERS

A defendant facing a criminal charge has two options: face the uncertainty of a jury trial, or plead guilty.³⁰ Most defendants choose the latter.³¹ But why do defendants make that decision?³² What happens to defendants who enter guilty pleas and then change their minds?³³

This Part provides background information on defendants' constitutional right to a fair trial, describes the mechanics of plea agreement withdrawals, and frames plea agreements as contracts.³⁴ It also examines *Mezzanatto*, the seminal case on waiver clauses in plea agreements.³⁵ Section A of this Part outlines defendants' right to a fair trial.³⁶ Section B discusses the mechanics of plea agreement withdrawals, the specific rules of evidence and criminal procedure that are essential to the plea agreement system, and the legislative intent behind these rules.³⁷ Section C examines how contracts of adhesion relate to plea agreements under general contract principles.³⁸ Section D defines waiver clauses and explores their prevalence in federal plea agreements.³⁹ It further reviews the factual and procedural history of the Supreme Court's 1995 *Mezzanatto* decision, which upheld the enforceability of waiver clauses in plea agreements for impeachment purposes.⁴⁰

²⁸ See *infra* notes 143–240 and accompanying text.

²⁹ See *infra* notes 241–318 and accompanying text.

³⁰ Gramlich, *supra* note 19. A defendant also can enter a *nolo contendere* plea, meaning that the defendant accepts punishment as though he or she is guilty without an admission of guilt. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003).

³¹ See Gramlich, *supra* note 19 (stating that ninety percent of criminal defendants pleaded guilty).

³² See Earl G. Penrod, *The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement*, 34 IND. L. REV. 1127, 1141 n.64 (2001) (listing reasons as to why criminal defendants may plead guilty). There are several reasons an innocent defendant may choose to plead guilty. *Id.* These reasons include: the desire to get a good deal from the prosecutor, the hope for a reduced sentence from a judge, the fear engendered by the uncertainty and expense of a jury trial, and the lack of understanding of what it means to plead guilty. *Id.* Moreover, defendants may enter plea agreements to avoid convictions for other crimes for which they are guilty. *Id.*

³³ See, e.g., *United States v. Newbert*, 504 F.3d 180, 181, 183 (1st Cir. 2007) (stating that the defendant did not breach a plea in a case where the defendant withdrew his guilty plea after evidence of his innocence surfaced).

³⁴ See *infra* notes 30–142 and accompanying text.

³⁵ See *infra* notes 30–142 and accompanying text.

³⁶ See *infra* notes 41–46 and accompanying text.

³⁷ See *infra* notes 47–65 and accompanying text.

³⁸ See *infra* notes 66–91 and accompanying text.

³⁹ See *infra* notes 92–142 and accompanying text.

⁴⁰ See *infra* notes 92–142 and accompanying text.

A. Defendants' Constitutional Right to a Fair Trial

The right to a fair trial is one of American citizens' most important entitlements.⁴¹ The Sixth Amendment to the U.S. Constitution provides criminal defendants with certain trial rights, including the right to a speedy public trial in front of an impartial jury of their peers, the right to confront the witnesses against them, and the right to counsel.⁴² The right to counsel includes the assurance of a competent defense.⁴³ All courts consider that right to hinge entirely on the aptitude of the defendant's attorney.⁴⁴

⁴¹ See Sarah Podmaniczky, Note, *Order in the Court: Decorum, Rambunctious Defendants, and the Right to Be Present at Trial*, 14 U. PA. J. CONST. L. 1283, 1289 (2012) (characterizing the right to a fair trial as "the most fundamental of all freedoms" (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965))).

⁴² U.S. CONST. amend. VI. The right to a "speedy trial" is still somewhat ill-defined. Lewis LeNaire, Comment, *Vermont v. Brillon: Public Defense and the Sixth Amendment Right to a Speedy Trial*, 35 OKLA. CITY U. L. REV. 219, 221 (2010). The Supreme Court has stated that the inquiry as to whether the "speedy trial" provision has been violated is very fact-specific, and that lower courts should find a violation only when the delay is intentional or unjust. *Pollard v. United States*, 352 U.S. 354, 361 (1957). The purpose of the clause is to prevent excessive incarceration before trial and to ensure that defendants can more ably defend themselves. LeNaire, *supra*, at 221–22 (quoting *United States v. Ewell*, 383 U.S. 116 (1966)). The right to a trial before an impartial jury is designed to protect criminal defendants from overreaching prosecutors and biased judges. Evan G. Hall, Note, *The House Always Wins: Systemic Disadvantage for Criminal Defendants and the Case Against the Prosecutorial Veto*, 102 CORNELL L. REV. 1717, 1719 (2017). The right of defendants to confront the witnesses against them allows defendants to hear the testimony against them and to impeach that testimony through cross-examination. Pamela R. Metzger, *Confrontation as a Rule of Production*, 24 WM. & MARY BILL RTS. J. 995, 998 (2016). The right to counsel minimizes the state's advantage over criminal defendants that are lay persons and unfamiliar with the law by allowing for, and in some cases providing, an advocate to represent them at criminal proceedings. Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 388 (2009).

⁴³ See U.S. CONST. amend. VI (guaranteeing the right to counsel); Stephen G. Gilles, Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1385–86 (1983) (stating that courts have interpreted the Sixth Amendment as ensuring the right to a competent defense).

⁴⁴ Gilles, *supra* note 43, at 1385–86. Most courts view the Sixth Amendment's right to counsel as implying the right to competent counsel, but defendants are entitled to a new trial only if they can prove that the incompetence of counsel prejudiced them. *Id.* at 1386; see, e.g., *Scott v. United States*, 427 F.2d 609, 610 (D.C. Cir. 1970) (requiring that the defendant show how the incompetence of his attorney had a prejudicial effect on the defendant's case). The only circuit courts that have not taken this approach are the Second, Fourth, and Sixth Circuits. Gilles, *supra* note 43, at 1385 n.27. The Fourth and Sixth Circuits require a showing of prejudice and will grant a new trial only if incompetence is shown. *Id.* at 1399–1400; see *Coles v. Peyton*, 389 F.2d 224, 227 (4th Cir. 1968) (holding that if the defendant's counsel is found to be incompetent, the court must grant a new trial); *Beasley v. United States*, 491 F.2d 687, 696–97 (6th Cir. 1974) (same). The Second Circuit requires the defense to show that, because of counsel's incompetence, the defendant did not receive a fair trial in violation of the Due Process Clause. Gilles, *supra* note 43, at 1408.

Sixth Amendment rights protect defendants from arbitrary or unjust government conduct and uphold the impartiality of the criminal justice system.⁴⁵ Although the right to a fair trial is a constitutional guarantee, that right is waivable.⁴⁶

B. The Mechanics of Plea Agreements

Most criminal cases do not go to trial, but instead conclude in a plea agreement.⁴⁷ In 2012, the Supreme Court in *Missouri v. Frye* acknowledged that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."⁴⁸

In a typical plea agreement, the prosecutor agrees to pursue a lesser sentence or to drop certain charges.⁴⁹ Through this bargain, the defendant foregoes the uncertainty of trial in return for a more lenient sentence, while the prosecu-

⁴⁵ See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (stating that fair trial rights protect defendants against arbitrary applications of the law); *Levine v. United States*, 362 U.S. 610, 616 (1960) ("[J]ustice must satisfy the appearance of justice." (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))).

⁴⁶ See *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that defendants may waive constitutional rights as conditions of entering plea bargains). In *Brady v. United States*, Robert M. Brady was charged with kidnapping and faced the death penalty. *Id.* at 743. Represented by competent counsel, Brady initially chose to plead not guilty. *Id.* When he discovered that his co-defendant had pled guilty and would be able to testify against him, Brady entered a guilty plea. *Id.* The trial judge questioned Brady twice about the voluntariness of his plea before accepting it. *Id.* Brady was sentenced to fifty years in prison, which eventually was shortened to thirty years. *Id.* at 744. Brady appealed, claiming that his plea was not made voluntarily because of the coerciveness of a prospective death penalty and because his attorney had pressured him to enter the agreement, given the significant sentence reduction that Brady would receive if he pled guilty. *Id.* The court ultimately held that Brady's waiver of a jury trial was valid because he had entered the agreement knowingly and voluntarily. *Id.* at 748.

⁴⁷ Scott & Stuntz, *supra* note 22, at 1909; Gramlich, *supra* note 19. The number of criminal defendants who choose to go to trial has fallen by sixty percent over the past twenty years. Gramlich, *supra* note 19. Some speculate that this decline in trials is a result of the so-called "trial penalty," in which defendants who exercise their right to a trial face much higher penalties. NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/8W7G-HWQT>].

⁴⁸ 566 U.S. 134, 144 (2012) (quoting Scott & Stuntz, *supra* note 22, at 1912). In *Missouri v. Frye*, the state charged Frye with driving with a revoked license—a crime that he had been convicted of three times before. *Id.* at 138. Frye's three prior convictions resulted in a felony charge that carried a maximum prison term of four years. *Id.* The prosecutor sent the defendant's attorney a letter with two plea offers. *Id.* The first offer was a three-year sentence with ten days of jail time if Frye pled guilty. *Id.* The other offer included reducing the charge to a misdemeanor and a ninety-day prison sentence. *Id.* at 138–39. The defendant's attorney never conveyed either offer to his client, causing both of them to expire. *Id.* at 139. Right before his trial, the defendant was arrested again for driving with a revoked license. *Id.* He pled guilty without an underlying plea agreement and was sentenced to three years in prison. *Id.* Frye appealed the decision, stating that he would have taken one of the original plea offers had his attorney informed him of their existence. *Id.* Ultimately, the Supreme Court held that the Sixth Amendment's right to competent counsel applies to lapsed plea agreements and remanded the case. *Id.* at 144, 151; see U.S. CONST. amend. VI (stating that criminal defendants have the right to counsel).

⁴⁹ See Scott & Stuntz, *supra* note 22, at 1909 (describing the mechanics of most plea bargains).

tor avoids the time and expense of trial.⁵⁰ By pleading guilty, defendants not only admit guilt, but also waive their right to a trial before a judge or jury.⁵¹

FRCP 11 governs the process for entering plea agreements.⁵² This Rule requires the court to question defendants about whether they entered the plea knowingly and voluntarily, and to advise defendants of the rights that they waive by pleading guilty.⁵³ The court may accept the plea, reject the plea, or postpone its decision until it assesses the presentence report.⁵⁴ A defendant can withdraw a plea before the court has accepted it for any reason.⁵⁵ After the court accepts a guilty plea, it can exercise its discretion and allow a defendant to withdraw the plea if the defendant provides a just reason for doing so.⁵⁶ Although this standard is flexible, defendants may not withdraw guilty pleas on a whim, nor may they do so after sentencing.⁵⁷

⁵⁰ Mallord, *supra* note 21, at 688.

⁵¹ See U.S. CONST. amend. VI (granting criminal defendants the right to a “speedy and public trial, by an impartial jury”); *Brady*, 397 U.S. at 748 (holding that defendants can waive constitutional rights as conditions of entering plea bargains).

⁵² FED. R. CRIM. P. 11. The advisory committee created Rule 11 of the FRCP to protect defendants’ fundamental rights when pleading guilty. Kristen N. Sinisi, Comment, *The Cheney Dilemma: Should a Defendant Be Allowed to Appeal the Factual Basis of His Conviction After Entering an Unconditional Guilty Plea?*, 59 CATH. U. L. REV. 1171, 1175–76 (2010). By pleading guilty, a defendant waives the right to a trial, the right to confront witnesses against them, and the protection from self-incrimination. *Id.* at 1177.

⁵³ FED. R. CRIM. P. 11(b)(1). *Brady* defines the two-pronged test for enforceable plea agreements. 397 U.S. at 755–56. A plea is considered to be voluntary if it is not the result of threats, untrue statements, or based on empty promises. *Id.* at 755. Defendants “voluntarily and intelligently” enter pleas when they are aware of the circumstances and consequences of their actions. *Id.* at 758. Despite this standard, criminal defendants often enter guilty pleas without sufficient judicial examination of their understanding of the result of the plea, or whether the plea was voluntary. Julian A. Cook III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C. L. REV. 1073, 1076 (2019).

⁵⁴ FED. R. CRIM. P. 11(c)(3)(A). A presentence report gives details of the defendant’s educational, family, social, and criminal history. *Presentence-Investigation Report*, BLACK’S LAW DICTIONARY, *supra* note 8. A probation officer prepares the presentence report and gives it to the judge to help determine the defendant’s sentence. *Id.*

⁵⁵ FED. R. CRIM. P. 11(d)(1); see, e.g., *United States v. Lord*, 915 F.3d 1009, 1013 (5th Cir. 2019) (rejecting defendants’ attempted plea withdrawal for conspiracy to operate an unlicensed money servicing business, after the defendants realized that they did not require a license for the type of business they were operating); *United States v. Wallace*, 276 F.3d 360, 363 (7th Cir. 2002) (discussing a defendant who unsuccessfully tried to withdraw his guilty plea after discovering that he was being held responsible for more than he initially thought); *United States v. Carr*, 740 F.2d 339, 343 (5th Cir. 1984) (enforcing the defendants’ guilty plea after the defendants discovered a defense that they did not know was available to them at the time of pleading).

⁵⁶ FED. R. CRIM. P. 11(d)(2)(B); *United States v. McTiernan*, 546 F.3d 1160, 1167 (9th Cir. 2008), *aff’d*, 552 F. App’x 749 (9th Cir. 2014). “Fair and just” reasons to withdraw a plea include insufficient plea instructions, new evidence, and unforeseen circumstances. *United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (9th Cir. 2004).

⁵⁷ See FED. R. CRIM. P. 11(e) (stating that pleas may not be withdrawn after sentencing); *McTiernan*, 546 F.3d at 1167 (noting that courts construe the standard for whether a plea may be withdrawn liberally); *United States v. Hyde*, 520 U.S. 670, 676 (1997) (stating that pleas may not be withdrawn on a whim).

At trial, FRCP 11(f) states that FRE 410 governs the admissibility of plea agreements and statements.⁵⁸ FRE 410 renders withdrawn guilty pleas and statements made during plea discussions inadmissible.⁵⁹ There are, however, two exceptions.⁶⁰ Statements made during plea discussions that result in a later plea withdrawal may be admissible if: (1) the court admitted another statement made during the plea discussions and fairness requires that the court also admit the statement in question, or (2) in a criminal proceeding for perjury and the defendant made the statement under oath.⁶¹

The advisory committee notes to FRE 410 explain the rationale behind excluding withdrawn guilty pleas from evidence by citing to the Supreme Court's landmark 1927 decision in *Kercheval v. United States*.⁶² In *Kercheval*, the Court held that admitting a withdrawn plea into evidence would be inconsistent with the decision to grant the defendant a trial because a jury may interpret a prior guilty plea as an admission of guilt.⁶³ Courts exclude statements made during

⁵⁸ FED. R. CRIM. P. 11(f); see FED. R. EVID. 410 (excluding evidence of plea agreements and plea discussions at trial). In 2002, the advisory committee amended the FRCP to create the current form of FRCP 11(f). FED. R. CRIM. P. 11(e) advisory committee's notes to 2002 amendment. Rule 11(e)(6), which formerly governed plea statements, barred the use of prior guilty pleas, nolo contendere pleas, and statements made during plea discussions as evidence in criminal trials. FED. R. CRIM. P. 11(e)(6); U.S. Dep't Just., Justice Manual, Criminal Resource Manual § 627, <https://www.justice.gov/jm/criminal-resource-manual-627-inadmissibility-pleas-federal-rule-criminal-procedure-11e6> [<https://perma.cc/YW9R-9A5U>] (last updated Jan. 22, 2020). A nolo contendere plea admits guilt for all purposes of the current case. *Nolo Contendere Plea*, BLACK'S LAW DICTIONARY, *supra* note 8. All of these provisions have been subsequently incorporated into FRE 410, so the substance of the Rule has not changed. See FED. R. CRIM. P. 11(f) (stating that FRE 410 governs the admissibility of plea agreements and statements); FED. R. EVID. 410 (prohibiting the admission of withdrawn plea agreements and plea discussions). Because some of the cases discussed in this Note occurred before the 2002 change, FRCP 11(e)(6) will be mentioned throughout this Note. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 197 (1995) (referring to FRCP 11(e)(6) because the case occurred before the 2002 amendment).

⁵⁹ FED. R. EVID. 410(a)(1), (4).

⁶⁰ *Id.* R. 410(b).

