No. 16-424

IN THE
Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF PETITIONER

JESSICA RING AMUNSON
Counsel of Record
ERICA L. ROSS
JOSHUA M. PARKER
CORINNE M. SMITH
LEONARD R. POWELL*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

*Admitted in California only;
supervised by principals of the firm

QUESTION PRESENTED

In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does *not* depend on challenging his "factual guilt." In *Blackledge* and *Menna*, the Court held that double jeopardy and vindictive prosecution are two such claims that are not inherently resolved by pleading guilty, because those claims do not challenge whether the government could properly meet its burden of proving each element of the crime.

In the years since this Court decided *Blackledge* and *Menna*, the circuit courts have deeply divided on whether a defendant's challenge to the constitutionality of his statute of conviction survives a plea, or instead is inherently waived as part of the concession of factual guilt.

The question presented is:

Whether a guilty plea inherently waives defendant's right to challenge the constitutionality of his statute of conviction.

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INTRODUCTION

Plea bargaining today is not just "some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 133, 144 (2012) (emphasis in original) (quotation marks omitted). The default rules of plea bargaining "determine[] who goes to jail[,] for how long," and for what crimes. *Id.* (quotation marks omitted). This case asks the Court to answer a question regarding the application of these default rules: whether a defendant who has not expressly waived the right to challenge on appeal the constitutionality of his statute of conviction nonetheless inherently waives this right merely by pleading guilty.

The answer to that question is no. In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that where a defendant pleads guilty, but then asserts a right that would have prevented the government from prosecuting him at all—such as the right not to be vindictively prosecuted or to be put into double jeopardy—the assertion of that right is not inherently waived or foreclosed by the guilty plea. A defendant's right not to be convicted pursuant to an unconstitutional statute plainly falls into this category. As this Court recognized more than a century ago and reaffirmed as recently as last year, "'an unconstitutional law is void, and is as no law,'" and any penalty imposed pursuant to that law "is, by definition, unlawful." *Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)).

Unlike core trial rights (like the right to cross-examine witnesses), and procedural and evidentiary rights (like rights under the Fourth Amendment), which

may be waived by a guilty plea or foreclosed because of a defendant's admissions in the plea, a challenge to the constitutionality of the statute of conviction goes to the very power of the government to prosecute the defendant. The default rule is that a defendant's ability to raise such a challenge does not automatically disappear merely because the defendant has chosen to admit he engaged in conduct that he asserts is constitutionally protected.

The government and the court below argue for a different default rule, claiming that a guilty plea *does* inherently waive a defendant's right to raise a constitutional challenge to the statute of conviction on appeal, unless the defendant expressly preserves his right to bring that challenge by entering a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). Rule 11(a)(2) permits the defendant to reserve in writing the right to appeal a conviction on specified grounds if the defendant is able to secure the approval of the prosecutor and the court. But, as its drafters explicitly noted, Rule 11(a)(2) does not displace this Court's decisions in *Blackledge* and *Menna*, which make clear that a challenge to the State's very power to bring the prosecution is preserved regardless of whether the defendant enters a conditional guilty plea.

Petitioner's interpretation of the default rules is dictated by this Court's precedent. But even if it were not, Petitioner's is the only interpretation that makes sense. There is no reason to leave unconstitutional criminal statutes on the books and unchallenged, which is where they will remain if defendants who plead guilty—the vast majority of defendants in the criminal

justice system—bear the burden of obtaining the permission of the prosecutor to reserve the right to bring a constitutional challenge on appeal. That rule would not only chill constitutionally protected conduct; it would also lead to a substantial waste of resources as defendants pursue unnecessary trials in which no factual disputes are at issue in order to challenge the constitutionality of their statutes of conviction. This Court should reaffirm its prior decisions and hold that a guilty plea does not inherently waive a post-plea challenge to the constitutionality of the statute of conviction.

OPINIONS BELOW

The July 5, 2016, opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a) is unpublished. The District Court for the District of Columbia's October 27, 2014 oral order denying Petitioner's motion to dismiss the indictment (Pet. App. 6a) is unreported. The district court's April 16, 2014 memorandum order denying in part Petitioner's motion to dismiss the indictment (Pet. App. 10a) is reported at 38 F. Supp. 3d 19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit entered its judgment on July 5, 2016. The petition for writ of certiorari was timely filed on September 30, 2016 and granted on February 21, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. V, and 40 U.S.C. §§ 5101, 5102, 5104, and 5109. These provisions are reproduced in the Petition Appendix at 17a.

