No. 19-20157

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIELA GOZES-WAGNER, ALSO KNOWN AS DANIELA WAGNER, ALSO KNOWN AS DANIELA MAYER GOZES, ALSO KNOWN AS DANIELA GOZES,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CATO INSTITUTE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS, DUE PROCESS INSTITUTE, AND TEXAS PUBLIC POLICY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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**Amici curiae* are nonprofit organizations with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

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Dated: November 1, 2019

/s/ Jonathan L. Marcus
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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is an organization committed to ensuring justice and due process for persons charged with a crime or wrongdoing. NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices. Its approximately 40,000 members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors. Particularly relevant to this case, NACDL published an extensive report on the trial penalty in 2018. NACDL has an interest in ensuring that defendants like Daniela Gozes-Wagner are not punished simply for exercising their constitutional right to make the government prove its case at trial.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory

[1] Both parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparing or submitting the brief.

safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil-rights laws. Founded nearly 100 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as amicus curiae. Through its Criminal Law Reform Project, the ACLU engages in nationwide litigation and advocacy to enforce and protect the rights of people accused of crimes, including those facing coercion from prosecutors and other state actors to abandon those rights.

The American Civil Liberties Union Foundation of Texas ("ACLU of Texas") is a nonpartisan organization with approximately 56,000 members across the state. Founded in 1938, the ACLU of Texas is headquartered in Houston and is one of the largest ACLU affiliates in the nation. The ACLU of Texas is the state's foremost defender of the civil liberties and civil rights of all Texans as guaranteed by the U.S. Constitution and our nation's civil rights laws. The ACLU of Texas regularly files *amicus* briefs on civil rights and constitutional issues, including in cases before this Court.

The Due Process Institute is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as an *amicus curiae* before the Supreme Court in cases that decided important criminal justice issues, such as *Timbs v. Indiana*, 139 S. Ct. 682 (2019) and *United States v. Haymond*, 139 S. Ct. 2369 (2019).

The Texas Public Policy Foundation ("TPPF") is a 501(c)(3) nonprofit, nonpartisan research institute. TPPF's mission is to promote and defend liberty, personal responsibility, and free enterprise by educating policymakers and shaping the public policy debate with sound research and outreach. Right on Crime is the trademarked name of TPPF's national criminal justice reform project. Right on Crime believes that a well-functioning criminal justice system enforces order and respect for every person's right to property and ensures that liberty does not lead to license, while also promoting fair and equal application of the law.

This case concerns TPPF and Right on Crime because equal application of the law cannot be reconciled with the routine imposition of much stiffer sentences in otherwise comparable cases for no other reason than to punish one defendant for exercising her constitutional right to trial. While ranges in sentencing for the same offense are appropriate in recognition of logical factors such as level of intent and criminal history, punishing a defendant for exercising a constitutional right

necessarily erodes that right and undermines the legitimacy of the criminal justice system. Public confidence in the system's legitimacy is both a moral and practical imperative, given that public cooperation with police is essential to the reporting and solving of crime. In short, TPPF and Right on Crime view an unlimited and mechanical application of the trial penalty as wholly incongruous with not just the Constitution, but any defensible conception of justice.

SUMMARY OF THE ARGUMENT

Criminal defendants increasingly face the specter of a steep penalty should they elect to exercise their constitutional right to a jury trial. The government routinely seeks much harsher sentences for defendants who refuse to forgo their trial rights and admit guilt at the onset of criminal proceedings. Because of the huge gulf between sentences imposed after a plea deal and those imposed after a conviction at trial, few rational defendants can hold the government to its constitutionally mandated burden to prove their guilt beyond a reasonable doubt at trial. Thus, the "choice" given defendants to plead guilty often is no choice at all. This trial penalty—the enhanced punishment that a defendant receives for refusing to concede guilt and instead taking the case to trial—violates due process. The trial penalty also has eroded the jury trial and the constitutional safeguards that go along with it. The result is a system that is less just, less transparent, and more prone to error.