⁶¹ *Id.*

⁶² *Id.* R. 410 advisory committee's notes to 1972 proposed rules; *Kercheval v. United States*, 274 U.S. 220, 224 (1927). The intent behind FRE 410(b)(1) was similar to the rationale underlying FRE 106, which provides that if a court admits a written or recorded statement into evidence, the opposing party may request to obtain any other part of the writing or recording that fairness requires. Colin Miller, *The Best Offense Is a Good Defense: Why Criminal Defendants' Nolo Contendere Pleas Should Be Inadmissible Against Them When They Become Civil Plaintiffs*, 75 U. CIN. L. REV. 725, 734 (2006). Both rules prevent parties from using the rules defensively when they introduce statements being used offensively. *Id.* at 734–35. An advisory committee is a committee formed to make suggestions to legislative bodies on appellate, bankruptcy, civil, criminal, and evidence rules. *Advisory Committee*, BLACK'S LAW DICTIONARY, *supra* note 8. The advisory committee for the FRE includes attorneys, law professors, federal judges, state chief justices, and members of the Department of Justice. *Federal Court Rules Research Guide*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=320799&p=2146449> [<https://perma.cc/8BQQ-L7XX>].

⁶³ 274 U.S. at 224–25. In *Kercheval*, the defendant pled guilty to mail fraud and was sentenced to three years in prison. *Id.* at 221. The defendant filed a petition alleging that the prosecutor had promised to recommend a three-month sentence and a one-thousand-dollar fine, and that the court had

plea discussions to foster candid communication between defendants and prosecutors, and to encourage plea agreements.⁶⁴ The advisory committee notes to FRCP 11(f) also state that the Rule is meant to promote plea agreements.⁶⁵

C. General Principles of Contracts and Plea Agreements as Contracts

Parties form a contract when there is an offer, acceptance, and consideration.⁶⁶ Not all agreements that fulfill these requirements, however, are enforceable contracts.⁶⁷ A contract is unenforceable on public policy grounds when legislation renders it unenforceable, or when justifications not to enforce the contract plainly outweigh the reasons to enforce it.⁶⁸ When deciding whether public policy outweighs the reasons to enforce specific contract terms, courts consider: (1) the policy itself and whether legislative or judicial decisions support that policy; (2) whether not enforcing the term would support that policy; (3) whether there was intentional wrongdoing involved in the making of the agreement; and (4) the connection between that wrongdoing and the term itself.⁶⁹ A court's finding that a specific term is unenforceable does not neces-

agreed to adopt the recommendation. *Id.* The court upheld the sentence, but allowed the defendant to withdraw his guilty plea and granted him a new trial. *Id.* At the new trial, the district court allowed the prosecution to introduce evidence of the original guilty plea as part of its case-in-chief. *Id.* at 221–22. The jury subsequently found the defendant guilty and the Eighth Circuit affirmed the lower court's verdict. *Id.* The Supreme Court, however, overturned the Eighth Circuit's ruling, and held that the guilty plea was inadmissible because the court's decision to allow the guilty plea to be withdrawn was inconsistent with its decision to grant the defendant a new trial. *Id.* at 225.

⁶⁴ FED. R. EVID. 410 advisory committee's notes to 1972 proposed rules; see *People v. Hamilton*, 383 P.2d 412, 416 (Cal. 1963) (explaining that the purpose of legislative changes to the admissibility of plea statements was rooted in encouraging plea agreements), *overruled by* *People v. Morse*, 388 P.2d 33 (Cal. 1964).

⁶⁵ FED. R. CRIM. P. 11 advisory committee's notes to 1979 amendment.

⁶⁶ RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. L. INST. 1981). An offer is a statement that conveys that one party is willing to give or do something for another party. *Offer*, BLACK'S LAW DICTIONARY, *supra* note 8. A party accepts an offer when that party expresses assent to the offeror. *Id.* at *Acceptance*. Consideration is something bargained for that a promisee gives to a promisor. *Id.* at *Consideration*.

⁶⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that violate public policy are unenforceable).

⁶⁸ *Id.* § 178(1); see, e.g., *Kardoh v. United States*, 572 F.3d 697, 699–700 (9th Cir. 2009) (holding that a contract between a Syrian national and an undercover federal agent in which forty thousand dollars were exchanged for alien registration cards, during a sting operation, was unenforceable because the contract was illegal); *Dubey v. Pub. Storage, Inc.*, 918 N.E.2d 265, 275–76 (Ill. App. Ct. 2009) (holding that a rental agreement that limited the liability of a storage company to five thousand dollars for loss or damage of property was unenforceable because it violated the Landlord and Tenant Act); *Ron Medlin Constr. v. Harris*, 681 S.E.2d 807, 810–11 (N.C. Ct. App. 2009) (holding that a contract between a general contractor and individuals for whom he had built a home was unenforceable because the contractor was not licensed), *aff'd*, 704 S.E.2d 486 (N.C. 2010).

⁶⁹ See RESTATEMENT (SECOND) OF CONTRACTS. § 178(3) (listing the factors to consider when deciding whether to void a term on public policy grounds).

sarily render the entire agreement void.⁷⁰ The blue pencil doctrine allows courts to enforce the contract's reasonable terms and to disregard or remove the unreasonable terms.⁷¹

Because a plea agreement includes an offer, an acceptance, and consideration, plea agreements *are* contracts.⁷² In plea agreements, a prosecutor offers to pursue a lesser sentence or to drop certain charges, and the defendant accepts this offer by agreeing to plead guilty.⁷³ Therefore, when a defendant or prosecutor breaches a plea agreement, courts will apply principles of contract law.⁷⁴

Plea agreements are rarely negotiable.⁷⁵ Most often the prosecutor—the party with the most bargaining power—presents a boilerplate agreement that the defendant can either accept or decline.⁷⁶ This “take it or leave it” form of

⁷⁰ See *id.* § 184 (stating that a court may enforce the remainder of an agreement when a term in the agreement violates public policy).

⁷¹ See *Jak Prods., Inc. v. Wiza*, 986 F.2d 1080, 1087 (7th Cir. 1993) (modifying a non-competition agreement by narrowing the terms). Courts follow the blue pencil test by determining whether they can remove unenforceable language—crossing it out with a blue pencil—without rearranging or modifying the original intent of the contract. *Blue Pencil Test*, BLACK'S LAW DICTIONARY, *supra* note 8. Drafters frequently employ the blue pencil doctrine in the context of non-competition agreements. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 673–74 (2008). Some scholars are critical of the doctrine because it violates contract principles, in that it allows for the creation of a new contract to which the parties did not agree. *Id.* at 674.

⁷² *United States v. Henry*, 758 F.3d 427, 431 (D.C. Cir. 2014); see *Puckett v. United States*, 556 U.S. 129, 137 (2009) (stating that plea agreements are basically contracts and thus contract principles govern them).

⁷³ *Santobello v. New York*, 404 U.S. 257, 262 (1971) (stating that a prosecutor's promise qualified as consideration); *Henry*, 758 F.3d at 431 (evaluating a plea agreement using contract principles).

⁷⁴ *Henry*, 758 F.3d at 431; see *United States v. Jones*, 58 F.3d 688, 691 (D.C. Cir. 1995) (applying contract law to a plea agreement). In 1995, in *United States v. Jones*, the D.C. Circuit applied contract principles to a plea agreement. 58 F.3d at 691. The case centered on defendant Otis Jones, who had agreed to plead guilty to mail theft by a postal employee and forgery of a U.S. Treasury check. *Id.* at 689–90. In the agreement, Jones consented to a guilty plea, the payment of restitution, and to aid in the government's investigation of others involved in Jones's plan. *Id.* at 690. The government agreed not to prosecute Jones for any other financial crimes related to his employment at the U.S. Postal Service, to inform the judge responsible for sentencing him of his cooperation in the government's investigation, and not to object to a lesser sentence under the Federal Sentencing Guidelines. *Id.* The government also promised to ask the court to reduce Jones's prison sentence. *Id.* When the time came, the government did not recommend a lesser sentence because the government did not think that Jones's cooperation with the investigation was substantial enough. *Id.* Although the district court judge expressed discomfort with the government's behavior, he enforced the plea agreement. *Id.* at 690–91. The contract's plain language stated that the government's promises would be fulfilled if a committee determined that Jones had substantially assisted the government. *Id.* at 691. Thus, the contract specifically contemplated that the government had the discretion to decide whether the defendant had fulfilled his end of the bargain. *Id.* The D.C. Circuit affirmed the lower court's ruling. *Id.* at 692.

⁷⁵ See *United States v. Hare*, 269 F.3d 859, 862 (7th Cir. 2001) (noting that a plea agreement is an adhesion contract).

⁷⁶ See *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (stating that prosecutors often use standard forms for plea agreements).

contract is called a contract of adhesion.⁷⁷ A contract of adhesion is a contract that a party must accept or deny in its entirety with no possibility of negotiation.⁷⁸ Courts regularly enforce contracts of adhesion; however, judges are more likely to scrutinize and intervene in a contract of adhesion than a traditional contract because by nature contracts of adhesion are susceptible to procedural unconscionability.⁷⁹

For a contract to qualify as a contract of adhesion, it must involve a standard form and non-negotiable terms.⁸⁰ The party in the stronger negotiating position almost always drafts an adhesion contract, leaving the weaker party little choice but to sign or forfeit the agreement entirely.⁸¹ Hospital bills, consumer credit card agreements, mortgage-lending forms, and retail return policies are all common forms of adhesion contracts where the adherent has no opportunity to negotiate the terms of the agreement.⁸²

Some scholars argue that contracts of adhesion should not be enforced because submission to non-negotiated terms does not fulfill the fundamental voluntariness requirement for contract validity.⁸³ Others support the enforcement of adhesion contracts because they reduce transaction costs and promote efficiency, but argue that courts should not enforce “unreasonable or indecent” terms.⁸⁴ Although courts enforce adhesion contracts routinely, if the terms are unjust to the weaker bargaining party, then a court will find such contracts unconscionable and consequently unenforceable.⁸⁵

⁷⁷ Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. REG. 313, 346 (2011).

⁷⁸ *Id.*

⁷⁹ See Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373, 435 (2014) (stating that judges often enforce contracts of adhesion); Schwartz, *supra* note 77, at 355 (identifying that judges are more likely to intervene in a contract of adhesion).

⁸⁰ Schwartz, *supra* note 77, at 346.

⁸¹ *Id.*; see *Adhesion Contract*, BLACK’S LAW DICTIONARY, *supra* note 8 (defining an adhesion contract as a standard form contract that a weaker party signs with no ability to negotiate the terms).

⁸² Feldman, *supra* note 79, at 386–87. Click-wrap contracts have become increasingly common as a result of the internet’s development. Zachary M. Harrison, Note, *Just Click Here: Article 2B’s Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907, 908 (1998). Click-wrap contracts involve an offer of terms that appear on a computer screen. *Id.* at 909. Consumers accept by clicking a box indicating that they accept those terms. *Id.* There are usually only two options—accept or decline—and there is no opportunity for the consumer to negotiate terms. *Id.* at 912.

⁸³ Schwartz, *supra* note 77, at 351. Because contracts of adhesion are nonnegotiable, a party that signs such a contract cannot voluntarily assent to the terms as if entering into a bargained-for agreement. *Id.*

⁸⁴ *Id.* at 351–52, 353.

⁸⁵ See *THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, 532 F. App’x 813, 818 (10th Cir. 2013) (noting that contracts are unconscionable when they are clearly unjust to the weaker party); Feldman, *supra* note 79, at 435 (stating that courts will opt to enforce adhesion contracts unless there is a clear bargaining imbalance).

Plea agreements possess many of the characteristics of potentially unjust contracts of adhesion.⁸⁶ Prosecutors' offices use boilerplate form contracts for plea agreements, which today consistently include FRE 410 and FRCP 11(f) waivers.⁸⁷ There is a clear imbalance of power between prosecutors and criminal defendants.⁸⁸ Prosecutors draft the agreements and thus determine the terms, and are often in a position to bring additional charges or suggest a longer sentence.⁸⁹ Criminal defendants face the potential loss of their freedom, and are therefore inclined to enter plea agreements with unfavorable terms.⁹⁰ Despite this power imbalance, courts have upheld these agreements as long as the government does not abuse its power and the defendants enter the agreements knowingly and voluntarily, and thus rarely intervene to prevent enforcement.⁹¹

D. The Enforceability of Waiver Clauses in Plea Agreements

Commercial contracts often include waiver clauses that require one party to give up a specific privilege, such as the right to a jury trial in the event of a civil dispute.⁹² Similarly, prosecutors often include waiver clauses in plea agreements.⁹³ A defendant's knowing and voluntary waiver of certain constitutional and statutory rights makes plea agreements possible and enforceable.⁹⁴ For example, inherent to a plea agreement is the defendant's waiver of their constitutional right to a jury trial.⁹⁵ Waivers of the right to appeal convictions and sentencing orders also have become commonplace in plea agreements.⁹⁶

⁸⁶ See *United States v. Hare*, 269 F.3d 859, 862 (7th Cir. 2001) (holding that a plea agreement constituted an acceptable contract of adhesion because the defendant had the choice not to enter the agreement if it was too unfavorable); Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 170 (2008) (noting that even in cases of clear prosecutorial misconduct, courts are still likely to uphold plea agreements).

⁸⁷ See *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (stating that prosecutors frequently include FRE 410 waivers in their standard form plea agreement contracts).

⁸⁸ *Id.*; Matt Cross, Note, *The Search for Consistency: The Interpretation of Plea Agreements and Appeal Waivers in the Face of Breach*, 15 J.L. SOC'Y 119, 140 (2013).

⁸⁹ Cross, *supra* note 88, at 143.

⁹⁰ See *id.* (describing the process of prosecutors railroading criminal defendants into plea agreements by threatening to bring more charges or seek harsher sentences).

⁹¹ See, e.g., *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 367 (7th Cir. 1999) (refusing to void a contract between parties of unequal bargaining power, even though the court found that there was no possibility of negotiation).

⁹² See Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167 (2004) (discussing the waiver of jury trials and arbitration clauses). Such contracts also frequently include arbitration clauses that require the parties to forego the court system entirely in favor of private arbitration. *Id.* at 169.

⁹³ *Id.* at 181. A waiver is a possessor's chosen abandonment of a known right. *Waiver*, BLACK'S LAW DICTIONARY, *supra* note 8.

⁹⁴ See, e.g., *Allied Ir. Banks v. Bank of Am., N.A.*, 875 F. Supp. 2d 352, 355 (S.D.N.Y. 2012) (discussing the waiver of the right to a jury trial).

⁹⁵ See *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that defendants can waive constitutional rights as conditions of plea bargains); Alexandra W. Reimelt, Note, *An Unjust Bargain:*

Additionally, plea agreements frequently feature a waiver of FRE 410 and FRCP 11(f).⁹⁷ These waivers allow the prosecution to use statements made during plea discussions at trial if the defendant breaches the agreement.⁹⁸ For many years, circuit courts disagreed on the validity of such waivers.⁹⁹

In *Mezzanatto*, the Supreme Court finally addressed the circuit split as to whether criminal defendants could waive the inadmissibility of plea agreements under FRCP 11(e)(6) and FRE 410.¹⁰⁰ In 1991, police arrested Gary Mezzanatto and charged him with possession of methamphetamine with intent

Plea Bargains and the Waiver of the Right to Appeal, 51 B.C. L. REV. 871, 876 (2010) (stating that appeal waivers have become increasingly common).

⁹⁶ See, e.g., *United States v. Smith*, 500 F.3d 1206, 1210 (10th Cir. 2007) (stating that a waiver of the right to appeal in a plea agreement is enforceable); *United States v. Hare*, 269 F.3d 859, 863 (7th Cir. 2001) (same). For example, in *United States v. Smith*, the plea agreement included a clause relinquishing the defendant's right to appeal her sentence. 500 F.3d at 1210. The court held that the waiver was knowing and voluntary because the waiver language in the plea agreement was clear, and because the court specifically had discussed her waiver of appellate rights during the plea colloquy. *Id.* at 1210–11.

⁹⁷ See *United States v. Mezzanatto*, 513 U.S. 196, 215 (1995) (Souter, J., dissenting) (stating that waivers of the inadmissibility of plea discussions have become commonplace).

⁹⁸ See, e.g., *United States v. Jim*, 786 F.3d 802, 806 (10th Cir. 2015) (allowing a waiver of FRE 410 protections), *aff'd*, 804 F. App'x 895 (10th Cir. 2020). Withdrawing a plea is almost always considered to be a breach of a plea agreement. See *id.* (holding that a plea withdrawal was a breach of the agreement, even though the court had given permission for the withdrawal); Christopher B. Mueller, "Make Him an Offer He Can't Refuse"—*Mezzanatto* Waivers as Lynchpin of Prosecutorial Overreach, 82 MO. L. REV. 1023, 1084–87 (2017) (citing cases in which plea withdrawals constituted a breach).