STATEMENT

I. Factual Background

Petitioner is a retired veteran who resides in North Carolina and has a concealed-carry permit from that State. *See* D.C. Cir. J.A. 30, 50, 101, 130.[1] On Thursday, May 30, 2013, Petitioner was driving from Virginia to Pennsylvania when he stopped en route to visit the U.S. Capitol. *Id.* at 57, 102, 162. Petitioner parked his Jeep on the 200 block of Maryland Avenue, SW, which is located just north of the United States Botanic Garden and approximately 1,000 feet from the entrance to the Capitol building. *Id.* at 162 ¶ 1. The parking lot is publicly accessible, but a permit is usually required to park there on weekdays. *Id.* at 101, 128. Although Petitioner did not know it at the time he parked there, the parking lot is statutorily included within the Capitol Grounds, where all weapons are prohibited pursuant to 40 U.S.C. § 5104(e). It is undisputed that there was no sign stating that the parking lot was part of the Capitol Grounds or that weapons were prohibited there. *Id.* at 125 n.1.

Petitioner's Jeep contained several lawfully-owned firearms. *See id.* at 130. After parking, Petitioner locked

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[1] Citations to "D.C. Cir. J.A." refer to the Joint Appendix filed in the D.C. Circuit on November 20, 2015.

his vehicle, leaving those firearms inside, secured out of sight. *See id.* at 162-63. He then proceeded, unarmed, to visit the House and Senate buildings. *Id.* at 125. Approximately an hour later, a Capitol Police officer noticed that Petitioner's Jeep had North Carolina plates, and she determined that it did not have a parking permit on the front windshield. *Id.* She also noticed what appeared to be a large blade strapped to a roller bar inside the vehicle and what appeared to be an empty gun holster in the map pocket of the driver's side door. *Id.*

The officer determined that the Jeep was registered to Petitioner, and she radioed for additional officers to assist her. *Id.* When Petitioner returned to his vehicle later that afternoon, he confirmed to the officers that he owned the Jeep, and he freely admitted that there were weapons inside the vehicle, for which he had lawful permits. *Id.* The officers informed Petitioner that it was "illegal to have weapons on Capitol grounds" and arrested him. *Id.* at 126. They transported him to Capitol Police headquarters and subsequently searched his Jeep pursuant to a warrant. *Id.* at 103. The search recovered three firearms, stored out of sight, as well as several knives. *Id.*

II. Petitioner Challenges The Constitutionality Of 40 U.S.C. § 5104(e) In The District Court.

Petitioner was charged in the U.S. District Court for the District of Columbia with one count of violating 40 U.S.C. § 5104(e), which makes it a crime to "carry on or have readily accessible to any individual on the [Capitol] Grounds or in any of the Capitol Buildings a firearm . . ."

40 U.S.C. § 5104(e)(1)(A)(i); *see also* J.A. 20-21.[2] Petitioner was also charged with violating D.C. Code § 22-4504(a), which prohibited carrying a pistol in public without a license, but that charge was later dropped after § 22-4504(a) was declared unconstitutional. *See Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014); J.A. 22.

On August 15, 2013, Petitioner voluntarily testified before a grand jury. D.C. Cir. J.A. 127. Petitioner explained that he had previously parked in the same spot without issue, that he was not aware he had parked within the Capitol Grounds, and that there was no sign indicating the area was restricted. *Id.* at 128-29. Petitioner testified that he did not notice any sign indicating a permit was required to park in that lot until Capitol Police pointed it out to him. *Id.* at 129. Petitioner was nonetheless indicted. J.A. 20.

Representing himself *pro se*, with appointed stand-by counsel, Petitioner filed numerous motions to dismiss the indictment, arguing *inter alia* that his storage of lawfully-owned weapons inside his locked vehicle was protected by the Second Amendment. For example, Petitioner argued that "[t]he 2nd Amendment to our Constitution states that 'the Right of the People to keep and bear Arms, shall not be infringed,'" and accordingly "there can be no legislation which would abrogate (abolish) them." D.C. Cir. J.A. 32-33 (emphasis omitted); *see also id.* at 36, 42-43, 46. He also raised a due process notice claim, arguing that he had not been given fair warning that weapons were banned in the parking lot,

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[2] Citations to "J.A." refer to the Joint Appendix filed with this brief.

which was freely accessible to the public. *See id.* at 39, 128. Petitioner presented argument on these motions at a hearing held April 7, 2014. He contended that his conduct had been "well within [his] protected rights of [the] Second Amendment," *id.* at 69, and that he had no way of knowing weapons were forbidden where he parked, *id.* at 65.