Amici believe that courts have an obligation to carefully scrutinize the government's recommended sentence after trial to ensure that the government is not improperly seeking to penalize defendants for exercising their constitutional trial rights. To be sure, plea deals have become a critical part of our criminal justice system and, if properly negotiated, can offer benefits to all interested parties. And *amici* do not dispute that, in appropriate cases, a defendant who is convicted after trial can receive a sentence that is not identical to the sentence imposed on an otherwise similarly situated defendant who pleaded guilty. But the Constitution does not permit the government to seek—nor courts to impose—a sentence designed to punish a defendant for exercising her trial rights.

This case presents a quintessential example of the trial penalty at work and features hallmarks of retaliation and vindictiveness. While the government substantially reduced the charges against Ms. Gozes-Wagner's co-defendants in exchange for guilty pleas (leaving two of them exposed to five-year maximum terms and the third to a ten-year term), it ***added*** a charge against Ms. Gozes-Wagner when she decided to proceed to trial, thereby exposing her to a dramatically (three times) higher maximum sentence of 30 years' imprisonment. The government then recommended a grossly disproportionate sentence—20 years' imprisonment—after Ms. Gozes-Wagner, a first-time, nonviolent offender, was convicted at trial.

Not only did the district court fail to recognize the problem despite the red flags, it piled on, justifying the disparity between Ms. Gozes-Wagner's and her co-defendants' sentences by identifying the "bottom line" reason for the disparity: her decision to go to trial. The court also neglected to conduct an independent review of the fairness of Ms. Gozes-Wagner's sentence, as required by 18 U.S.C. § 3553(a), despite the glaring disparities in sentences among the co-defendants and the severity of the recommended sentence relative to Ms. Gozes-Wagner's lesser culpability and lack of a criminal record. The upshot is that Ms. Gozes-Wagner received at least a 300 percent increase in sentence (from 5 to 20 years) for no other reason than that she exercised her constitutional right to have the government prove its case against her at trial.

Accordingly, *amici* submit that the Court should vacate Ms. Gozes-Wagner's sentence and remand for resentencing.

ARGUMENT

I. THE TRIAL PENALTY IS FORCING VIRTUALLY ALL CRIMINAL DEFENDANTS TO FORGO THEIR TRIAL RIGHTS.

The data is alarming. In 2017, only 2.8 percent of federal criminal defendants went to trial. NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 14 (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 [hereinafter *NACDL Report*]. Similarly, only 2.7 percent of federal criminal defendants exercised their constitutional right to trial in 2016. *Id.* These anemic figures stand in marked contrast to decades past, where, in the early 1900s for instance, 50 percent of federal defendants proceeded to trial, *id.* at 19 n.39; and, in 1970, 15 percent of federal criminal defendants went to trial, *id.* at 5 n.2.

The trial penalty is the key driver of this plummeting trial rate. On account of the trial penalty, "very few federal defendants rationally can choose to exercise their constitutional right to trial" and "most of the defendants who *do* go to trial do so against their own best interests." Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 Miss. L.J. 1195, 1249 (2015). Indeed, "individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose." NACDL Report at 5; *accord*, *e.g.*, Kim, *supra* at 1212–13 ("Many scholars argue that trial penalties in America are so large that defendants have no real choice but to accept whatever sentence the prosecutor chooses to offer for pleading guilty."); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L.Q. 67, 87–91 (2005) (noting that the trial penalty has "ballooned in magnitude" and emphasizing that "sentences after trial are significantly, even wildly different

from those imposed after a guilty plea in factually similar cases"). Study after study supports the existence of the trial penalty, making it "among the most robust findings in the empirical sentencing literature." Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent'g Rep., No. 4–5, at 256, 261 (2019); *accord*, *e.g.*, *id.* at 257 (recounting 2019 analysis showing that "on average, trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that are 20 to 60 percent longer"); NACDL Report at 17 (noting that the "discrepancy between average sentences post-trial as opposed to those imposed following a guilty plea" supports the existence of a trial penalty); Kim, *supra* at 1199–1200 (referring to 2015 study concluding that "the average federal trial penalty is actually around sixty-four percent").