⁹⁹ See *United States v. Acosta-Ballardo*, 8 F.3d 1532, 1536 (10th Cir. 1993) (holding FRCP 11(e)(6)(D) waivers unenforceable); *Mezzanatto I*, 998 F.2d 1452, 1456 (9th Cir. 1993) (same), *rev'd*, 513 U.S. 196; *United States v. Lawson*, 683 F.2d 688, 693 (2d Cir. 1982) (same). The Second, Ninth, and Tenth Circuits have concluded that waivers that allow for the admission of plea statements into evidence are unenforceable. *Acosta-Ballardo*, 8 F.3d at 1536; *Mezzanatto I*, 998 F.2d at 1456; *Lawson*, 683 F.2d at 693. All three circuits emphasized that Congress's clear intent in creating FRCP 11(e)(6) and FRE 410 was to promote candid discussions that would lead to plea agreements. See *Acosta-Ballardo*, 8 F.3d at 1535–36 (explaining how the legislative history of the two rules clearly demonstrates an intent to promote plea bargaining); *Mezzanatto I*, 998 F.2d at 1455 (same); *Lawson*, 683 F.2d at 692–93 (same). The three circuits opted not to uphold waivers that were clearly contrary to Congress's intent. See *Acosta-Ballardo*, 8 F.3d at 1535–36 (refusing to uphold a waiver that was inconsistent with legislative intent); *Mezzanatto I*, 998 F.2d at 1456 (same); *Lawson*, 683 F.2d at 693 (same). In contrast, the Seventh Circuit held that a FRE 410 waiver was enforceable. *United States v. Dortch*, 5 F.3d 1056, 1067–68 (7th Cir. 1993). The court reasoned that enforcement of the waiver would not frustrate the legislative intent behind FRE 410 or FRCP 11(e)(6) because signing a waiver after plea negotiations had already concluded would not discourage a defendant from entering plea talks. *Id.* at 1068.

¹⁰⁰ 513 U.S. at 197. FRCP 11(e)(6) no longer exists because of the 2002 amendment to the Rule, which made FRCP 11(f) simply cross reference FRE 410. FED. R. CRIM. P. 11 advisory committee's notes to 2002 amendment. The modification of FRCP 11(f) did not cause the content of the Rule to change because FRE 410 and former FRCP 11(e)(6) are substantively the same. Compare FED. R. CRIM. P. 11(f), and FED. R. EVID. 410, with U.S. Dep't Just., *supra* note 58.

to distribute.¹⁰¹ Prior to trial, the defendant and his attorney met with the prosecutor to enter discussions about the possibility of aiding the government.¹⁰² The prosecutor conditioned the meeting on Mezzanatto accepting that any statements made at the meeting could be used to impeach him if the case ever went to trial.¹⁰³ At the meeting, Mezzanatto admitted to knowingly selling methamphetamine to an undercover officer, as well as to knowing about the manufacturer's laboratory.¹⁰⁴

The U.S. District Court for the Southern District of California tried Mezzanatto for his possession charge.¹⁰⁵ On the stand, Mezzanatto denied his involvement in the distribution of methamphetamine, stating that he had no knowledge of the manufacturer's methamphetamine laboratory.¹⁰⁶ The prosecutor cross-examined him about his inconsistency with statements made at the prior meeting.¹⁰⁷ Mezzanatto denied making the earlier statements, causing the prosecution to call an agent who had been present at the meeting for corroboration.¹⁰⁸ The prosecutor used statements that the defendant had made during plea negotiations for impeachment purposes, namely by presenting evidence that contradicted Mezzanatto's testimony on the stand.¹⁰⁹ The jury subsequently convicted Mezzanatto and sentenced him to 170 months in prison.¹¹⁰

¹⁰¹ *Mezzanatto*, 513 U.S. at 197–98. Under federal law, it is unlawful for a person to manufacture, distribute, or possess a controlled substance with the intention of manufacturing or distributing said substance. 21 U.S.C. § 841(a)(1). Mezzanatto distributed methamphetamine on behalf of a manufacturer. *Mezzanatto*, 513 U.S. at 199. The manufacturer was arrested and agreed to help police apprehend other members of his enterprise. *Id.* at 197–98. The police arrested Mezzanatto in a sting operation that the manufacturer helped orchestrate. *Id.* at 198.

¹⁰² *Mezzanatto*, 513 U.S. at 198.

¹⁰³ *Id.* Mezzanatto agreed to this condition after consulting his attorney. *Id.*

¹⁰⁴ *Id.* at 198–99. Mezzanatto stated that up until his arrest he only had sold methamphetamine in ounce quantities. *Id.* at 198. Mezzanatto initially stated that he was just a dealer and had no knowledge that the manufacturer was producing methamphetamine at his home. *Id.* at 199. He later admitted to knowing about the methamphetamine laboratory. *Id.* In the meeting, Mezzanatto downplayed his involvement in the operation, at which point, the prosecutor ended the meeting because the government had obtained contradictory information regarding Mezzanatto's role. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Mezzanatto claimed that the manufacturer used the laboratory in his home to create explosives for the Central Intelligence Agency (CIA). *Id.*

¹⁰⁷ *Id.* Defense counsel objected to this line of questioning, stating that the statements made during plea negotiations were inadmissible under FRE 410. FED. R. EVID. 410; *Mezzanatto*, 513 U.S. at 199. But because Mezzanatto had signed a waiver prior to his meeting with the prosecution, his statements were deemed admissible. Eric L. Dahlin, Note, *Will Plea Bargaining Survive United States v. Mezzanatto?*, 74 OR. L. REV. 1365, 1369 (1995).

¹⁰⁸ *Mezzanatto*, 513 U.S. at 199.

¹⁰⁹ *See id.* (noting that the district court permitted the admission of prior statements for impeachment purposes). Impeachment is the presentation of evidence that contradicts a witness's testimony. *Impeachment*, BLACK'S LAW DICTIONARY, *supra* note 8. For example, defendants can be impeached with a prior conviction or prior inconsistent statement if they deny them while testifying. FED. R. EVID. 410(b)(2); *see, e.g., Mezzanatto*, 513 U.S. at 199 (impeaching a defendant after his testimony contradicted statements he made during plea discussions).

¹¹⁰ *Mezzanatto*, 513 U.S. at 199.

The Ninth Circuit reversed the district court's decision to admit Mezzanatto's prior statements.¹¹¹ The court first looked to the language of FRE 410 itself, observing that FRE 410 is absolute, aside from two express exceptions, neither of which contemplate admission of statements for impeachment purposes.¹¹² The Ninth Circuit then reviewed the legislative history of FRE 410, discerning that Congress clearly intended to exclude plea statements for impeachment purposes.¹¹³ The Ninth Circuit acknowledged that Congress had not explicitly addressed whether criminal defendants could waive the protections of FRE 410 and FRCP 11(e)(6).¹¹⁴ The court concluded, however, that enforcing waiver contravened congressional intent by essentially destroying the plea-bargaining mechanism.¹¹⁵ Effective plea bargaining, the court reasoned, is essential to the criminal justice system because it cuts costs and promotes efficiency and justice.¹¹⁶ If criminal defendants lack the protections that FRE 410 and FRCP 11(e)(6) provide, they would be much less likely to participate cooperatively in

¹¹¹ *Mezzanatto I*, 998 F.2d 1452, 1460 (9th Cir. 1993), *rev'd*, 513 U.S. 196.

¹¹² *Id.* at 1454–55; *see* FED. R. EVID. 410 (listing the exceptions to FRE 410). First, courts may admit statements made during plea discussions to present a full picture of the negotiations to the jury if other statements from the plea discussions have been admitted. FED. R. EVID. 410; *Mezzanatto I*, 998 F.2d at 1454. The legislature designed this exception to prevent counsel from selectively admitting statements made during plea discussions. *Mezzanatto I*, 998 F.2d at 1454. Second, courts may admit plea statements in a separate perjury proceeding. FED. R. EVID. 410; *Mezzanatto I*, 998 F.2d at 1454. The purpose of this exception is to prevent defendants from contradicting their plea statements in other proceedings. *Mezzanatto I*, 998 F.2d at 1454.

¹¹³ *Mezzanatto I*, 998 F.2d at 1454. The court cited advisory committee language that explicitly rejected an earlier draft of FRE 410 that would have allowed for plea statements to be used for impeachment purposes. *Id.*; *see* Act of Dec. 12, 1975, Pub. L. No. 94-149, 89 Stat. 805 (1975) (amending FRE 410, which previously allowed for the admission of plea statements for impeachment); FED. R. EVID. 410 (allowing statements to be used for impeachment); H.R. REP. NO. 94-414, at 10 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 713, 714 (same); S. REP. NO. 99-1277, at 10 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057 (same). In similar cases, the Second and Fifth Circuits also noted Congress's unmistakable intent to exclude plea statements from impeachment use. *See* *United States v. Lawson*, 683 F.2d 688, 692–93 (2d Cir. 1982) (stating that the legislative history of FRE 410 shows that Congress intended to exclude plea statements for impeachment); *United States v. Martinez*, 536 F.2d 1107, 1108 (5th Cir. 1976) (same).

¹¹⁴ *Mezzanatto I*, 998 F.2d at 1454.

¹¹⁵ *Id.* at 1456. The court also noted that FRE 410 and FRCP 11(e)(6) did not create substantive rights, but rather assured fair process. *Id.* The Ninth Circuit acknowledged that defendants can waive certain rights during plea negotiations, such as the right to bring a civil action and the right to appeal. *Id.* at 1455–56; *see* *Newton v. Rumery*, 480 U.S. 386, 390 (1987) (waiving the right to sue a municipality); *United States v. Navarro-Botello*, 912 F.2d 318, 319–20 (9th Cir. 1990) (waiving the right to appeal).

¹¹⁶ *Mezzanatto I*, 998 F.2d at 1454. Many scholars contest the belief that plea bargaining promotes justice and, instead, maintain that plea bargaining results in injustice for criminal defendants. Stephanos Bibas, Essay, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1140 (2011). They claim that defendants often enter unfavorable deals based on their attorney's error and miss the opportunity of trial, which could have led to a more favorable result. *Id.* Additionally, because there is no formalized recording of the plea-bargaining process, unlike at criminal trial, the result lacks transparency. Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 82 (2015).

plea discussions for fear that prosecutors would use their statements against them.¹¹⁷ Additionally, the court did not think that the government should be allowed to obtain a waiver from a defendant who has less power because they are facing criminal charges.¹¹⁸ For these reasons, the Ninth Circuit reversed the lower court's ruling and held that a criminal defendant could not waive the statutory ban on admission of statements made during plea negotiations.¹¹⁹

The government appealed the Ninth Circuit's decision and the Supreme Court granted certiorari.¹²⁰ On appeal, Mezzanatto argued that the Court should affirm the Ninth Circuit's holding and find his waiver inadmissible for three reasons: (1) plea-statement rules guarantee unwaivable procedural rights;¹²¹ (2) enforcement of the waiver would discourage plea agreements;¹²² and (3) waiver would encourage abuse of prosecutorial power.¹²³

The Supreme Court noted that it had consistently held that criminal defendants could waive some of their most fundamental rights, such as the right to a jury trial, the right to a double jeopardy defense, the right to confront one's accuser, and the right to counsel.¹²⁴ The Court also pointed to its previously acknowledged presumption of waivability with respect to the FRE.¹²⁵ Addi-

¹¹⁷ *Mezzanatto I*, 998 F.2d at 1455.

¹¹⁸ *Id.* at 1456.

¹¹⁹ *Id.* Chief Justice Wallace dissented, stating that Rules 410 and 11(e)(6) should not be treated differently from the multitude of other rights that criminal defendants can waive. *Id.* at 1456–57 (Wallace, J., dissenting).

¹²⁰ *United States v. Mezzanatto*, 513 U.S. 196, 197 (1995).

¹²¹ *Id.* at 204.

¹²² *Id.* at 206.

¹²³ *Id.* at 209.

¹²⁴ *Id.* at 200–01. The court cited several cases as examples of the presumption of the waivability of the rights of criminal defendants. *See id.* (citing *Peretz v. United States*, 501 U.S. 923, 936 (1991) (stating that criminal defendants can waive their fundamental rights)); *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (holding that the double jeopardy defense is waivable in a plea agreement); *Evans v. Jeff D.*, 475 U.S. 717, 730–31 (1986) (holding that the statutory right to attorney's fees is waivable in the civil context); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that a knowing and voluntary guilty plea waives the defendant's right to a jury trial, the right against self-incrimination, and the right to face one's accusers); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (approving a waiver of the right to counsel); *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 151 (1872) (stating that a party may waive any right in a contract if it benefits him or her).

¹²⁵ *Mezzanatto*, 513 U.S. at 202; *see Note, Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 139–40 (1932) (stating that courts have widely enforced agreements waiving rules of evidence); *see also, e.g., Sac & Fox Indians v. Sac & Fox Indians*, 220 U.S. 481, 488–89 (1911) (enforcing waiver of hearsay objections). For example, in 1911, the Supreme Court enforced contracts that waived hearsay objections in *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of Mississippi in Oklahoma*. 220 U.S. at 488–89. In that case, the Sac and Fox Indians of the Mississippi in Iowa sued the Sac and Fox Indians of the Mississippi in Oklahoma, as well as the United States, for failure to fulfill treaty obligations. *Id.* at 482. The Iowa and Oklahoma Indians agreed that the parties could admit *ex parte* affidavits as depositions, thereby waiving hearsay objections to that evidence. *Id.* at 488–89. The Supreme Court did not interpret Congress's failure to address the issue of waivability as an implied rejection of the concept. *Mezzanatto*, 513 U.S. at 203–04. Although the Court acknowledged that some procedural rules are too fundamental to the fact-finding process to be waivable, it did

tionally, the Supreme Court disagreed with the Ninth Circuit's concern that waivers would discourage plea agreements.¹²⁶ The Court noted that the Ninth Circuit had considered waiver from only the defendant's perspective.¹²⁷ Although a defendant may be less likely to engage in a plea agreement with a waiver clause, a prosecutor may be unwilling to enter a plea agreement without one.¹²⁸ The Court further indicated that the potential for prosecutorial abuse was not a compelling enough reason to prohibit waiver clauses in plea agreements.¹²⁹ The Court trusted that prosecutors would generally execute their duties faithfully and fairly.¹³⁰

The Supreme Court concluded that FRE 410 and FRCP 11(e)(6) are presumptively waivable and, absent evidence that the defendant did not knowingly and voluntarily enter the plea agreement, courts should enforce these waiver

not conclude that the admission of plea statements fits into that category. *Id.* at 204. For example, the Court acknowledged that a defendant's right to conflict-free counsel should not be waivable. *See id.* (citing *Wheat v. United States*, 486 U.S. 153, 162 (1988) (stating that a court may refuse to allow defendants to waive their right to conflict-free counsel)). Additionally, if a rule or statute expressly states that it is not waivable, then it cannot be waived contrary to the clear expression of Congress's intent. Pamela Bennett Louis, Note, *United States v. Mezzanatto: An Unheeded Plea to Keep the Exclusionary Provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) Intact*, 17 PACE L. REV. 231, 242 (1996). For example, FRCP 43 states that the defendant's presence at court proceedings is not waivable. FED. R. CRIM. P. 43; Louis, *supra*, at 243. The Court also reasoned that the admission of plea statements would make verdicts more accurate, in that when prosecutors use statements from a prior plea negotiations for impeachment purposes, they reveal that defendants have lied to either the government or the jury. *Mezzanatto*, 513 U.S. at 204. Knowledge of the defendant's untruthfulness, the Court reasoned, would aid the jury in reaching a proper verdict. *Id.* at 205. The Court also observed that FRE 410 only limits the admission of statements made in plea discussions *against* the defendant, meaning that the defendant may enter statements made in plea discussions for his or her benefit. *Id.*; *see* FED. R. EVID. 410 (limiting the use of statements made during plea discussions against the defendant). If a defendant makes the choice to enter such statements, they open the door for the prosecution to enter statements from the same discussion if it would be unfair to exclude them. FED. R. EVID. 410(b)(1). This notion of a defendant "opening the door" to the presentation of certain evidence, is similar to the rationale behind FRE 404, which allows the prosecution to introduce rebuttal evidence of a defendant's character trait only after the defendant presents evidence of that trait. *Id.* R. 404(a)(2)(A).

¹²⁶ *Mezzanatto*, 513 U.S. at 206–07 (citing *Mezzanatto I*, 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd*, 513 U.S. 196).

¹²⁷ *Id.* at 207.

¹²⁸ *Id.* Prosecutors are motivated to enter plea agreements because they can achieve a conviction without the time and expense of trial and because they are often able to gain insight into other relevant criminal activity. Mallord, *supra* note 21, at 688; Justin H. Dion, Note, *Criminal Law—Prosecutorial Discretion or Contract Theory Restrictions?—The Implications of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 W. NEW ENG. L. REV. 149, 157 (2000).

¹²⁹ *Mezzanatto*, 513 U.S. at 210.