The court ordered the government to file responsive briefing on the Second Amendment issue. *See id.* at 92. The government extensively addressed the question of whether the Second Amendment, as interpreted by this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), prohibited Petitioner's prosecution. *See* D.C. Cir. J.A. 106-13. The government argued that all government property is inherently a "sensitive place" where there is no right to armed self-defense under the Second Amendment. *Id.* at 112.

The government also filed motions that addressed many of the due process notice arguments Petitioner had raised. The government argued that there could be no notice or warning concerns because: (1) § 5104(e) has no "knowledge and/or intent requirements" (*i.e.*, the statute has "no … *mens rea* element"), *id.* at 124, 130; and (2) the statute defining the Capitol Grounds makes a "clear reference" to the relevant parking lot when it designates "all grounds bounded by the curblines of First Street, Southwest on the east; Washington Avenue, Southwest to its intersection with Independence Avenue, and Independence Avenue from such intersection to its intersection with Third Street, Southwest on the south; Third Street, Southwest on the

west; and Maryland Avenue, Southwest on the north," 40 U.S.C. § 5102(c)(1)(C), as being part of the Capitol Grounds, D.C. Cir. J.A. 138.

On October 27, 2014, the district court orally denied Petitioner's claim that his Second Amendment rights had been violated, concluding that a government-owned parking lot was the same as a "government building[]," where all weapons could presumptively be banned. Pet. App. 9a. The court also declined to accept Petitioner's due process notice argument.

III. Petitioner Pleads Guilty.

Petitioner's case was set for trial, but he sent a letter to the court indicating that he would be unable to appear. D.C. Cir. J.A. 145. Subsequently, he pled guilty to the charge of violating § 5104(e). The plea conceded Petitioner's factual guilt—that he had violated § 5104(e) by parking his vehicle, which contained several firearms and knives, within the area statutorily designated as the Capitol Grounds. *See* J.A. 24-26, 30-31. The plea agreement expressly waived Petitioner's trial rights, as well as Petitioner's right to appeal his sentence or to collaterally attack his conviction or sentence—unless he claimed the sentence was above the statutory maximum or guidelines range determined by the court, or unless his collateral attack was based on newly discovered evidence or a claim of ineffective assistance of counsel. *See id.* at 39-41. The plea agreement did not, however, contain any express waiver of the right to directly appeal the conviction, nor did it concede in any way that § 5104 itself was constitutional. *See id.* at 30-31, 38-41. The plea agreement also included an integration clause stating that the plea comprised the "[c]omplete

[a]greement" between the parties and that no "promises, understandings, or representations have been made . . . other than those contained in writing herein." *Id.* at 45.

At the plea colloquy on November 21, 2014, the district court reviewed with Petitioner the rights waived by the plea agreement. *Id.* at 54, 61-79. As part of that review, the court explained to Petitioner that he retained the right to "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." *Id.* at 63. Petitioner agreed that he was willing to give up "most of [his] rights to an appeal . . . [o]ther than what [the court] mentioned." *Id.* at 66.

IV. The D.C. Circuit Holds That A Plea Inherently Waives All Constitutional Claims.

Four days after he was sentenced, Petitioner filed a notice of appeal with the D.C. Circuit. *See* D.C. Cir. J.A. 24-25. He then filed a *pro se* opening merits brief, focusing on his claim that his Second Amendment rights had been violated. *See* J.A. 16-17. The government did not move to dismiss the appeal as being either waived or foreclosed by Petitioner's guilty plea, nor did it otherwise respond in any manner to Petitioner's brief. Approximately seven months later, the D.C. Circuit set a new briefing schedule and appointed counsel to serve as amicus curiae to argue in favor of Petitioner. *Id.* at 17.