Prosecutors have an arsenal of tools at their disposal to increase the likelihood that a defendant who refuses to admit guilt at the outset will receive an inflated sentence. For one thing, the government has virtually unfettered charging discretion and can select a statute of conviction that carries a specific range of penalties, or stack multiple charges on top of one another to create enhanced sentencing exposure. If a defendant chooses to go to trial, the government can make sure that the indictment charges her under a statute that carries a bloated maximum penalty or a mandatory minimum sentence. NACDL Report at 25. The

government also retains substantial control over the ultimate Sentencing Guidelines range that, to a large extent, dictates the sentence received by a convicted defendant. Thus, prosecutors can include (or omit) certain facts that will cause the Guidelines loss calculation to increase (or decrease), recommend that defendants who plead guilty be rewarded with a reduction of sentence for acceptance of responsibility, and urge that a court give cooperating defendants a sentencing bonus for substantial assistance. *Id.* at 32–34, 39–47. And prosecutors make these critical decisions while having an overwhelming information advantage over defendants, who are not entitled to review critical pieces of evidence within the government's possession—including exculpatory evidence to which defendants are entitled under *Brady v. Maryland*—until after the time to accept a plea deal has passed. *See, e.g.*, Brandon A. Bell, *Not For Human Consumption: Vague Laws, Uninformed Plea Bargains, and the Trial Penalty*, 31 Fed. Sent'g Rep., No. 4–5, at 226, 226–27 (2019). To name just one more factor, the government's ability to detain defendants before trial gives prosecutors even more leverage to obtain a guilty plea, as detained defendants face substantial difficulties contributing to their own defense and often confront extreme financial pressures that can be alleviated by pleading guilty. Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 Fed. Sent'g Rep., No. 4–5, at 284, 286 (2019).

To be clear, the trial penalty is distinct from the modest benefits that prosecutors, in appropriate cases, can offer defendants who forgo trial and plead guilty. *Amici* recognize that "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). And "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). For these reasons, the ordinary "'give-and-take' of plea bargaining" typically raises few constitutional concerns. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

There comes a point, however, when withholding a modest guilty-plea reward for criminal defendants who go to trial crosses a constitutional line and becomes an unlawful and vindictive attempt to punish that defendant for exercising her trial rights. *See, e.g.*, Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 Duq. L. Rev. 709, 725–26 (2013) (highlighting the need to "distinguish . . . penalties from lost or foregone waiver rewards" and explaining that defendants who are convicted after trial should not "be made to suffer further punishment over and above what their crimes merit"). Indeed, in the very same case that sanctioned the typical "give-and-take" inherent in plea bargaining, the Supreme Court made clear that "punish[ing] a person because he has done what the

law plainly allows him to do is a due process violation of the most basic sort" and is "patently unconstitutional." *Bordenkircher*, 434 U.S. at 363. Thus, "[t]he law is clear beyond peradventure that a sentence based on retaliation for exercising the constitutional right to stand trial is invalid." *United States v. Mazzaferro*, 865 F.2d 450, 460 (1st Cir. 1989); *see also United States v. Hernandez*, 894 F.3d 1104, 1112 (9th Cir. 2018) ("Enhancing a sentence solely because a defendant chooses to go to trial risks chilling future criminal defendants from exercising their constitutional rights."); *United States v. Norris*, 910 F.2d 1246, 1247 (5th Cir. 1990) ("[Defendant] had a constitutional right to plead not guilty and should not be penalized for exercising that right.").[2]

This appeal presents a glaring example of an unconstitutional trial penalty. The government did not simply withhold modest benefits from Ms. Gozes-Wagner when she declined to plead guilty. Instead, it made sure that her sentencing exposure skyrocketed once she decided to exercise her constitutional right to trial.