¹³⁰ *Id.* Although the duty of most attorneys is to provide zealous advocacy for their clients, prosecutors have additional ethical responsibilities. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 727 (1999). Prosecutors must not simply seek convictions, but seek to do justice. *Id.* Thus, two conflicting objectives influence prosecutors: (1) the duty to be the government's zealous advocate, and (2) the responsibility to assure that justice is being served. *Id.*

clauses.¹³¹ Because Mezzanatto never suggested that he entered the plea agreement involuntarily or unwittingly, and because he had the opportunity to consult with his attorney, the Court overturned the Ninth Circuit to enforce the waiver.¹³² Thus, the Supreme Court held that statements made in the course of plea agreements subject to FRE 410 and FRCP 11(e)(6) waivers were admissible for impeachment purposes.¹³³

Justice Ginsburg penned a much-cited, single paragraph concurrence in which she expressed concern that a waiver that allowed for the use of plea statements for the prosecution's case-in-chief could impede plea agreement negotiations.¹³⁴ Justice Ginsburg believed that these waivers would take away a defendant's opportunity to negotiate, and would thus discourage them from entering plea discussions at all.¹³⁵

Justice Souter dissented, arguing that enforcing FRE 410 waivers in plea agreements would be inconsistent with Congress's intent to promote plea-bargaining.¹³⁶ He cited the advisory committee's notes, which stated that FRE 410's explicit purpose was to foster candor in plea-bargaining.¹³⁷ Justice Souter further noted that Congress had designed the Federal Rules of Evidence and

¹³¹ *Mezzanatto*, 513 U.S. at 210.

¹³² *Id.* at 210–11. Even if Mezzanatto had not had the opportunity to consult with his attorney, that would not necessarily have negated his plea. *See* *United States v. Ortiz-Sanchez*, 138 F. App'x 921, 922 (9th Cir. 2005) (holding that ineffective assistance of counsel does not necessarily render a plea unknowing or involuntary).

¹³³ *Mezzanatto*, 513 U.S. at 210.

¹³⁴ *Id.* at 211 (Ginsburg, J., concurring). Justice O'Connor and Justice Breyer joined the concurrence. *Id.* Because the waiver in the *Mezzanatto* case was specific to impeachment, the majority did not address the question of case-in-chief waivers. *Id.* Even though Justice Ginsburg's concurrence was only one paragraph, circuit courts consistently have looked to it for guidance. *See* *United States v. Newbert*, 504 F.3d 180, 188 (1st Cir. 2007) (relying on Justice Ginsburg's concurrence in *Mezzanatto*); *United States v. Rebbe*, 314 F.3d 402, 406 n.1 (9th Cir. 2002) (citing Justice Ginsburg's concurrence). Justice Ginsburg's concerns have been realized as several circuits have allowed for the use of plea statements for the government's case-in-chief. *See, e.g.*, *United States v. Jim*, 786 F.3d 802, 813 n.6 (10th Cir. 2015) (enforcing a waiver that allowed the government to use plea statements for the government's case-in-chief), *aff'd*, 804 F. App'x 895 (10th Cir. 2020). Other courts have expanded the holding in *Mezzanatto* to allow the use of plea statements for rebuttal purposes. *See, e.g.*, *United States v. Roberts*, 660 F.3d 149, 163–64 (2d Cir. 2011) (allowing the use of plea statements for rebuttal).

¹³⁵ *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring).

¹³⁶ *Id.* at 213 (Souter, J., dissenting) (citing FED. R. EVID. 410 advisory committee's notes to 1972 proposed rule). Justice Stevens joined the dissent. *Id.* at 211. Justice Souter cited Justice Kennedy's concurrence in *Williamson v. United States*, in which Justice Kennedy emphasized that the advisory committee's notes are evidence of Congress's intent. *Id.* at 213 (citing *Williamson v. United States*, 512 U.S. 594, 614–15 (1994)).

¹³⁷ FED. R. EVID. 410 advisory committee's note to 1972 proposed rule; *Mezzanatto*, 513 U.S. at 213 (Souter, J., dissenting).

the Federal Rules of Criminal Procedure to promote the criminal justice system's overall functionality and efficiency.¹³⁸

Additionally, Souter's dissent identified several likely consequences of the majority's decision.¹³⁹ First, Justice Souter observed that as a result of the Court's holding, prosecutors would default to including waivers in plea agreements, thereby rendering FRE 410 and FRCP 11(e)(6) meaningless.¹⁴⁰ Second, Justice Souter expressed his fear that such waivers eventually would function as a waiver of the right to trial itself because courts would extend the majority's rationale behind approving waivers for limited impeachment purposes to admitting statements for the prosecutor's case-in-chief.¹⁴¹ Justice Souter concluded that such a practice, wherein prosecutors used plea negotiation statements for their cases-in-chief, would be equivalent to defendants simply pleading guilty, in that prosecutors would be able to present the defendant's previous incriminating admissions to the jury.¹⁴²

II. THE EXTENSION OF *MEZZANATTO*

Following the Supreme Court's 1995 decision in *United States v. Mezzanatto*, the U.S. Circuit Courts of Appeals have been inconsistent in their enforcement of FRE 410 and FRCP 11(f) waivers against criminal defendants.¹⁴³

¹³⁸ *Mezzanatto*, 513 U.S. at 213 (Souter, J., dissenting). Although the majority believed that admitting plea statements would not discourage parties from entering plea agreements, Justice Souter reasoned that the Court's view on this issue was irrelevant because it contradicted the view of Congress. *Id.* at 215 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)) (stating that congressional intent, not the Court's opinion of how it can improve the law, should be the deciding factor). Justice Souter also stated that if the majority disagreed with Congress's view that plea bargaining would not be as effective with enforceable waivers, then the government could petition Congress to change the rule. *Id.* at 216 n.1 (stating that it is the court's role to interpret the federal rules considering Congress' intent).

¹³⁹ *Id.* at 216.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 217.

¹⁴² *Id.* at 218.

¹⁴³ See Mueller, *supra* note 98, at 1084–87 (stating that the circuit courts' applications of *Mezzanatto* have been hugely varied). The U.S. Court of Appeals for the District of Columbia Circuit and the Fifth, Sixth, Eighth, and Tenth Circuits have all enforced waivers allowing prosecutors to use statements in their cases-in-chief. See *United States v. Jim*, 786 F.3d 802, 806 (10th Cir. 2015) (enforcing a plea waiver after the court had allowed the defendant to withdraw his plea), *aff'd*, 804 F. App'x 895 (10th Cir. 2020); *United States v. Sylvester*, 583 F.3d 285, 289 (5th Cir. 2009) (allowing the use of plea statements for the government's case-in-chief); *United States v. Fifer*, 206 F. App'x 502, 509–10 (6th Cir. 2006) (same); *United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000) (same); *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (same). The Second, Third, Seventh, and Ninth Circuits have enforced waivers allowing the use of plea statements for rebuttal purposes. See *United States v. Roberts*, 660 F.3d 149, 163–64 (2d Cir. 2011); *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008); *United States v. Rebbe*, 314 F.3d 402, 408–09 (9th Cir. 2002); *United States v. Krilich*, 159 F.3d 1020, 1026 (7th Cir. 1998). The First Circuit enforced a waiver that allowed for plea statements to be used exclusively for impeachment purposes, thus not extending the reading of *Mezzanatto*. See *Mezzanatto*, 513 U.S. at 210 (allowing plea statements to be

Some circuit courts have refused to enforce these waivers when they are not in the interest of justice.¹⁴⁴ Other circuits have enforced the waivers when the prosecution uses the statements for limited rebuttal purposes.¹⁴⁵ Still, other circuit courts have allowed prosecutors to use FRE 410 and FRCP 11(f) waivers to admit plea statements for use in their cases-in-chief.¹⁴⁶ This Part discusses the enforcement of plea waivers among the circuit courts.¹⁴⁷ Section A of this Part compares two circuit courts' approaches to plea waivers following the defendants' withdrawal of their guilty pleas.¹⁴⁸ Section B discusses the difference between the use of plea statements for impeachment purposes—using statements that directly impeach the defendant's testimony—and rebuttal purposes—using statements that contradict *any* evidence or testimony presented at trial.¹⁴⁹ Section C examines *United States v. Burch*, in which the circuit court expanded the rationale in *Mezzanatto* to admit plea statements for use in the government's case-in-chief, thus setting the stage for other circuits to enforce these waivers and threaten the constitutional rights of criminal defendants.¹⁵⁰

A. Differing Approaches to Waiver Clauses in Withdrawn Pleas

When a court accepts a guilty plea, it has the discretion under FRCP 11 to allow a defendant to withdraw that plea if the defendant provides a "fair and just" reason for withdrawal.¹⁵¹ A withdrawal of a guilty plea, however, consti-

used for impeachment purposes with a valid waiver); *United States v. Jiménez-Bencevi*, 788 F.3d 7, 16–17 (1st Cir. 2015) (same). In some cases, courts have not enforced waivers in extenuating circumstances. *See United States v. Newbert*, 504 F.3d 180, 181 (1st Cir. 2007) (declining to enforce a plea waiver when the defendant had withdrawn his plea after evidence of his innocence came to light).

¹⁴⁴ *See Newbert*, 504 F.3d at 188–89 (Boudin, J., concurring) (stating that the court could have voided a 410 waiver if the court found that the defendant had breached the plea agreement because enforcing said waiver would have been contrary to the interests of justice); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2007) (refusing to enforce a waiver of the right to appeal because it would constitute a miscarriage of justice).

¹⁴⁵ *See Roberts*, 660 F.3d at 163–64 (enforcing a rebuttal waiver); *Hardwick*, 544 F.3d at 570 (same); *Rebbe*, 314 F.3d at 408–09 (same); *Krilich*, 159 F.3d at 1026 (same).

¹⁴⁶ *See Jim*, 786 F.3d at 813 n.6 (enforcing a plea waiver after the court had allowed the defendant to withdraw his plea); *Sylvester*, 583 F.3d at 289 (allowing the use of plea statements for the government's case-in-chief); *Fifer*, 206 F. App'x at 509–10 (same); *Young*, 223 F.3d at 911 (same); *Burch*, 156 F.3d at 1321 (same).

¹⁴⁷ *See infra* notes 151–240 and accompanying text.

¹⁴⁸ *See infra* notes 151–178 and accompanying text.

¹⁴⁹ *See infra* notes 179–216 and accompanying text.

¹⁵⁰ *See infra* notes 217–240 and accompanying text.

¹⁵¹ FED. R. CRIM. P. 11(d)(2)(B); *see United States v. McTiernan*, 546 F.3d 1160, 1167 (9th Cir. 2008) (noting that a plea can be withdrawn if there is a "fair and just" reason for doing so), *aff'd*, 552 F. App'x 749 (9th Cir. 2014). Previously recognized "fair and just" reasons include insufficient plea instructions, new evidence, or changed circumstances. *See, e.g., United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (9th Cir. 2004) (allowing a defendant to withdraw his plea when a Supreme Court case intervened). *But see United States v. Turner*, 898 F.2d 705, 713 (9th Cir. 1990) (holding that a change of mind does not constitute a "fair and just" reason for withdrawing a guilty plea).

tutes a breach of a plea agreement contract.¹⁵² What consequences should a defendant face if a judge allows the withdrawal of a guilty plea that includes a waiver of FRE 410 and FRCP 11(f) protections post-*Mezzanatto*?¹⁵³

In 2007, the First Circuit held, in *United States v. Newbert*, that a FRE 410 waiver in a plea agreement was not enforceable when the defendant withdrew his guilty plea after evidence of his innocence became available.¹⁵⁴ In *Newbert*, the defendant signed a form containing a provision that allowed the government to use statements made during plea negotiations if he decided against pleading guilty or withdrew his guilty plea.¹⁵⁵ Soon afterward, the defendant sought to withdraw his plea because evidence of his innocence had surfaced.¹⁵⁶ The U.S. District Court for the District of Maine found that although the defendant's guilty plea had been knowing and voluntary, the appearance of evidence supporting his innocence constituted a "fair and just" reason for allowing him to withdraw his plea.¹⁵⁷ The district court found that when the defendant withdrew his plea, he did not breach his plea agreement, and thus had not waived FRE 410.¹⁵⁸

¹⁵² See Mueller, *supra* note 98, at 1039 (stating that withdrawing a plea constitutes a breach of the plea agreement).

¹⁵³ Compare *United States v. Newbert*, 504 F.3d 180, 181 (1st Cir. 2007) (declining to enforce a plea waiver), with *United States v. Jim*, 786 F.3d 802, 806 (10th Cir. 2015) (enforcing a plea waiver after a plea withdrawal), *aff'd*, 804 F. App'x 895 (10th Cir. 2020).

¹⁵⁴ 504 F.3d at 181, 183. Scholars have acknowledged that the court's actions in *Newbert* are not the norm. See Mueller, *supra* note 98, at 1042–43 (stating that most courts do enforce plea waivers). Most courts not only enforce plea waivers, but also extend them. *Id.*

¹⁵⁵ 504 F.3d at 183. Newbert pled guilty to possession of a controlled substance with intent to distribute. *Id.* The police had found 18.3 grams of cocaine at Newbert's residence. *Id.* Per his plea agreement, Newbert agreed to the following provision: "If defendant fails to enter a guilty plea or seeks and is allowed to withdraw his plea of guilty . . . he hereby waives any rights that he has under Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure." *Id.* The clause explicitly stated that the defendant understood that, due to his guilty plea, any statements made surrounding his plea and during the plea negotiations would be usable against him. *Id.*

¹⁵⁶ *Id.* Newbert originally pleaded guilty to shield his wife and his friend, James Michael Smith, but later discovered that the two were living together and that Smith would be testifying against him. *Id.* One of Newbert's daughters told him that Smith had confessed to owning the cocaine. *Id.* Smith was the prosecution's only non-expert witness and there was no physical proof that connected Newbert to the cocaine aside from the fact that the police had discovered it in his home. *Id.*

¹⁵⁷ *United States v. Newbert (Newbert I)*, 471 F. Supp. 2d 182, 199 (D. Me. 2007), *aff'd*, 504 F.3d 180; see FED. R. CRIM. P. 11(d)(2)(B) (stating that a defendant can withdraw a plea before sentencing if the defendant can show a "fair and just" reason for doing so). The court ultimately decided that allowing the defendant to have a jury trial was the best course of action because the defendant's freedom was at stake. *Newbert I*, 471 F. Supp. 2d at 199. The government filed a motion to reconsider the district court's order allowing for the plea withdrawal. *Newbert*, 504 F.3d at 184. The government then filed a motion in limine requesting that the defendant's guilty plea and his statements made during the plea discussions be admissible against him at trial. *Id.* The defendant subsequently filed an opposing motion. *Id.*

¹⁵⁸ *Newbert*, 504 F.3d at 184.

On appeal, the First Circuit applied traditional contract principles to the plea agreement at issue, noting that uncertain terms should be construed against the government as the drafting party.¹⁵⁹ The court evaluated the plea agreement within the "four corners" of the document.¹⁶⁰ The court observed that the government's inclusion of the phrase "under circumstances constituting a breach of this Agreement" in the plea agreement suggested that there are some situations in which a plea withdrawal would be acceptable without constituting a breach of the plea agreement.¹⁶¹

Additionally, the court recognized that criminal defendants facing imprisonment are in a weaker bargaining position.¹⁶² Based on these high stakes, the court deduced that contract principles should apply differently to plea agreements than to commercial contracts.¹⁶³ The court ultimately upheld the district court's decision, endorsing its reasoning that, in this case, the plea withdrawal did not constitute a plea agreement breach.¹⁶⁴ The First Circuit invoked Justice Ginsburg's concurrence in *Mezzanatto*, which acknowledged that allowing the government to use waivers to admit plea statements for its case-in-chief would likely harm the plea-bargaining process.¹⁶⁵

Chief Judge Boudin concurred, stressing that even if the district court determined that the defendant had breached the plea agreement, it could have chosen not to enforce the waiver clause.¹⁶⁶ Boudin cited the First Circuit's 2007 decision in *United States v. Teeter*, in which the court chose not to en-

¹⁵⁹ *Id.* at 185 (citing *United States v. Giorgi*, 840 F.2d 1022, 1026 (1st Cir. 1988)).

¹⁶⁰ *United States v. Newbert (Newbert II)*, 477 F. Supp. 2d 287, 290 (D. Me. 2007), *aff'd*, 504 F.3d 180; *see Newbert*, 504 F.3d at 186 (adhering to the district court's reading of the plea agreement). Under the four corners rule, judges consider the meaning of a contract without extrinsic evidence, limiting their analysis to the words that appear in the contract itself. Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 342 (2013).

¹⁶¹ *Newbert II*, 477 F. Supp. 2d at 290–91 (emphasis omitted). The government subsequently appealed the decision. *Newbert*, 504 F.3d at 184.

¹⁶² *See Newbert*, 504 F.3d at 187 (describing the different obligations and interests of the parties).

¹⁶³ *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). In the Fourth Circuit's 1986 decision in *United States v. Harvey*, the court stated that the Constitution provides the basis for a criminal defendant's contractual rights, and therefore the considerations are different and broader than those applied to commercial contracts. *Id.* In *Harvey*, the defendant was charged with several drug-related offenses including drug smuggling. *Id.* at 295. The defendant moved to enforce a plea agreement that he claimed had barred his prosecution in other districts. *Id.* The Fourth Circuit concluded that the term in question was ambiguous and, as a result, construed the term in favor of the defendant, barring prosecutions in other districts. *Id.*

¹⁶⁴ *Newbert*, 504 F.3d at 188.

¹⁶⁵ *Id.* (quoting *United States v. Mezzanatto*, 513 U.S. 196, 211 (1995) (Ginsburg, J., concurring)) (expressing concern about the use of plea statements for the government's case-in-chief).