[2] The Supreme Court in *Bordenkircher* upheld the state's adding of charges against a defendant after the defendant declined to plead guilty to the offense for which he was originally charged. 434 U.S. at 365. But nothing in that decision precludes relief in this case, which is plainly distinguishable. The sentencing judge here expressly stated that he was imposing a heightened sentence on Ms. Gozes-Wagner for the sole reason that she exercised her constitutional right to trial. And, unlike *Bordenkircher*, this case presents a stark disparity in sentences between co-defendants—disparities that must be considered and justified in light of post-*Bordenkircher* statutory developments. Notably, moreover, the courts in *Mazzaferro* and *Hernandez* did not view *Bordenkircher* as an obstacle to granting relief.

After the government secured guilty pleas from two of Ms. Gozes-Wagner's co-defendants that locked in reduced charges that exposed them to a maximum sentence of five and ten years, respectively, it returned a new indictment against Ms. Gozes-Wagner that charged her with an additional crime and increased her maximum sentence from ten years to thirty years. And the government sought a ratcheted-up sentence after trial—twenty years in prison—even though it conceded that Ms. Gozes-Wagner was a "mid-level manager" who was less culpable than her co-defendants, who were the "kingpin[s]" of the fraud scheme. ROA.516, 1153.

The district court nevertheless adopted the government's recommended sentence of twenty years' imprisonment, ignoring the suspicious timing of the government's additional, more severe charges against Ms. Gozes-Wagner and the great disparity in sentences between her and her more culpable co-defendants. The court decided that the 300 percent increase in sentence compared to two co-defendants (who faced a maximum of five years) and the 200 percent increase compared to the other co-defendant (who faced a maximum of ten years) was justified because, "bottom line," Ms. Gozes-Wagner exercised her constitutional trial rights while the others did not. ROA.1234.

While other cases might present closer questions, there is no debating that Ms. Gozes-Wagner, a nonviolent first offender, was punished—harshly so—for making the government prove its case at trial. This is "patently unconstitutional."

Bordenkircher, 434 U.S. at 363. Accordingly, the Court should vacate her sentence and remand for resentencing.

II. THE TRIAL PENALTY ERODES KEY FOUNDATIONS OF THE CRIMINAL JUSTICE SYSTEM.

In addition to unlawfully punishing criminal defendants for exercising a constitutional right, the trial penalty imperils other critical pillars of the criminal justice system. It compromises the Sixth Amendment right to a jury trial, increases the likelihood that innocent persons will be convicted, disrupts proportionality in punishment, and frustrates public review of government conduct.

A. The Trial Penalty Fundamentally Undermines the Sixth Amendment Right to a Jury Trial.

The most obvious and pernicious effect of the trial penalty has been its steady erosion of criminal defendants' Sixth Amendment right to a jury trial. Indeed, "[t]he trial penalty has transformed the Sixth Amendment right to trial by jury into a fiction for the vast majority of people accused of crimes." Emma Andersson & Jeffery Robinson, *The Insidious Injustice of the Trial Penalty: "It Is Not the Intensity but the Duration of Pain that Breaks the Will to Resist,"* 31 Fed. Sent'g Rep., No. 4–5, at 222, 222 (2019); *see also id.* ("Trial has become a seldom seen and seldom utilized part of the criminal legal system, and justice has suffered as a result."); Vikrant P. Reddy & R. Jordan Richardson, *Why the Founders Cherished the Jury*, 31 Fed. Sent'g Rep., No. 4–5, at 316, 317 (2019) ("The

cherished right of trial by jury . . . has become a mere afterthought in the modern criminal justice system.").

Eliminating the jury trial as an option for most criminal defendants uproots the jury's ancient and venerable place in the criminal justice system, with potentially disastrous consequences. The Supreme Court long has recognized that "trial by jury in criminal cases is fundamental to the American system of justice," "essential" both for "preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan v. Louisiana*, 391 U.S. 145, 149, 158 (1968). The Founders shared this belief in the centrality of the jury, which serves as a "paradigmatic image underlying the Bill of Rights" that "summed up—indeed, embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1190 (1991). It thus comes as no surprise that "the right to trial by jury was probably the most valued of all civil rights" for the founding generation. Reddy & Richardson, *supra* at 316; *see also*, *e.g.*, Amar, *supra* at 1183 (noting that "the only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases").