¹⁶⁶ *Newbert*, 504 F.3d at 188–89 (Boudin, J., concurring) ("For good cause, the district court can relieve a defendant of such a waiver—just as it can relieve parties from a stipulation or refuse to honor a plea agreement's waiver of the right to appeal when the waiver would effect a 'miscarriage of justice.'").

force a waiver of the right to appeal because the waiver involved trial rights and could result in a “miscarriage of justice.”¹⁶⁷ The *Teeter* court acknowledged that the “miscarriage of justice standard” was not particularly clear, but identified several relevant factors, such as the obviousness, magnitude, and character of the error, the effect of the error on the defendant, the burden on the government to correct the error, and the defendant’s level of cooperation.¹⁶⁸

The First Circuit’s refusal to enforce a waiver clause in *Newbert* stands in contrast to the approach taken by the Tenth Circuit in its 2015 decision in *United States v. Jim*.¹⁶⁹ In *Jim*, the Tenth Circuit enforced a FRE 410 waiver after the defendant withdrew his plea.¹⁷⁰ In assessing the plea waiver validity, the Tenth Circuit considered only whether the defendant’s plea was knowing

¹⁶⁷ *Id.* at 189 n.8 (citing *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2007)). In *Teeter*, the defendant was charged with several federal and state charges. 257 F.3d at 20. The defendant entered a plea agreement, pleading guilty to several charges, including conspiracy, intent to use a firearm to commit a violent crime, and aiding and abetting interstate domestic violence. *Id.* The defendant also waived her right to appeal. *Id.* In return, the government agreed to drop a kidnapping charge, as well as other charges. *Id.* During a change of plea hearing, the court asked the defendant if she had entered her plea knowingly and voluntarily. *Id.* The court failed to mention her waiver of the right to appeal and misstated that she possessed that right. *Id.* The defendant then challenged the appeal waiver. *Id.* The First Circuit acknowledged that plea waivers were valid, but held that courts could refuse to enforce them if there was a risk of a “miscarriage of justice.” *Id.* at 25–26. The First Circuit ultimately did not enforce the waiver. *Id.* at 31.

¹⁶⁸ *Id.* at 26.

¹⁶⁹ Compare *United States v. Jim*, 786 F.3d 802, 806 (10th Cir. 2015) (enforcing a waiver in a withdrawn plea agreement), *aff’d*, 804 F. App’x 895 (10th Cir. 2020), with *Newbert*, 504 F.3d at 188 (affirming the district court’s decision not to enforce a plea waiver).

¹⁷⁰ 786 F.3d at 806. Derrick Jim pleaded guilty to aggravated sexual abuse inside the Navajo Nation. *Id.* at 804. The jury found that Jim had dragged the victim from a couch, causing her to hit her head, and then proceeded to vaginally and anally rape her. *Id.* at 805. His plea agreement contained a waiver of FRE 410. *Id.* The agreement also included a waiver of FRE 801(d)(2)(A), which states that an opposing party’s statements are not hearsay. FED. R. EVID. 801(d)(2)(A); *Jim*, 786 F.3d at 806. Jim subsequently filed a motion to withdraw his plea, claiming that there was new evidence to impeach the victim, and that he had not entered his plea knowingly and voluntarily. *Jim*, 786 F.3d at 807. Prior to this motion, Jim had stated *pro se* that he did not know that by signing the plea agreement he would be waiving his right to a trial. *Id.* The district court expressed concern regarding Jim’s alleged unawareness that by pleading guilty he would be forsaking a trial. *Id.* at 807–08. FRCP 11(b)(1)(C) and (F) require that the judge accepting a guilty plea inform defendants that they are waiving their right to a trial. FED. R. CRIM. P. 11(b)(1)(C), (F). The magistrate judge who accepted Jim’s plea had neglected to tell Jim that he was waiving his right to a trial, further compounding the court’s unease. *Jim*, 786 F.3d at 808. As a result, although the court allowed Jim to withdraw his guilty plea, the court specifically warned him that because of the FRE 410 waiver, the prosecution could present his statements made during plea negotiations to the jury. *Id.* When Jim withdrew his plea, the government added an additional charge of aggravated sexual abuse—anal penetration by force. *Id.* at 805. Jim filed a motion in limine to stop the government from using his plea statements against him at trial, claiming that this would lead to an unfair trial. *Id.* at 808. His motion also argued that he did not knowingly enter his guilty plea, containing the FRE 410 waiver, because he did not have access to the government’s evidence against him, which would have been available to him through discovery. *Id.* The court denied the motion. *Id.* As a result, the government was able to use the defendant’s plea statements against him, and the jury convicted him. *Id.* at 805. Jim was sentenced to 360 months of imprisonment. *Id.*

and voluntary.¹⁷¹ This approach contrasts sharply with that of the First Circuit, which accepted that the defendant's plea was knowing and voluntary, but still held a similar agreement unenforceable.¹⁷² The Tenth Circuit determined that the defendant's plea was knowing and voluntary based on his age and education, his prior experience pleading guilty, and the clear language of the plea agreement.¹⁷³ The Tenth Circuit also interpreted *Mezzanatto* as stating that the *only* ground for ignoring a waiver was if it was not "knowing and voluntary."¹⁷⁴ Scholars characterize this reading as problematic for defendants who withdraw a plea for a "fair and just" reason.¹⁷⁵ Despite the trial court's finding that the defendant had a valid reason to withdraw his plea, the Tenth Circuit chose to enforce the waiver, without any consideration of fairness, because there was no constitutional violation.¹⁷⁶ The court addressed neither the argument that FRCP 11 permits withdrawal of guilty pleas for "fair and just" reasons, nor the argument that FRE 410 waiver robbed the defendant of his right to a fair trial.¹⁷⁷ Unlike the First Circuit's ultimate decision not to enforce the FRE 410 waiver, citing policy concerns, the Tenth Circuit's approach strictly enforced the terms of Jim's guilty plea without a fairness analysis.¹⁷⁸

¹⁷¹ See *Jim*, 786 F.3d at 810, 813 (addressing only the issue of the defendant's knowing and voluntary acceptance of the plea waiver and sentencing). The defendant argued that the Court in *Mezzanatto*, in stating that a defendant must show "some affirmative indication that the [waiver] was entered into unknowingly or voluntarily," had set forth a new evidentiary standard for defendants challenging whether they entered a plea knowingly and voluntarily. *Id.* at 810 (citing *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)). The court rejected this argument and held that the defendant had the burden of proving whether the plea was knowing or voluntary under the regular evidentiary standards. *Id.* at 811.

¹⁷² See *Newbert I*, 471 F. Supp. 2d 182, 199 (D. Me. 2007), *aff'd*, 504 F.3d 180 (finding that a defendant entered a plea knowingly and voluntarily, but still refusing to enforce the agreement). Compare *id.* at 806 (holding that a FRE 410 waiver was enforceable), with *Newbert*, 504 F.3d at 188 (upholding the district court's decision not to enforce a plea agreement that was entered knowingly and voluntarily).

¹⁷³ *Jim*, 786 F.3d at 813. At the time the agreement was signed, Jim was twenty-eight years old, had a high school diploma, and had some college credits. *Id.* He previously had pleaded guilty to two drunk driving charges. *Id.*

¹⁷⁴ See *id.* at 810, 813 (addressing the knowing and voluntary factors exclusively when evaluating the validity of a waiver clause); Mueller, *supra* note 98, at 1076 (criticizing the Tenth Circuit's decision in *Jim* for ignoring fairness considerations).

¹⁷⁵ Mueller, *supra* note 98, at 1076.

¹⁷⁶ *Id.* at 1076–77.

¹⁷⁷ See *Jim*, 786 F.3d at 810, 813 (addressing only whether the defendant's plea was knowing and voluntary).

¹⁷⁸ See Mueller, *supra* note 98, at 1076 (expressing concerns about the fairness of the *Jim* decision). Compare *Jim*, 786 F.3d at 806 (applying strict enforcement of a plea waiver after it had been withdrawn), with *United States v. Newbert*, 504 F.3d 180, 187–88 (1st Cir. 2007) (declining to enforce a plea waiver after taking into consideration policy implications).

B. The Use of Plea Statements for Impeachment and Rebuttal Purposes

The Supreme Court in *Mezzanatto* endorsed FRE 410 and FRCP 11(f) waivers to admit plea statements exclusively for impeachment purposes.¹⁷⁹ Under a strict reading of *Mezzanatto*, the only time these waivers would be triggered is when a defendant testifies and contradicts statements made earlier during plea discussions.¹⁸⁰ Thus, the risk of plea statements coming out at trial is very much within the defendant's control—he or she can choose not to testify while still presenting a competent defense.¹⁸¹ On the other hand, an expansive reading of *Mezzanatto* enforces waivers to admit statements for rebuttal purposes and for the government's case-in-chief, thereby severely limiting a criminal defendant's ability to present a competent defense.¹⁸²

Following *Mezzanatto*, some appellate courts have enforced waivers to allow for the use of plea statements for rebuttal purpose, whereas others have declined to uphold such waivers.¹⁸³ For example, in 2002, in *United States v. Rebbe*, the Ninth Circuit extended the rationale of *Mezzanatto* to the use of plea statements subject to FRE 410 and FRCP 11(f) waivers for rebuttal purposes, but not for the government's case-in-chief.¹⁸⁴ In contrast, in 2015, in *United States v. Jiménez-Bencevi*, the First Circuit opted not to allow the use of plea statements for rebuttal purposes when the agreement did not specify that the statements could be used for a non-impeachment purpose.¹⁸⁵

In *Rebbe*, the defendant argued that the government could use his plea statements only for impeachment purposes, and that the district court had erred

¹⁷⁹ 513 U.S. 196, 210 (1995).

¹⁸⁰ See generally *id.* (failing to address the possibility of lower courts expanding upon the Court's ruling).

¹⁸¹ See Mueller, *supra* note 98, at 1078, 1081 (observing that even impeachment waivers can have negative effects, in that defendants are unlikely to testify); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U.L. REV. 1449, 1450, 1459 (2005) (stating that, as of 2002, just over fifty percent of defendants who proceed to trial end up testifying on their own behalf).

¹⁸² See *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting) (explaining that the majority's rationale likely will be expanded to include case-in-chief waivers); Mueller, *supra* note 98, at 1081 (stating that rebuttal evidence is much more harmful to a defendant, in comparison to impeachment evidence, because it almost entirely prevents the defendant from presenting a competent defense).

¹⁸³ See *United States v. Roberts*, 660 F.3d 149, 163–64 (2d Cir. 2011) (allowing the prosecution to use the defendant's statements made during plea negotiations for rebuttal purposes); *United States v. Hardwick*, 544 F.3d 565, 569–70 (3d Cir. 2008) (same); *United States v. Krilich*, 159 F.3d 1020, 1026 (7th Cir. 1998) (same).

¹⁸⁴ 314 F.3d 402, 408–09 (9th Cir. 2002). Scholars note that the *Mezzanatto* decision, unlike *Rebbe*, did not address whether a prosecutor could use a defendant's plea statements for rebuttal purposes with a valid FRE 410 waiver. Colin Miller, *Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence That They Rejected Favorable Plea Bargains*, 59 U. KAN. L. REV. 407, 411 (2011). Nevertheless, the Ninth Circuit relied upon the analysis in *Mezzanatto* to reach its decision. *Rebbe*, 314 F.3d at 407.

¹⁸⁵ See 788 F.3d 7, 16–17 (1st Cir. 2015) (refusing to extend a FRE 410 waiver beyond the scope of the plea agreement).

in admitting his statements for the government's case-in-chief.¹⁸⁶ The Ninth Circuit reasoned that the government had not used the plea statements for its case-in-chief because the statements were only used to contradict evidence and testimony presented at trial that conflicted with the defendant's prior statements.¹⁸⁷ Had the waiver permitted the use of plea statements for the government's case-in-chief, the court stated it would have the same concerns as Justice Ginsburg in *Mezzanatto*.¹⁸⁸ Because those facts had not come before the

¹⁸⁶ 314 F.3d at 406. The *Mezzanatto* ruling explicitly endorses waivers of FRE 410 and FRCP 11(e)(6) only to admit statements for impeachment purposes. 513 U.S. at 210. In *Rebbe*, the government charged defendant Roger Rebbe, an accountant, with conspiracy to evade workers' compensation payments and federal payroll taxes. 314 F.3d at 404. Rebbe assisted Sherman Oaks Tree Service and its CEO, George Buskett, in the tax evasion scheme. *Id.* Rebbe had told Buskett to open two separate bank accounts—the "green account" and the "blue account." *Id.* Money accumulated from the business would be placed into the "blue account," and then a share of the income would be consistently transferred from the "blue account" to the "green account." *Id.* The company only reported income from the "green account" to the Internal Revenue Service (IRS). *Id.* Rebbe was responsible for filing the company's tax returns. *Id.* The IRS audited Buskett and requested all the deposit slips from the "green account" to see where the money had originated. *Id.* Rebbe and Buskett created fake deposit slips to make it appear that the money in the "green account" had come from several different sources, even though all of the money had actually come from the "blue account." *Id.* Before entering plea negotiations, Rebbe signed a waiver that stated that the government could use any statements from the meeting for cross-examination or to rebut any other evidence or argument presented in the case. *Id.* The waiver specifically stated that the government could not use statements for its case-in-chief. *Id.* The waiver read: "[T]he government may use . . . statements made . . . at the meeting and all evidence . . . from those statements for the purposes of cross-examination . . . or to rebut any evidence, argument or representations offered by or on behalf of [the defendant] . . ." *Id.* In his proffer, Rebbe disclosed that he had advised his co-conspirator to open a hidden account and that he knew that the tax returns he filed were not accurate. *Id.* He met with the government a second time, again signing a waiver, and admitted that he had created false deposit slips and filed fraudulent tax returns. *Id.* Plea discussions did not result in an agreement, and a grand jury later indicted Rebbe. *Id.* The government planned to use Rebbe's statements during plea discussions at trial for rebuttal purposes. *Id.* Rebbe filed a motion to prohibit the admission of his statements. *Id.* His motion failed to persuade the district court. *Id.* at 404–05. Rebbe presented his defense and the government moved to introduce his statements made during plea negotiations, arguing that the testimony and evidence presented was contradictory to Rebbe's statements. *Id.* at 405. Although Rebbe did not testify himself, he did call four witnesses to testify on his behalf. *Id.* The government used Rebbe's statements to rebut his claims that he did not know that the payroll tax returns were inaccurate, that he had not advised Mr. Buskett on where he should deposit checks, and that he did not participate in the making of fake deposit slips. *Id.* The court allowed the use of the statements and Rebbe was convicted on all counts. *Id.* Rebbe was sentenced to one year and one day in prison followed by three years of supervised release, and required to pay a \$1,800 special assessment fee. *Id.*

¹⁸⁷ *Rebbe*, 314 F.3d at 406. Rebbe had presented evidence that Buskett was financially sophisticated enough to have operated the scheme on his own. *Id.* at 407. He also had witnesses testify that Rebbe had only ever received records from the "green account," suggesting that Rebbe had no knowledge of the existence of the "blue account." *Id.* Finally, Rebbe presented evidence that he had not participated in creating the fraudulent deposit slips. *Id.*

¹⁸⁸ See *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring) (stating that plea waivers allowing the government to use plea statements for their cases-in-chief likely would inhibit plea agreements); *Rebbe*, 314 F.3d at 406 n.1 (noting that the concerns in Justice Ginsburg's concurrence would be relevant if the waiver allowed for statements to be admitted for the prosecution's case-in-chief).

court, however, it did not conclusively address the potential of a chilling effect on the plea-bargaining process.¹⁸⁹

The Ninth Circuit observed that the agreement expressly stated that the defendant's statements could be used for rebuttal purposes and both the defendant and his attorney had signed the waiver.¹⁹⁰ Because the Supreme Court in *Mezzanatto* had held that waivers of FRE 410 and FRCP 11(f) were presumptively enforceable, the court stated that the defendant bore the burden of overcoming this presumption.¹⁹¹ The Ninth Circuit determined that the defendant had failed to distinguish the use of rebuttal evidence from impeachment evidence.¹⁹² The court further reasoned that the facts of the case were sufficiently similar to those of *Mezzanatto*, and ultimately held that waivers of FRE 410 and FRCP 11(f) were enforceable in an agreement that explicitly stated that plea statements could be used for rebuttal purposes.¹⁹³

In *Jiménez-Bencevi*, defendant Xavier Jiménez-Bencevi was charged with witness tampering, possession and use of a firearm in furtherance of a violent crime, and the use of a cell phone to attempt kidnapping.¹⁹⁴ The charges arose from the defendant's alleged attempt to kidnap a woman, Delia Sánchez-Sánchez.¹⁹⁵ When she resisted, the defendant allegedly shot and killed her.¹⁹⁶ As

¹⁸⁹ *Rebbe*, 314 F.3d at 406.

¹⁹⁰ *Id.* at 407. The court determined that it was clear that the defendant's presentation of evidence, which contradicted statements he had made at the plea meeting, triggered the waiver. *Id.*

¹⁹¹ *Id.* (citing *Mezzanatto*, 513 U.S. at 204).

¹⁹² *See id.* (holding that the circumstances in this case were analogous to those of *Mezzanatto*).

¹⁹³ *Id.* at 407–09. The Ninth Circuit stated that the admission of plea statements promotes the truth-seeking function of trials and encourages defendants to present honest defenses. *Id.* The defendant argued that the enforcement of waivers allowing rebuttal evidence would discourage defendants from participating in the plea agreement process, and that the enforcement of those waivers ran counter to Congress's intention of promoting plea bargains. *Id.* at 408. The Ninth Circuit noted that the defendant in *Mezzanatto* raised these concerns, and that the Supreme Court ultimately determined that such concerns were insufficient to overcome the presumption of waivability. *Id.* Because *Rebbe* could not present any evidence to demonstrate that defendants would be significantly deterred from entering plea bargains, his argument was unsuccessful. *Id.* The defendant also claimed that enforcement of the clause would deprive him of his right to present a defense at trial. *Id.* This argument did not convince the court because the defendant had knowingly and voluntarily agreed to the terms with counsel present, and because the agreement only limited his defense in that he could not contradict any of the statements made during plea discussions. *Id.* The court noted that *Rebbe* could have successfully defended against the admission of the statements by challenging the government's evidence, questioning the credibility of the government's witnesses, raising doubts about inconsistencies in the government's evidence, or challenging the government's witnesses with respect to their qualifications and motivations for testifying. *Id.*

¹⁹⁴ 788 F.3d 7, 9 (1st Cir. 2015). The prosecution alleged that Jiménez-Bencevi murdered Sánchez-Sánchez to keep her from providing evidence to the authorities that connected him to another crime. *Id.* A month before his trial, Jiménez-Bencevi had approached the government in the hopes of entering a plea agreement to avoid the death penalty. *Id.* at 10. The defendant stated that he would enter a guilty plea if the government would not seek the death penalty. *Id.*

¹⁹⁵ *Id.* at 9–10.

¹⁹⁶ *Id.*

a prerequisite to entering plea discussions, the government had the defendant sign a proffer agreement that outlined his role in the commission of the crimes and provided information about the other parties involved.¹⁹⁷ The agreement included a waiver that stated that if the defendant were to subsequently testify inconsistently with this proffer statement, the government would impeach his statements.¹⁹⁸ After receiving the defendant's proffer statement, the government rejected his guilty plea and the case went to trial.¹⁹⁹

As part of their evidence, the prosecution presented a surveillance video that captured the murder at the center of the case.²⁰⁰ In support of his defense, Jiménez-Bencevi planned to call the former Chief of the Special Photographic Unit of the FBI Laboratory as an expert witness.²⁰¹ The government objected to this expert's testimony because it directly contradicted the proffer in which the defendant had claimed that he shot Sánchez-Sánchez.²⁰² The jury ultimately convicted the defendant and sentenced him to life in prison without the possibility of parole.²⁰³

The First Circuit's opinion emphasized the clear differences between rebuttal and impeachment purposes.²⁰⁴ The First Circuit stated that nothing in the waiver expressly allowed the government to use the defendant's proffer state-

¹⁹⁷ *Id.* In the proffer agreement, the defendant agreed to a life sentence without the possibility of parole. *Id.* The government also stated that no statements made in the proffer would be used against Jiménez-Bencevi in the District of Puerto Rico. *Id.* A proffer agreement is an agreement between a prosecutor and a defendant that provides immunity for the defendant, but allows the prosecutor to follow any leads that come from the defendant's disclosures. *Proffer Agreement*, BLACK'S LAW DICTIONARY, *supra* note 8. These agreements are often prerequisites to entering a plea agreement. Robert I. Smith, III, *Fair Play and Criminal Justice: Drafting Proffer Agreements in Light of Total Waiver of Rule 410*, 66 S. C. L. REV. 809, 810 (2015). These proffer agreements often include FRE 410 waivers. *Id.* The rules governing proffer agreements are less defined than those governing plea agreements, and thus the protections afforded to defendants entering proffer agreements are more limited. *Id.* at 815. The First Circuit stressed that the district court's enforcement of the agreement was particularly unacceptable given that it was an unaccepted proffer agreement. *Jiménez-Bencevi*, 788 F.3d at 17–18; see Smith, *supra*, at 815 (explaining that proffer agreements provide little protection for criminal defendants).

¹⁹⁸ *Jiménez-Bencevi*, 788 F.3d at 16.

¹⁹⁹ *Id.* at 10.

²⁰⁰ *Id.* at 11.

²⁰¹ *Id.* at 13. The expert witness would have testified that the person in the video was not Jiménez-Bencevi because, in his expert opinion, the shooter was at least five feet and ten and a half inches tall, whereas Jiménez-Bencevi was only five feet and seven inches. *Id.* Another suspect, Jiménez-Bencevi's brother Raymond, was five feet and ten inches tall. *Id.*

²⁰² *Id.* at 13. The district court overruled the government's objection, but told the defendant that he had an obligation to inform the expert witness about the contents of the proffer. *Id.* Jiménez-Bencevi objected, arguing that this would open the door for his expert to be cross-examined about the proffer, essentially admitting the proffer itself into evidence. *Id.* at 14. The court stated that Jiménez-Bencevi could not hire an expert to testify to something that he knew to be entirely false, and thus barred Jiménez-Bencevi from calling an expert witness. *Id.*

²⁰³ *Id.* at 14.

²⁰⁴ *Id.* at 16.

ments for any purpose other than impeachment.²⁰⁵ Thus, allowing the government to cross-examine the defendant's expert witness about the proffer statement exceeded the scope of the agreement.²⁰⁶ The court noted that waivers that allow plea statements to be used for rebuttal can limit a defense case in certain circumstances.²⁰⁷ For example, if the defense presented a video that unequivocally showed a different perpetrator committing the crime, the court would need to exclude this conclusive evidence because it was inconsistent with the proffer.²⁰⁸ Scholars argue that not admitting evidence that conflicts with a plea statement is significantly more limiting to the defense than the possibility of the prosecution impeaching a defendant who chooses to testify.²⁰⁹

In *Jiménez-Bencevi*, the First Circuit also acknowledged that there were many reasons that a defendant might be dishonest in plea statements when trying to avoid the death penalty.²¹⁰ For example, the defendant may find making a deal to accept life in prison preferable to the possibility of death.²¹¹ The defendant also could be covering for another person.²¹² Furthermore, the defendant may suffer from an impairment or delusions.²¹³ This acknowledgement that defendants may agree to untrue plea statements is in tension with the Supreme Court's contention in *Mezzanatto* that the admission of plea statements would augment the truth-seeking function of the criminal justice system.²¹⁴ Because *Mezzanatto* exclusively contemplates the use of plea statements for impeachment purposes, it is unclear whether the Supreme Court would expect rebuttal and case-in-chief waivers also to result in more accurate verdicts.²¹⁵ Although the First Circuit acknowledged that waiver clauses that allow for plea state-

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See *id.* (distinguishing the proffer agreement at issue from those that expressly contemplate the use of plea statements for rebuttal purposes); Mueller, *supra* note 98, at 1081 (arguing that rebuttal waivers hinder a competent defense).

²⁰⁸ *Jiménez-Bencevi*, 788 F.3d at 18.

²⁰⁹ See, e.g., Mueller, *supra* note 98, at 1081 (stating that waivers permitting plea statements for rebuttal purposes are more harmful than those for impeachment because the former limit a defendant's ability to bring forth a meaningful defense). This principle is echoed in the 1990 Supreme Court case, *James v. Illinois*, in which the court refused to expand the impeachment exception to other witnesses because doing so would have prevented defendants from mounting a competent defense. 493 U.S. 307, 318 (1990).

²¹⁰ 788 F.3d at 17–18.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Compare United States v. Mezzanatto, 513 U.S. 196, 204 (1995) (stating that plea waivers would result in more accurate verdicts), with *Jiménez-Bencevi*, 788 F.3d at 17–18 (stating that people often have motives to plead guilty when they are not actually guilty). *Mezzanatto* exclusively discussed the use of plea statements for impeachment purposes, but not for rebuttal or case-in-chief. 513 U.S. at 204.

²¹⁵ See 513 U.S. at 204 (discussing the use of plea statements for impeachment purposes exclusively).

ments to be used for rebuttal purposes are perfectly valid when clearly outlined in the agreement, the court’s discussion revealed that the use of evidence for rebuttal, rather than impeachment purposes, could mean the difference between a guilty and not-guilty verdict.²¹⁶

C. The Use of Plea Statements for the Government’s Case-in-Chief

The Fifth, Sixth, Eighth, and Tenth Circuits, and the District of Columbia Court of Appeals, all have expanded the rationale in *Mezzanatto* to enforce waivers allowing prosecutors to use plea statements in their cases-in-chief.²¹⁷ These circuits have found that if a defendant enters a plea knowingly and voluntarily, there is no reason to treat case-in-chief waivers differently from the impeachment waiver in *Mezzanatto*.²¹⁸ For example, in 1998, in *United States v. Burch*, the District of Columbia Court of Appeals upheld a waiver clause in a plea agreement that allowed the government to use plea statements in its case-in-chief.²¹⁹ After his arrest, defendant Larry Burch entered negotiations and pled guilty to possession with the intent to distribute crack cocaine.²²⁰ The government agreed to request dismissal of the other three counts on his indictment, to permit pre-sentence release, and to inform the U.S. Departure Guideline Committee (Guideline Committee) of how Burch had cooperated with the government.²²¹

Burch subsequently filed a motion to withdraw his plea, claiming that he was innocent of the alleged offense.²²² The trial court granted Burch’s motion,

²¹⁶ *Jiménez-Bencevi*, 788 F.3d at 16.

²¹⁷ See *United States v. Jim*, 786 F.3d 802, 813 n.6 (10th Cir. 2015) (enforcing waivers that allow for the use of plea statements in the government’s case-in-chief), *aff’d*, 804 F. App’x 895 (10th Cir. 2020); *United States v. Sylvester*, 583 F.3d 285, 289 (5th Cir. 2009) (same); *United States v. Fifer*, 206 F. App’x 502, 509–10 (6th Cir. 2006) (same); *United States v. Young*, 223 F.3d 905, 909–11 (8th Cir. 2000) (same); *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (same).

²¹⁸ See *Jim*, 786 F.3d at 813 n.6 (expanding the rationale in *Mezzanatto* to case-in-chief waivers); *Sylvester*, 583 F.3d at 289 (same); *Fifer*, 206 F. App’x at 509–10 (same); *Young*, 223 F.3d at 911 (same); *Burch*, 156 F.3d at 1321 (same).

²¹⁹ 156 F.3d at 1321.

²²⁰ *Id.* at 1318. He was found with more than fifty grams of cocaine. *Id.* He also was acquitted of a conspiracy charge. *Id.* at 1317.

²²¹ *Id.* at 1318. The Guideline Committee can file a pleading with the sentencing court if a defendant has been sufficiently cooperative with a criminal investigation. U.S. Dep’t Just., *supra* note 58, § 9-27.410. The court may depart from the Federal Sentencing Guidelines. *Id.* In this case, if the committee had found Burch’s help sufficient, it would have filed a motion allowing the sentencing judge to depart from the guidelines. *Burch*, 156 F.3d at 1318–19.

²²² *Burch*, 156 F.3d at 1318–19. With his motion, Burch included a letter to the trial judge, stating that he had no knowledge of the drugs and that they belonged to Bailey—a woman who the police had also arrested when the drugs were found. *Id.* Burch said that he pleaded guilty because he was facing threats from Bailey, who said that she would incriminate him in her own deal with the government, and because he believed that a jury would be more likely to believe Bailey over him, given his status as a young Black man with a prior drug conviction. *Id.*

but stated that it still would enforce the waiver of FRE 410 and FRCP 11(e)(6) to admit his prior plea statements.²²³ Burch was convicted and sentenced to twelve and a half years in prison and five years of supervised release.²²⁴

The D.C. Circuit decided that the reasoning underlying *Mezzanatto* was applicable beyond the scope of the specific question addressed therein, and held that waivers of FRE 410 and FRCP 11(f) are enforceable to admit evidence for the prosecution's case-in-chief.²²⁵ The court cited the three principles outlined in *Mezzanatto*: (1) that there is no evidence that Congress intended to prevent waivers; (2) that FRE 410, FRCP 11(e)(6), and the respective advisory committee notes do not recommend limitations on waivability; and (3) that there are no policy reasons that overcome the presumption of waivability.²²⁶

The court acknowledged two counter-arguments against extending *Mezzanatto* to waivers allowing for the use of statements in the prosecution's case-in-chief.²²⁷ First, the defendant argued that, in enacting FRE 410 and FRCP 11(e)(6), Congress impliedly expressed its intent to create unwaivable rights that protect the accused and benefit the judiciary.²²⁸ The D.C. Circuit disposed of this argument by noting that the Supreme Court already had deemed congressional intent an insufficient basis to overcome the presumption of waivability.²²⁹ Second, the court addressed a concern that allowing waivers for the use of plea statements in the government's case-in-chief could discourage defendants from participating in plea negotiations.²³⁰ The court concluded that it

²²³ *Id.* The judge expressed skepticism at the defendant's late claim of innocence, but nonetheless decided to give the defendant an opportunity to have a trial. *Id.* The court ruled that statements made during Burch's plea hearing and in his conversations with the DEA could be used for the prosecution's case-in-chief, whereas statements made during plea discussions could only be used for rebuttal or impeachment purposes. *Id.*

²²⁴ *Id.* Burch appealed the conviction. *Id.* at 1317. During the time that his direct appeal was pending, Burch filed a writ for habeas corpus with claims of ineffective assistance of counsel and prosecutorial misconduct. *Id.* The court denied his petition and the defendant filed a petition for a certificate of appealability. *Id.* The court consolidated the direct appeal with that petition. *Id.*

²²⁵ *Id.* at 1320–21 (citing *United States v. Mezzanatto*, 513 U.S. 196, 201–02, 208 n.5, 204–10 (1995)).

²²⁶ *Id.* at 1321.

²²⁷ *Id.* 1321–22.

²²⁸ *Id.* at 1321. Although personal rights are traditionally waivable—because FRE 410 and FRCP 11(e)(6) protect institutional interests by encouraging plea bargaining—they should not be waivable. *Id.* Personal rights include the right to testify on one's own behalf, the right to plead guilty, the right to waive a jury trial, and the right to waive an appeal. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (listing the personal rights that a defendant has over his or her case). The Fifth Circuit relied upon the analysis in *Burch* to evaluate a case-in-chief waiver. *See United States v. Sylvester*, 583 F.3d 285, 291 (5th Cir. 2009) (citing *Burch*, 156 F.3d at 1321–22) (agreeing with *Burch* that arguments relying on congressional intent to promote open plea discussions are not strong enough to justify the refusal to uphold case-in-chief waivers).

²²⁹ *Burch*, 156 F.3d at 1321. The Fifth Circuit also engaged with and disposed of this argument. *Sylvester*, 583 F.3d at 291.

²³⁰ *Burch*, 156 F.3d at 1322.

was unlikely that allowing the case-in-chief use of plea statements from a previously executed plea agreement would discourage defendants from entering plea discussions.²³¹ Ultimately, the D.C. Circuit held that waivers allowing the introduction of plea statements in the government's case-in-chief were valid.²³² Courts have since relied on *Burch* to justify the enforcement of case-in-chief waivers.²³³

Although the majority of circuit courts have held case-in-chief waivers enforceable, legal commentators are critical of the practice.²³⁴ Some scholars have expressed skepticism that case-in-chief waivers have no more effect on a defendant's participation in the plea bargaining system than impeachment waivers.²³⁵ Some have argued that a case-in-chief waiver is essentially a waiver of the trial itself.²³⁶ Additionally, scholars believe that the vast difference between the consequences of signing a plea agreement with an impeachment waiver, versus a case-in-chief waiver, will almost certainly affect the plea-bargaining process.²³⁷ Others have further noted that a judge's failure to accept

²³¹ *Id.* The court highlighted that the waiver in question was enacted with the signing of the actual plea agreement, which had occurred after the plea discussions. *Id.* The court stated that this was distinguishable from waivers that defendants execute prior to plea negotiations. *Id.* The court, however, did not indicate whether it would enforce a waiver in an agreement that had been executed prior to plea discussions. *Id.*

²³² *Id.* at 1321.

²³³ See, e.g., *Sylvester*, 583 F.3d at 289 (relying on the same rationale in *Burch*, which allowed the use of plea statements in the government's case-in-chief).