The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004). "Just as suffrage ensures the people's ultimate control in

the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306; *accord, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality opinion) (similar). Granting ultimate decision-making authority to the people in criminal cases secures liberty for individual defendants by guarding against arbitrary government action. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 114 (2013) (referring to the "historical role of the jury as an intermediary between the State and criminal defendants"); *Duncan*, 391 U.S. at 155 ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 55 (2003) ("Only by interposing the people directly between the state and the individual charged with a crime could the people guarantee that the new government would not mimic the tyranny of its predecessor."); Amar, *supra* at 1183 ("[T]he key role of the jury was to protect ordinary individuals against governmental overreaching.").

Jury trials are indispensable for yet another reason: they promote trust in the law and the criminal justice system. "The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017). "Over the long course its

judgments find acceptance in the community, an acceptance essential to respect for the rule of law." *Id.* Put differently, "[c]ommunity participation in the administration of the criminal law" is "critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *accord*, *e.g.*, *Peña-Rodriguez*, 137 S. Ct. at 860 ("The jury is a tangible implementation of the principle that the law comes from the people."); *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.").

By pressuring defendants to plead guilty to avoid a substantially enhanced punishment after trial by jury, the trial penalty strikes at the heart of the Sixth Amendment's jury guarantee and imperils its salutary effects. Indeed, "[t]he constitutional complaint" that enhancing a person's sentence as punishment for exercising her constitutional right to trial offends the Constitution "seems particularly acute . . . because the very purpose of the jury guarantee is to prohibit the government from punishing a defendant without a jury's approval." Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Cal. L. Rev. 47, 62–63 (2011). "It results in a perverse situation in which the government punishes a person because he demands that the government satisfy this exact prerequisite to punishment." *Id.* at 63. And this state of affairs

cannot be justified by the "age-old criticism" that "[j]ury trials are inconvenient for the government," and so a trial penalty is necessary to ensure that all but a few defendants plead guilty. *See Haymond*, 139 S. Ct. at 2384 (plurality opinion). "[L]ike much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty." *Id.* (plurality opinion); *accord, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("[The jury-trial guarantee] has never been efficient, but it has always been free."). Because the trial penalty undermines this core protection of liberty, it should be vigorously policed and invalidated whenever imposed.

B. The Trial Penalty Compromises the Integrity of the Criminal Justice System.

The trial penalty undermines the criminal justice system in other significant ways.

First, and perhaps most concerning, the trial penalty exerts pressure on innocent defendants to plead guilty to crimes that they did not commit. The stark disparity in sentences following conviction by guilty plea and those following conviction after trial induces a rational defendant to plead guilty to avoid greater punishment—even if she is innocent. Indeed, "[t]he distance between what is being offered and the potential sentencing exposure for those who go to trial" has become "so large that few defendants take the risk of turning down the offer." Mona Lynch, *Hard Bargains: The Coercive Power of Drug Laws in Federal Court*

(2016); *see also* Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 Utah L. Rev. 51, 95 (2012) ("At some point, the sentencing differential becomes so large that it destroys the defendant's ability to act freely and decide in a rational manner whether to accept or reject the government's offer.").

Empirical evidence confirms that this is not simply an abstract fear. A large number of innocent defendants, in fact, plead guilty. For example, the National Registry of Exoneration has identified 498 individuals who pleaded guilty to a crime that they never committed, a figure that accounts for 20 percent of the exonerees in the database.[3] The Innocence Project similarly reports that 41 of the 367 individuals exonerated based on DNA evidence since 1989 had pleaded guilty to crimes that they did not commit.[4]

To make matters worse, the incentive to plead guilty under threat of the trial penalty typically is strongest in cases where conviction is less certain—as often would be the case for the innocent. Evidence suggests that prosecutors scale plea

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[3] *See The National Registry of Exonerations*, U. Mich. L. Sch., http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=Group&FilterValue1=P (last visited Oct. 30, 2019).

[4] *DNA Exonerations in the United States*, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Oct. 30, 2019).

discounts to the strength of the case. *See* Shawn D. Bushway *et al.*, *An Explicit Test of Plea Bargaining in the "Shadow of the Trial,"* 52 Criminology, No. 4, at 723, 723–54 (2014). Prosecutors thus are more likely to offer "larger plea discounts, greater plea-trial differentials, and increased incentives for innocent defendants to waive their Sixth Amendment rights." Brian D. Johnson, *Trials And Tribulations: The Trial Tax And The Process Of Punishment*, 48 Crime & Just. 313, 338 (2019). As a result, the trial penalty is likely to be the most severe—and the attendant pressure to plead guilty the most pronounced—for the wrongly accused.

Second, the trial penalty reduces transparency in and oversight of the criminal justice system. By pressuring almost all defendants to forgo trial by jury, the trial penalty reduces the opportunity for the public to evaluate the government's prosecutions and law enforcement conduct. An increase in plea bargains contributes to "incomplete investigations, inadequate disclosure, limited adversarial testing," and "perfunctory judicial oversight." Jenia I. Turner, *Plea Bargaining*, Reforming Crim. Just.: A Report of the Acad. for Just. on Bridging the Gap between Scholarship and Reform, Vol. 3, at 75 (Erik Luna Ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/4_Reforming-Criminal-Justice_Vol_3_Plea-Bargaining.pdf. Judicial review of the government's conduct also becomes more difficult as fewer and fewer cases reach trial due to the trial penalty. As Judge Gerard Lynch observed, the essence of plea bargaining is

that prosecutors replace the judge and jury as the "central adjudicator of facts" and "arbiter of most legal issues and of the appropriate sentence to be imposed"—thus standing "in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker." Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off*, 55 Stan. L. Rev. 1399, 1404 (2003). And the opaqueness of the process is compounded by prosecutors' failure to collect data about plea bargaining and the significant challenges to obtaining what little information there is through open records requests. *See, e.g.*, Nicole Fortier, ACLU Smart Justice, Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration 8–11 (Feb. 2019).[5]

Thus, as the trial penalty reduces the number of criminal cases that reach trial, both the public and the judiciary have a markedly diminished opportunity to police the conduct of prosecutors and law enforcement. Public confidence in the criminal justice system suffers as a result.

Third, the trial penalty violates the guiding tenet of the criminal justice system that punishment should correspond to the defendant's actual culpability. The Supreme Court has held "as a matter of principle that a criminal sentence must

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5 https://www.aclu.org/sites/default/files/field_document/aclu_smart_justice_prosecutor_transparency_report.pdf.

be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 290 (1983); *see also* 18 U.S.C. § 3553(a) (instructing judges to impose sentences that are "sufficient, but not greater than necessary" to achieve the recognized goals of sentencing). And the Supreme Court has identified three comparative metrics that determine whether a particular sentence is proportional. *Solem*, 463 U.S. at 290–91 (highlighting "the gravity of the offense and the harshness of the penalty," "the sentences imposed on other criminals in the same jurisdiction," and "the sentences imposed for commission of the same crime in other jurisdictions"). The trial penalty, by definition, results in significantly different sentences for defendants convicted on the basis of identical conduct—or worse, far harsher sentences for defendants who are less culpable. As a result, the trial penalty undermines the aim of the criminal justice system to impose punishments commensurate with culpability.