²³⁴ See Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1690 (2013) (noting that a judge's decision not to accept a plea could trigger a case-in-chief waiver); Miller, *supra* note 184, at 437 (arguing that defendants should be able to submit evidence of the rejection of a favorable plea with a valid FRE 410 waiver); Julia A. Keck, Note, *United States v. Sylvester: The Expansion of the Waiver of Federal Rule of Evidence 410 to Allow Case-in-Chief Use of Plea Negotiation Statements*, 84 TUL. L. REV. 1385, 1399 (2010) (contending that a case-in-chief waiver effectively replaces a trial); Adam Robison, Comment, *Waiver of Plea Agreement Statements: A Glimmer of Hope to Limit Plea Statement Usage to Impeachment*, 46 S. TEX. L. REV. 661, 674–75 (2005) (arguing that case-in-chief waivers will have a much greater effect on the plea-bargaining process than impeachment waivers).

²³⁵ Robison, *supra* note 234, at 674–75. These scholars reason that because defendants choose whether to testify at trial, they ultimately determine the admissibility of their own prior statements with an impeachment waiver. E.g., *id.* at 675. In contrast, in the case of rebuttal waivers, defendants are extremely limited in their defense strategy because any argument or testimony inconsistent with prior plea statements could trigger the admission of those statements. See Mueller, *supra* note 98, at 1081 (stating that rebuttal waivers severely limit the defense's strategy).

²³⁶ Keck, *supra* note 234, at 1399. Scholars also argue that, in addition to waiving the right to a trial, case-in-chief waivers also inadvertently undermine the Fifth Amendment's right against self-incrimination. *Id.* at 1402.

²³⁷ Robison, *supra* note 234, at 674–75. These commentators argue that, when defendants begin plea discussions that do not culminate in a final agreement, they make themselves vulnerable to the possibility of the government bringing a case against them without any evidence beyond the statements made during plea bargaining. Keck, *supra* note 234, at 1399. This concern echoes Justice Souter's dissent in *Mezzanatto*. See 513 U.S. 196, 217 (1995) (Souter, J., dissenting) (stating that a case-in-chief waiver is the effective waiver of a trial).

a guilty plea could result in the triggering of a case-in-chief waiver.²³⁸ Such scholars likewise point to the inherent unfairness that allows a defendant's plea to be used against them, but does not allow the defendant to present evidence of a rejection of a favorable guilty plea.²³⁹ Despite the fact that courts are trending toward enforcing case-in-chief waivers, the majority of the legal community believes that such waivers pose a serious risk to the constitutional rights of criminal defendants.²⁴⁰

III. THE CIRCUIT COURTS' EXTENSION OF *MEZZANATTO* THREATENS DEFENDANTS' RIGHT TO A FAIR TRIAL

Defendants have a constitutional right to a fair trial.²⁴¹ But extensions of the Supreme Court's 1995 holding in *United States v. Mezzanatto* are threatening that right.²⁴² The use of plea statements in the government's case-in-chief or for rebuttal purposes ultimately defeats the purpose of going to trial.²⁴³ If the prosecution presents a defendant's own incriminating statements, the jury is left with little doubt as to their guilt.²⁴⁴ The trial itself becomes a mere formality rather than a meaningful exercise of a defendant's constitutional right.²⁴⁵ This Part discusses the consequences of the circuit courts' expansive readings of *Mezzanatto*, addresses the ethical implications for prosecutors raised by case-in-chief waivers, and suggests that these waivers can be voided as unjust using contract principles.²⁴⁶ Section A of this Part examines how case-in-chief and rebuttal waivers threaten the constitutional rights of criminal defendants.²⁴⁷ Section B argues that the use of case-in-chief waivers violates

²³⁸ Miller, *supra* note 234, at 1690.

²³⁹ Miller, *supra* note 184, at 437. FRE 410 waivers are only enforceable *against* defendants, though the rationale in *Mezzanatto* is equally applicable. *Id.*

²⁴⁰ See Miller, *supra* note 234, at 1690 (stating that a judge's failure to accept a plea triggers a case-in-chief waiver); see also Miller, *supra* note 184, at 433 (noting that most modern courts have upheld case-in-chief waivers); Keck, *supra* note 234, at 1399 (contending that a case-in-chief waiver waives the right to a trial); Robison, *supra* note 234, at 674–75 (asserting that case-in-chief waivers are more harmful to the plea-bargaining process than impeachment waivers).

²⁴¹ U.S. CONST. amend. VI.

²⁴² See 513 U.S. at 217 (Souter, J., dissenting) (expressing concern that these waivers would eventually waive the entire trial); Keck, *supra* note 234, at 1399 (same).

²⁴³ See *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting) (predicting that lower courts will interpret the majority's decision expansively, thereby leading to the "waiver of trial itself"); Keck, *supra* note 234, at 1399 (arguing that a case-in-chief waiver makes it so that a prosecutor does not have to present any other evidence other than the defendant's plea statements, which serve as a confession to the jury).

²⁴⁴ See *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting) (expressing concern about the effects of case-in-chief waivers).

²⁴⁵ See *id.* (expressing concern that the majority's decision will result in the functional waiver of criminal trials).

²⁴⁶ See *infra* notes 250–318 and accompanying text.

²⁴⁷ See *infra* notes 250–270 and accompanying text.

the prosecutor’s ethical obligations.²⁴⁸ Section C reasons that courts should refuse to enforce case-in-chief and rebuttal waivers because they are contracts that are contrary to public policy.²⁴⁹

A. Case-in-Chief and Rebuttal Waivers Threaten Defendants’ Right to a Fair Trial

Circuit courts’ expansive readings of *Mezzanatto* threaten defendants’ constitutional right to a fair trial.²⁵⁰ Defendants arguing against the enforceability of FRE 410 and FRCP 11(f) case-in-chief waivers rightly have asserted that enforcing such waivers inhibits plea bargaining, thereby frustrating the clear congressional intent behind these rules.²⁵¹ In 1998, in *United States v. Burch*, the District of Columbia Court of Appeals dismissed this tremendous policy concern by emphasizing a procedural technicality in the case—the defendant had signed the waiver *after* engaging in plea discussions—without considering the implications of case-in-chief waivers generally.²⁵² According to the court, the case-in-chief waiver in question did not discourage this particular defendant from entering a plea agreement because he already had entered plea discussions when he signed the agreement, including the waiver.²⁵³ Later courts, however, unfortunately have relied upon *Burch* as justification for enforcing case-in-chief waivers that are *not* signed after entering plea negotiations.²⁵⁴ For example, the signing of proffer agreements is usually a prerequisite for entering a plea agreement, and the defendant will almost always sign the agreement before plea discussions begin.²⁵⁵ Courts in favor of an expansive reading of *Mezzanatto* focus on the “knowing and voluntary” nature of the

²⁴⁸ See *infra* notes 271–286 and accompanying text.

²⁴⁹ See *infra* notes 287–318 and accompanying text.

²⁵⁰ See U.S. CONST. amend. VI (establishing the right to a fair trial for criminal defendants); *United States v. Rebbe*, 314 F.3d 402, 408–09 (9th Cir. 2002) (allowing the use of plea statements for rebuttal purposes); *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998) (expanding FRE 410 waivers to allow evidence to be used in the prosecution’s case-in-chief); Mueller, *supra* note 98, at 1081 (observing that rebuttal evidence is more threatening than impeachment evidence because the former severely limits a defendant’s defense strategy).

²⁵¹ See *Burch*, 156 F.3d at 1322 (presenting the defendant’s argument that FRE 410 waivers frustrate Congress’s purpose for enacting the Rule).

²⁵² See *id.* (enforcing a case-in-chief waiver without considering the implications on future cases). In *Burch*, the D.C. Circuit ultimately extended the *Mezzanatto* holding to allow statements to be used for the prosecution’s case-in-chief. *Id.* at 1321.

²⁵³ *Id.* at 1322.

²⁵⁴ See, e.g., *United States v. Sylvester*, 583 F.3d 285, 289 (5th Cir. 2009) (relying on the rationale in *Burch* to allow for the use of plea statements in the government’s case-in-chief).

²⁵⁵ See Smith, *supra* note 197, at 810 (stating that criminal defendants usually sign proffer agreements that contain FRE 410 waivers, before entering plea discussions); see also *United States v. Jiménez-Bencevi*, 788 F.3d 7, 10 (1st Cir. 2015) (noting that the defendant signed a proffer before engaging in plea discussions).

agreement.²⁵⁶ In extending *Mezzanatto* outside its proper context, these courts fail to consider the vast differences in the results of impeachment waivers from those of case-in-chief waivers.²⁵⁷ Defendants trigger impeachment waivers only when they choose to testify, whereas they can activate case-in-chief waivers immediately if they breach the agreement.²⁵⁸

Additionally, case-in-chief waivers likely will discourage defendants from entering plea discussions.²⁵⁹ The majority in *Mezzanatto* dismissed this concern by reasoning that, although some defendants may be discouraged from participating in the plea-bargaining process, many prosecutors would not even engage in the process without a waiver clause.²⁶⁰ Circuit courts have adopted this rationale when enforcing case-in-chief waivers.²⁶¹ The *Mezzanatto* Court failed to contemplate how public policy concerns could potentially supersede the presumptive validity of waivers, and also overlooked compelling justifications against waiver enforcement, namely preventing false convictions and protecting the integrity of the criminal justice system.²⁶² As Justice Souter observed in his dissent in *Mezzanatto*, the use of plea statements for the government's case-in-chief nullifies the need for a trial because the outcome is almost

²⁵⁶ See *United States v. Jim*, 786 F.3d 802, 813 & n.6 (10th Cir. 2015) (expanding the rationale in *Mezzanatto* to case-in-chief waivers), *aff'd*, 804 F. App'x 895 (10th Cir. 2020); *Sylvester*, 583 F.3d at 289 (same); *United States v. Fifer*, 206 F. App'x 502, 509–10 (6th Cir. 2006) (same); *United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000) (same); *Burch*, 156 F.3d at 1321 (same). For example, the Tenth Circuit in *United States v. Jim* held that the defendant's plea was knowing and voluntary based on his age and education, his prior experience with guilty pleas, and the clear language used in the plea agreement. 786 F.3d at 813. At the time the agreement was signed, Jim was twenty-eight years old, had a high school diploma, and had some college credits. *Id.* He had previously pleaded guilty to two drunk driving charges. *Id.* The Tenth Circuit's interpretation mistakenly read *Mezzanatto* as stating that the *only* ground for ignoring a waiver was if it was not knowing and voluntary, and ignored the fact that pleas can be withdrawn when it is "fair and just" to do so. See *id.* (considering exclusively whether Jim's plea was knowing and voluntary); Mueller, *supra* note 98, 1049 (criticizing the Tenth Circuit's decision in *Jim* for ignoring fairness considerations).

²⁵⁷ See Robison, *supra* note 234, at 674–75 (stating that case-in-chief waivers have a much greater effect on the plea-bargaining process than impeachment waivers).

²⁵⁸ See Mueller, *supra* note 98, at 1081 (noting that impeachment waivers discourage defendants from testifying).

²⁵⁹ Robison, *supra* note 234, at 674–75.

²⁶⁰ See 513 U.S. 196, 207 (1995) (rejecting arguments that the enforcement of FRE 410 waivers for impeachment purposes would adversely affect the plea-bargaining process).

²⁶¹ See *Jim*, 786 F.3d at 813 & n.6 (enforcing case-in-chief waivers); *Sylvester*, 583 F.3d at 289 (same); *Fifer*, 206 F. App'x at 509–10 (same); *Young*, 223 F.3d at 911 (same); *Burch*, 156 F.3d at 1321 (same).

²⁶² See *Mezzanatto*, 513 U.S. at 207 (declining to address the public policy implications of the presumptive validity of plea waivers); *United States v. Jiménez-Bencevi*, 788 F.3d 7, 17–18 (1st Cir. 2015) (stating that defendants have incentives to plead guilty even when they are innocent); *United States v. Newbert*, 504 F.3d 180, 187–88 (1st Cir. 2007) (refusing to enforce a plea agreement where there was evidence of the defendant's innocence); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2007) (stating that plea agreements can be voided in the interests of justice).

certain.²⁶³ Thus, the failure among circuit courts to acknowledge the vast contextual difference between the implications of impeachment waivers and case-in-chief waivers threatens the integrity of the criminal justice system and the constitutional rights of criminal defendants.²⁶⁴

The enforcement of waivers that utilize plea statements for rebuttal purposes produces nearly the same unjust outcome as case-in-chief waivers.²⁶⁵ When a waiver sanctions plea statements for rebuttal purposes, the prosecution can use those statements to refute any evidence presented at trial and, in doing so, significantly limit the defendant's opportunity to establish a competent defense.²⁶⁶ Although a defendant can choose not to testify, a rebuttal waiver allows the prosecution to rebut any evidence presented at trial, including any statements made by another witness or any arguments that the defendant's attorney has put forth.²⁶⁷ Courts consistently have considered a defendant's right to a competent defense to hinge solely on the aptitude of his or her attorney; however, rebuttal waivers severely handicap the strategy of even the most competent defense attorney.²⁶⁸ Thus, rebuttal waivers essentially rob criminal defendants of the right to a competent defense.²⁶⁹ Consequently, instead of continuing to stretch the im-

²⁶³ *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting); see Keck, *supra* note 234, at 1399 (noting that a case-in-chief waiver replaces a trial).

²⁶⁴ See U.S. CONST. amend. VI (establishing the right to a fair trial); *Jim*, 786 F.3d at 813 & n.6 (allowing a case-in-chief waiver after the defendant failed to prove that the plea was not knowing and involuntary); *Sylvester*, 583 F.3d at 289 (extending the holding in *Mezzanatto* to include case-in-chief waivers when the waiver at issue was entered knowingly and voluntarily and made in the presence of counsel); *Fifer*, 206 F. App'x at 509–10 (holding that counsel's advisement that the defendant agree to a case-in-chief waiver did not amount to ineffective assistance of counsel because the record failed to establish that defense counsel did not understand the significance of the waiver); *Young*, 223 F.3d at 915 (allowing a case-in-chief waiver because the plea agreement was entered into voluntarily and the defendant received benefits, such as the prosecution's promise not to seek a sentencing enhancement); *Burch*, 156 F.3d at 1321 (enforcing a case-in-chief waiver because it was knowing and voluntary, and because there was not a sufficient showing to establish ineffective assistance of counsel).

²⁶⁵ See, e.g., *United States v. Rebbe*, 314 F.3d 402, 408 (9th Cir. 2002) (limiting a defendant's defense strategy); *Mueller*, *supra* note 98, at 1081 (stating that rebuttal waivers allow for the use of witnesses' and attorneys' statements that contradict the defendant's prior plea statements).

²⁶⁶ See *Rebbe*, 314 F.3d at 408 (stating that the defendant could not present evidence nor arguments that contradicted his plea statements).

²⁶⁷ See *Mueller*, *supra* note 98, at 1081 (stating that rebuttal waivers severely limit the defense's strategy).

²⁶⁸ See *Gilles*, *supra* note 43, at 1385–86 (stating that courts consider the actions of a defendant's attorney only when evaluating whether the defendant received a competent defense). Rebuttal and case-in-chief waivers may discourage defense attorneys from participating in plea discussions, which can be important opportunities for the defense to assess the prosecutor's strategy and attitude. *Mueller*, *supra* note 98, at 1036. Once the waiver is enacted, the only tool available to the defense attorney is to stress the prosecution's high burden of proof because any argument pertaining to "factual innocence" would trigger the waiver. *Id.* at 1048.

²⁶⁹ See *Gilles*, *supra* note 43, at 1386 (explaining that an inquiry into competent defense only looks to the defense attorney's aptitude); *Mueller*, *supra* note 98, at 1036 (arguing that rebuttal waivers have a more substantial effect on the overall defense strategy than impeachment waivers).

plications of *Mezzanatto*, courts should enforce waivers to permit the admittance of plea statements solely for impeachment purposes.²⁷⁰

B. Waiver Clauses and Prosecutorial Ethics

Judges are not the only actors with the power and obligation to prevent injustices caused by case-in-chief and rebuttal waivers. Prosecutors are commonly referred to as “ministers of justice,” meaning that they must balance the law, the individual circumstances of each case, and the well-being of the public when deciding whether to bring charges.²⁷¹ A prosecutor’s duty is not to win cases, but to serve ultimate justice, thus obligating them to prevent miscarriages of justice and to avoid wrongful convictions while also working to achieve just convictions.²⁷² Overall, U.S. Attorneys’ offices have lower caseloads and are better funded than their state counterparts.²⁷³ It is especially troubling, therefore, that without the excuse of crushing caseloads or scarce resources federal prosecutors routinely use FRE 410 waivers to make plea statements available for rebuttal purposes and for the prosecution’s case-in-chief.²⁷⁴ FRE 410 waivers are likely to cause a miscarriage of justice, thereby violating the ethical duties of prosecutors.²⁷⁵ For example, in *United States v. Newbert*, evidence of the defendant’s innocence came to light, and yet the prosecutor still

²⁷⁰ See *United States v. Mezzanatto*, 513 U.S. 196, 217 (1995) (Souter, J., dissenting) (predicting that the majority’s opinion would be read expansively, leading to the invocation of case-in-chief waivers). Justice Ginsburg’s concurrence, joined by Justices O’Connor and Breyer, expressed concerns regarding case-in-chief waivers. *Id.* at 211 (Ginsburg, J., concurring). Justice Stevens joined Justice Souter’s dissent. *Id.* at 211–18 (Souter, J., dissenting). Thus, a five justice majority opposed the use of case-in-chief waivers. Mueller, *supra* note 98, at 1046.