The Guidelines provisions that call for enhanced sentences for financial crimes—which played an outsized role in this case—are a key contributor to the chasm between culpability and punishment caused by the trial penalty. The amount of loss caused by a crime can increase a defendant's Guidelines range by as much as twenty years. *See* U.S. Sentencing Guidelines Manual § 2B1.1 (U.S. Sentencing Comm'n 2018). And a prosecutor has wide discretion to manipulate the amount of loss attributed to two equally culpable defendants—reducing the

figure for the defendant who pleaded guilty while increasing it for the defendant who went to trial. The exercise of that discretion, in turn, contributes to a huge disparity in ultimate sentences for similarly situated defendants (as this case starkly demonstrates).

It thus comes as no surprise that judges, scholars, and even former prosecutors have recognized that an emphasis on the amount of loss often leads to sentences that are disproportionate to the seriousness of the offense. *See, e.g.*, *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2014) ("In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence."); Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent'g Rep., No. 1, at 6, 7 (2013) ("[I]t should be obvious that in a great many, perhaps most, cases . . . the amount of loss does not fairly convey the reality of the crime or the criminal."); Mark H. Allenbaugh, *"Drawn From Nowhere": A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data*, 26 Fed. Sent'g Rep., No. 21, at 19, 25 (2013) ("Although the concept of loss has intuitive appeal as a measure of economic offense seriousness, it is far too abstract in its current form to serve as an appropriate sentencing factor for so many diverse types of offenses and offenders."); *accord* NACDL Report at 33.

Fourth, just as the trial penalty gives most defendants little choice but to plead guilty, it likewise pressures them to accept all manner of onerous terms as a condition to pleading guilty and receiving a lower sentence. These terms include, for example, waiver of a defendant's right to challenge the applicability of the statute of conviction, the legality of police conduct (including the acquisition of evidence critical to proving the charges against her), and the lawfulness of her sentence. *See, e.g.*, Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. Rev. 871 (2010); NACDL Report at 28. As a result of the waivers in guilty pleas, moreover, defendants increasingly never receive exculpatory evidence in the possession of prosecutors—evidence that might reveal the government's challenges in obtaining a conviction, or, more disturbingly, the defendant's innocence.

III. COURTS SHOULD CAREFULLY SCRUTINIZE SENTENCING RECOMMENDATIONS THAT APPEAR TO PENALIZE DEFENDANTS FOR EXERCISING THEIR RIGHT TO A JURY TRIAL.

Courts should scrutinize all sentencing recommendations for defendants who were convicted after trial—particularly in cases, like this one, where one or more co-defendants pleaded guilty—to guard against prosecutorial vindictiveness and ensure that the government is not seeking to penalize a defendant for exercising her constitutional trial rights. A sentencing court should look at factors including the sequencing of charges (whether the government added charges when a defendant

refused to plead guilty) and the disparity in sentencing recommendation (whether the proposed sentence substantially exceeds that recommended for or received by similarly situated defendants who pleaded guilty) to determine whether imposing a particular sentence would constitute a forbidden trial penalty.

Although some cases might present close questions, the red flags in this case leave no doubt that the government sought to punish Ms. Gozes-Wagner for having the audacity to make it prove its case at trial. As explained above, the government added a charge carrying a maximum penalty of twenty years' imprisonment—thereby tripling her maximum exposure—when Ms. Gozes-Wagner declined to plead guilty, while at the same time dropping that same charge against her cooperating co-defendants. Not only that, it recommended that Ms. Gozes-Wagner receive a sentence of twenty years, even though two of her concededly more culpable co-defendants were subject to a maximum five-year sentence and the third a maximum ten-year sentence.

Where, as here, the government recommends a sentence that appears to punish a defendant for going to trial, a court must carefully consider whether imposing that sentence is lawful and consistent with overarching sentencing standards. Courts have ample means at their disposal to prevent the imposition of a trial penalty, even if the recommended sentence falls within the properly calculated Guidelines range. Indeed, a sentencing court "does not enjoy the benefit

of a legal presumption that the Guidelines should apply." *Rita v. United States*, 551 U.S. 338, 351 (2007). Similarly, the Supreme Court has stressed that "a sentencing court may no longer rely exclusively on the Guidelines range; rather, the court 'must make an individualized assessment based on the facts presented' and the other statutory factors." *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (citation omitted).

Significantly, now that the Guidelines are advisory, the sentencing considerations enumerated in 18 U.S.C. § 3553(a) have grown in importance and afford sentencing judges substantial discretion to tailor a sentence by varying downward from the Guidelines range. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 490 (2011) ("[D]istrict courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a) . . . ."); *Gall v. United States*, 552 U.S. 38, 49–50 (2007) ("[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party."). Section 3553(a) includes two considerations on which courts should focus when determining whether a recommended sentence raises the specter of a trial penalty. First, § 3553(a) directs courts to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for

the offense." 18 U.S.C. § 3553(a)(2)(A). Second, the statute requires that courts evaluate "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6); *accord, e.g.*, *Gall*, 552 U.S. at 54 (highlighting § 3553(a)(6) and noting that the sentencing judge "gave specific attention to the issue of disparity when he inquired about the sentences already imposed . . . on two of Gall's codefendants").

Applying these considerations, a sentencing court should grant a downward variance in any case in which imposing a sentence within the applicable Guidelines range would result in an impermissible trial penalty. The amount of the variance will depend on the facts of a particular case, but the ultimate sentence should ensure that a defendant who is convicted after trial receives only a slight sentence increase on account of forgoing the benefits of a guilty plea. *See, e.g.*, Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, *supra* at 351 (outlining a proposal of a "system of punishment ceilings in which trial sentences cannot exceed plea outcomes by more than a modest, fixed amount," which would "ensure that trial sentences are not overly punitive rather than preventing leniency in plea offers"); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 Tul. L. Rev. 1237, 1242 (2008) (proposing "plea-based ceilings" pursuant to which "no defendant could receive a punishment after trial that exceeded the sentence he could have had as a

result of a plea offer by more than a modest, predetermined amount"); Lippke, *supra* at 726 (proposing that sentencing rewards for pleading guilty "be kept small—something in the range of 10% reductions from deserved sentences"). Faithful application of the statutory sentencing factors to eliminate trial penalties will have potent ameliorative effects for the criminal justice system, including "encourag[ing] more innocent defendants to contest charges, induc[ing] prosecutors to screen cases more carefully, discourag[ing] overcharging, and diminish[ing] the perception that justice is a negotiable commodity often traded away in secret deals." Covey, *supra* at 1258.

In this case, even though the government's charging decisions and recommended sentence—***four times*** the statutory maximum for two of Ms. Gozes-Wagner's more culpable co-defendants who pleaded guilty—carried telltale marks of the trial penalty, the district court completely ignored those signs and failed to genuinely consider the statutory sentencing factors. Instead, the court expressed its perceived powerlessness to deviate from the government's recommendation, remarking that it was "not the charging authority." ROA.1233. Compounding the harm in abdicating its responsibility under § 3553(a) to ensure just punishment and avoid unwarranted sentencing disparities, the court in fact expressly ***endorsed*** the imposition of a trial penalty, observing that Ms. Gozes-Wagner's inflated sentence was justified because, "bottom line, . . . she exercised the constitutional rights that

she has in the United States to plead not guilty." ROA.1234. The district court's procedural and substantive errors compel reversal to ensure that Ms. Gozes-Wagner is not unconstitutionally punished for exercising her right to trial. *See, e.g.*, *Gall*, 552 U.S. at 51 (explaining that an appellate court must "ensure that the district court committed no significant procedural error," including by "failing to consider the § 3553(a) factors," and then "consider the substantive reasonableness of the sentence under an abuse-of-discretion standard").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court and vacate Daniela Gozes-Wagner's sentence.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019 the foregoing document was served on counsel for all parties through the CM/ECF system and via email.

Dated: November 1, 2019 /s/ Jonathan L. Marcus
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 5th Cir. R. 32.3, the undersigned certifies this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the portions exempted by Fed. R. App. P. 32(f), this brief contains 6,478 words printed in a proportionally spaced typeface.

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Dated: November 1, 2019

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