²⁷¹ Ross Galin, Note, *Above the Law: The Prosecutor’s Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 *FORDHAM L. REV.* 1245, 1264 (2000).

²⁷² See *Berger v. United States*, 295 U.S. 78, 88 (1935) (defining the role of federal prosecutors); Galin, *supra* note 271, at 1264–65 (quoting *Berger*, 295 U.S. at 88) (describing the unique role of a prosecutor). In *Berger v. United States*, the Court stated:

The United States Attorney[’s] . . . interest . . . in a criminal prosecution is not that it shall win the case, but that justice shall be done It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. at 88.

²⁷³ Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 *NW. U. L. REV.* 261, 278 (2011).

²⁷⁴ See *United States v. Roberts*, 660 F.3d 149, 163–64 (2d Cir. 2011) (allowing the prosecution to use the defendant’s statements that were made during plea negotiations for rebuttal purposes); *Sylvester*, 583 F.3d at 289 (allowing the use of plea statements for the government’s case-in-chief); Gershowitz & Killinger, *supra* note 273, at 278 (stating that federal prosecutors have more resources and lower caseloads than state prosecutors); Ware, *supra* note 92, at 168 (acknowledging that waivers have become commonplace in the criminal context).

²⁷⁵ See *United States v. Newbert*, 504 F.3d 180, 187–88 (1st Cir. 2007) (refusing to enforce a plea waiver after evidence of the defendant’s innocence became available); Galin, *supra* note 271, at 1264–65 (stating that prosecutors have the duty to prevent a miscarriage of justice).

sought to invoke the waiver clause.²⁷⁶ If the court had enforced that waiver, a wrongful conviction likely would have been the outcome.²⁷⁷ The court in *United States v. Jiménez-Bencevi* also recognized that defendants have incentives to plead guilty for crimes they did not commit and, therefore, plea statements may not always be true.²⁷⁸

Prosecutors include FRE 410 waivers in their standard plea bargain forms to discourage defendants from breaching their pleas and requiring a trial.²⁷⁹ These waivers, however, further skew an already unbalanced process.²⁸⁰ Unlike in a criminal trial, there is almost no oversight over the plea-bargaining process.²⁸¹ There is no transcript or recording that courts can review for an abuse of discretion.²⁸² Additionally, if a defendant who entered a plea agreement with a case-in-chief waiver later withdraws their plea, the prosecution's case already has been made for them.²⁸³ The prosecutor simply can read a defendant's confession or reveal the prior guilty plea and rest their case.²⁸⁴ Therefore, although these waivers serve as time savers for prosecutors seeking to obtain convictions, they also raise tremendous public policy concerns that can outweigh this practical benefit.²⁸⁵ If prosecutors must rely on these waivers to win at trial, perhaps they should not be bringing the case at all.²⁸⁶

C. Contractual Solutions for a Constitutional Problem

Even if prosecutors insist on continuing to use these unethical waivers, contract law permits courts to avoid enforcing agreements that are contrary to public policy.²⁸⁷ Given the adverse policy implications of FRE 410 and FRCP 11(f)

²⁷⁶ 504 F.3d at 184.

²⁷⁷ See *id.* at 188 (observing that a wrongful conviction was likely the outcome if the court chose to enforce the plea agreement); RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981) (stating that contracts that violate public policy are unenforceable).

²⁷⁸ See 788 F.3d 7, 17–18 (1st Cir. 2015) (acknowledging that defendants have incentives to plead guilty when they are in fact innocent); Penrod, *supra* note 32, 1141 n.64 (same).

²⁷⁹ See *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (noting that prosecutors frequently include FRE 410 waivers in their standard form plea agreement contracts).

²⁸⁰ See Cross, *supra* note 88, at 140 (identifying the power discrepancy between prosecutors and criminal defendants).

²⁸¹ McConkie, *supra* note 116, at 82.

²⁸² *Id.*

²⁸³ See *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting) (stating that a case-in-chief waiver is the waiver of a trial); Keck, *supra* note 234, at 1399 (same).

²⁸⁴ Keck, *supra* note 234, at 1399.

²⁸⁵ See Scott & Stuntz, *supra* note 22, at 1924 (stating that prosecutors are incentivized to engage in plea agreements to save the time and expense of trial).

²⁸⁶ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasizing that a duty of prosecutors is to prevent false convictions).

²⁸⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981) (stating that contracts that violate public policy are unenforceable).

waivers, courts should invoke contract principles to void these waivers.²⁸⁸ A contract is void on public policy grounds if the policy justifications for voiding the contract clearly outweigh the reasons for enforcing it.²⁸⁹ The considerations when deciding if public policy justifications eclipse the reasons for enforcing a particular contract term are: (1) the legislature or judiciary's support for the policy; (2) whether enforcement of that term would undermine the policy; (3) whether the agreement was a product of intentional misconduct; and (4) the nexus between that misconduct and the term.²⁹⁰

There are two major policies that discourage the use of waivers for admission of plea statements for non-impeachment purposes: (1) promoting plea bargaining; and (2) ensuring that defendants receive fair trials.²⁹¹ Congress has made it clear that encouraging defendants to make plea bargains benefits the criminal justice system.²⁹² The U.S. Constitution guarantees defendants the right to a fair trial.²⁹³ Although the *Mezzanatto* Court interpreted Congress's silence on whether the rules could be waived as a presumption of waivability, there are strong reasons to believe that this interpretation inevitably frustrates Congress's purpose for the rules.²⁹⁴ Enforcing waiver clauses that permit the use of plea statements in rebuttals and in the government's cases-in-chief will discourage defendants from participating in plea discussions and will threaten defendants' trial rights, thus, undermining Congress's intent in creating FRE 410 and FRCP 11(f).²⁹⁵ Although the *Mezzanatto* Court dismissed this argument as applied to impeachment waivers, it is unclear whether the Court would have done the same

²⁸⁸ See *United States v. Henry*, 758 F.3d 427, 431 (D.C. Cir. 2014) (asserting that contract principles govern plea agreements); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that violate public policy are void).

²⁸⁹ RESTATEMENT (SECOND) OF CONTRACTS § 178.

²⁹⁰ *Id.* § 178(3).

²⁹¹ See U.S. CONST. amend. VI (ensuring the right to a fair trial); *Mezzanatto I*, 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd*, 513 U.S. 196 (1995) (noting Congress's intention to promote plea bargaining).

²⁹² Act of Dec. 12, 1975, Pub. L. No. 94-149, 89 Stat. 805 (1975) (modifying FRE 410, which previously allowed for the admission of plea statements for impeachment purposes); FED. R. EVID. 410 (1974) (permitting statements to be used for impeachment); H.R. REP. NO. 94-414, at 10 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 713, 714 (declining to allow for an impeachment exception to FRE 410); S. REP. NO. 99-1277, at 10 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057 (same).

²⁹³ U.S. CONST. amend. VI.

²⁹⁴ See *Mezzanatto*, 513 U.S. at 203-04 (stating that the presumption of waivability does not undermine Congress's intention behind enacting FRE 410).

²⁹⁵ See U.S. CONST. amend. VI (establishing the right to a fair trial); *Mezzanatto I*, 998 F.2d at 1455 (noting that the enforcement of FRE 410 waivers will discourage criminal defendants from entering plea agreements). Impeachment waivers are not as threatening to the plea-bargaining process because defendants can avoid being impeached by simply choosing not to testify. Robison, *supra* note 234, at 674-75. Because most defendants are represented by competent counsel in plea discussions, attorneys may urge their clients not to participate in order to assure that their statements cannot be used in the prosecution's case-in-chief. *Id.* at 675.

in the case of a rebuttal or case-in-chief waiver.²⁹⁶ As more courts enforce case-in-chief and rebuttal waivers, criminal defendants and their attorneys may grasp the enormous cost of engaging in plea discussions—which may or may not result in a deal—and opt not to participate.²⁹⁷ Evidence of intentional wrongdoing is also unlikely in the drafting of plea agreements, and thus it is improbable that courts would hold these agreements to be unenforceable for such a reason.²⁹⁸ Ultimately, given that the policy concerns clearly outweigh the benefits of enforcing these waiver terms, courts should hold these types of waivers to be unenforceable.²⁹⁹

In addition to being supported by public policy, this shift would also be feasible because the rest of the plea agreement could still be salvaged.³⁰⁰ It is not unprecedented for judges to refuse to enforce a single clause in a plea agreement.³⁰¹ In *United States v. Teeter*, in spite of the contractual validity of the waiver clause at issue, the First Circuit chose, in the interests of justice, not to enforce a waiver of the right to appeal.³⁰² Similarly, that same court, in *Newbert*, refused to enforce an otherwise valid FRE 410 waiver because there was evidence that the defendant was actually innocent.³⁰³ Although the First Circuit did not outright state that plea agreements are adhesion contracts and should therefore be read more critically, its rationale embodies this idea.³⁰⁴ The court acknowledged that it should interpret ambiguities against the government as the drafter of the contract.³⁰⁵ It also noted that defendants are in a weaker bargaining

²⁹⁶ See *Mezzanatto*, 513 U.S. at 207 (suggesting that policy justifications could overcome the presumption of waivability in the context of impeachment waivers).

²⁹⁷ See *id.* at 217 (Souter, J., dissenting) (implying that case-in-chief waivers would discourage criminal defendants from engaging in plea discussions because of the high risks in doing so).

²⁹⁸ See *id.* at 207 (majority opinion) (stating that because prosecutors have limited resources and must make decisions as to which testimony is credible, they enforce conditions in plea agreements to protect their time and resources).

²⁹⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981) (stating that a contract may be unenforceable for public policy reasons).

³⁰⁰ See *Jak Prods., Inc. v. Wiza*, 986 F.2d 1080, 1087 (7th Cir. 1993) (modifying a non-competition agreement by narrowing the terms).

³⁰¹ *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2007).

³⁰² *Id.* The court did not define what those terms were, but stated that it would be clear based on case-specific facts. *Id.* at 26. Although the First Circuit affirmed the defendant's conviction, it struck the waiver clause from the defendant's plea agreement. *Id.* at 31.

³⁰³ See 504 F.3d 180, 187–88 (1st Cir. 2007) (declining to enforce a plea agreement after evidence of the defendant's innocence arose); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that violate public policy are unenforceable).

³⁰⁴ See *Newbert*, 504 F.3d at 188 (stating that there is an imbalance of power between the parties, given that the government is the drafting party); Schwartz, *supra* note 77, at 347–48 (asserting that courts are more likely to reform adhesion contracts compared to other types of contracts).

³⁰⁵ See *Newbert*, 504 F.3d at 188 (acknowledging that the government is the drafting party and thus any ambiguity should be construed against them); Schwartz, *supra* note 77, at 346 (stating that the stronger party is often the drafter of a contract of adhesion).

position because their freedom is at stake.³⁰⁶ The First Circuit upheld the district court's decision to reform the contract between the defendant and the government, thereby voiding the waiver clause.³⁰⁷ The First Circuit reached its decision in spite of the facts that the agreement clearly stated that the defendant could not withdraw his guilty plea, both parties had signed the agreement voluntarily, and nothing in the agreement suggested that it was invalid.³⁰⁸ Notably, the agreement's resemblance to a contract of adhesion might have influenced the court to intervene.³⁰⁹

Courts should consider the extreme imbalance of power between prosecutors and criminal defendants, as well as the adhesive nature of plea agreements when evaluating their enforceability.³¹⁰ If the terms of the agreement are clearly unfair to the criminal defendant, courts should refuse to enforce these unconscionable agreements.³¹¹ Additionally, there are strong public policy reasons for not enforcing a contract where there is a likelihood that the defendant is actually innocent.³¹² Given that the goal of the criminal justice system is to seek the truth, enforcing an agreement that punishes the wrong person when there is evidence to support his or her innocence clearly violates public policy, and judges must hold such contracts unenforceable.³¹³ Courts should follow the examples set

³⁰⁶ *Newbert*, 504 F.3d at 187. Courts are more likely to reform contracts of adhesion than other types of contracts because the imbalance of power and the weaker party's inability to negotiate terms can make for an unfair outcome. See Schwartz, *supra* note 77, at 347–48 (acknowledging that courts are more likely to intervene in contracts of adhesion).

³⁰⁷ See *Newbert*, 504 F.3d at 187–88 (upholding the district court's decision); *Newbert I*, 471 F. Supp. 2d 182, 199 (D. Me. 2007) (choosing not to enforce a valid term in a plea agreement), *aff'd*, 504 F.3d 180.

³⁰⁸ See *Newbert*, 504 F.3d at 187–88 (holding that the withdrawal of a plea did not constitute a breach of the agreement when exculpatory evidence arose post-plea); *Newbert I*, 471 F. Supp. 2d at 199 (allowing the withdrawal of the defendant's guilty plea). The contract at issue had all the required elements—an offer, an acceptance, and consideration—and the defendant had entered the agreement knowingly and voluntarily. See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (stating the required elements for a valid contract); Schwartz, *supra* note 77, at 347 (explaining that contracts must be voluntary to be enforceable).

³⁰⁹ See *Newbert I*, 471 F. Supp. 2d at 199 (allowing the withdrawal of a plea without triggering a FRE 410 waiver); Schwartz, *supra* note 77, at 347–48 (acknowledging that courts are less reluctant to reform adhesion contracts than other contract types).

³¹⁰ See *Newbert*, 504 F.3d at 187 (acknowledging the power discrepancy between criminal defendants and prosecutors); Schwartz, *supra* note 77, at 347–48 (noting that courts are more likely to intervene in a contract of adhesion than in the commercial context).

³¹¹ See *THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, 532 F. App'x 813, 818 (10th Cir. 2013) (stating that contracts are unconscionable when they are clearly unjust to the weaker party).

³¹² See *Newbert*, 504 F.3d at 187–88 (refusing to enforce a plea agreement where there was evidence of the defendant's innocence); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that violate public policy are unenforceable).

³¹³ See *Newbert*, 504 F.3d at 187–88 (declining to enforce a plea agreement where there was evidence of the defendant's innocence); *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1114 (9th Cir. 2001) (stating that the purpose of the criminal justice system is to seek the truth); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating contracts that violate public policy are unenforceable).

forth in *Newbert* and *Teeter*, and refuse to enforce plea agreements with waivers of FRE 410 and FRCP 11(f) when the court believes that enforcement of those agreements will run counter to the interests of justice.³¹⁴ Courts should consider fairness, rather than automatically enforcing plea agreements that a defendant has entered "knowingly and voluntarily."³¹⁵ For example, in cases where the court allows a defendant to withdraw a plea, the court should also be able to void the waiver clause even though the defendant technically breached his or her plea agreement.³¹⁶ The court should not interpret said plea withdrawal as a breach or, at the very least, should not allow the withdrawal to trigger the admission of plea statements.³¹⁷ In the context of plea agreements, in which a criminal defendant's freedom is at stake, courts should not hesitate to employ the foundational principles of contract law that were developed to protect weaker bargaining parties.³¹⁸

CONCLUSION

Circuit courts' expansive interpretations of *United States v. Mezzanatto* pose risks to the rights of criminal defendants, as well as the functionality of the criminal justice system. The enforcement of FRE 410 and FRCP 11(f) waivers, which allow for the use of plea statements for rebuttal purposes or the prosecution's case-in-chief, discourages plea bargaining and threatens a defendant's right to a fair trial. As a result, courts should apply contract principles to plea agreements that contain these types of waivers, and should hold them to be unenforceable and void for public policy reasons. Furthermore, courts should strike these clauses from plea agreements when they threaten the sacred trial rights of criminal defendants. Courts also should not hesitate to intervene in these agreements because they are essentially adhesion contracts, and are thus more likely to be unconscionable. Finally, these waivers violate prosecutorial ethics because they do not promote justice and are likely to result in wrongful convictions.

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³¹⁴ *Newbert*, 504 F.3d at 187–88; see *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2007) (stating that plea agreements can be voided in the interests of justice).

³¹⁵ See Mueller, *supra* note 98, at 1076–77 (criticizing courts that do not consider fairness when evaluating the validity of waiver clauses in plea agreements).

³¹⁶ See, e.g., *Newbert*, 504 F.3d at 181, 183 (refusing to enforce a plea agreement when the defendant breached the plea by withdrawing with the court's permission).

³¹⁷ See *id.* at 188–89 (Boudin, J., concurring) (stating that although the majority found that the withdrawn plea did not constitute a breach, the court could have also chosen not to enforce the waiver clause); *Teeter*, 257 F.3d at 25–26 (refusing to enforce a plea because it would result in a miscarriage of justice).

³¹⁸ See *Newbert*, 504 F.3d at 185 (applying traditional contract principles to a plea agreement); RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that contracts that run contrary to public policy are unenforceable).