Amicus fully briefed the primary constitutional challenges that Petitioner had raised at the district court, and Petitioner expressly adopted amicus's arguments as his own. *See id.* at 18. Petitioner argued

that the Second Amendment protects the right to "keep and bear arms" for self-defense, and that § 5104(e) infringes on that right by effectively banning law-abiding citizens from securely storing lawfully-owned weapons in their vehicles parked in a publicly accessible lot. Amicus D.C. Cir. Br. 22, 25. Petitioner also argued that § 5104(e), both facially and as-applied, violates the Due Process Clause because it fails to give fair warning as to what areas are considered the Capitol Grounds where weapons are banned. *Id.* at 54-56. And further, Petitioner argued, the lack of any notice, especially when combined with the government's argument that § 5104(e) has no *mens rea* requirement, violates due process. *Id.* at 55.

In response, the government argued—for the first time, nearly one year after Petitioner had filed his opening brief—that even though Petitioner's plea did not contain any express waiver of the right to appeal his conviction, the plea *inherently* waived Petitioner's right to raise any constitutional claims that accrued before he pled guilty, including his constitutional challenges to the statute. *See* Gov't D.C. Cir. Br. 28 & n.15. The government therefore urged the D.C. Circuit not to reach the merits of Petitioner's claims on appeal.

Petitioner countered that because the plain terms of his plea agreement did not include a waiver of his right to directly appeal with a constitutional challenge to the statute of conviction, the court should not interpret the contract between the parties to waive that right. Amicus D.C. Cir. Reply 1-8. Petitioner further argued that his constitutional challenges survived his guilty plea pursuant to this Court's holdings in *Blackledge v. Perry*,

417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975). Amicus D.C. Cir. Reply 8-13.

In *Blackledge*, a state prosecutor charged a defendant with felony assault with a deadly weapon after the defendant appealed his conviction of a lesser-included offense. 417 U.S. at 22-23. The defendant pled guilty to the charge but later filed a habeas petition alleging that the felony indictment constituted vindictive prosecution in violation of his due process rights. *Id.* at 23-26. The Court held that the defendant's guilty plea did not foreclose his due process claim because, as opposed to claims that could be "cured" by the government, the *Blackledge* defendant's claim "went to the very power of the State to bring the defendant into court to answer the charge brought against him." *Id.* at 30. If the defendant had succeeded with his vindictive prosecution claim, it would have had the "practical result" of "prevent[ing] a trial from taking place at all." *Id.* at 30-31 (internal quotation marks omitted). In other words, the State was categorically "forbid[den]" from "bring[ing] [the] more serious charges against the defendant" because of the "sufficiently serious due process concerns" raised by "the potential for prosecutorial vindictiveness." *United States v. Broce*, 488 U.S. 563, 574-75 (1989) (citing *Blackledge*, 417 U.S. at 30-31).

Similarly, in *Menna*, this Court held that pleading guilty does not preclude a defendant from subsequently raising a double jeopardy claim where "judged on its face the charge is one which the State may not constitutionally prosecute." 423 U.S. at 62 n.2. That is because, in such a circumstance, "the State may not

convict" the defendant "no matter how validly his factual guilt is established." *Id.* *Menna* further clarified that a guilty plea does not "inevitably 'waive' all antecedent constitutional violations," but rather represents the defendant's concession of his "factual guilt." *Id.* Thus, the plea "renders irrelevant" any claim that depends on challenging the government's evidence of guilt, *i.e.*, those claims that "do not stand in the way of conviction, if factual guilt is validly established," such as procedural defects or Fourth Amendment violations. *Id.*; *see Blackledge*, 417 U.S. at 30. By contrast, where "the claim is that the State may not convict [the defendant] no matter how validly his factual guilt is established"—that is, where the defendant contends that "the charge is one that the State may not constitutionally prosecute" *at all*—"[t]he guilty plea . . . does not bar the claim." *Menna*, 423 U.S. at 62 n.2.

As Petitioner explained to the D.C. Circuit, his constitutional challenges to § 5104 were akin to the claims the Court held were not inherently precluded by guilty pleas in *Blackledge* and *Menna*. Like the defendants in those cases, Petitioner was not challenging his "factual guilt": he did not contest whether the government could show, for example, that Petitioner's car was parked on the Capitol Grounds, or that it contained firearms. Amicus D.C. Cir. Reply 9, 12. Rather, Petitioner asserted that even assuming the elements of the statute were satisfied, he *still* could not be validly prosecuted or convicted because § 5104 itself was unconstitutional both on its face and as applied to his particular circumstances. *See id.* at 15, 27. Thus, Petitioner argued that under *Blackledge* and *Menna*,

the court should reach the merits of his Second Amendment and due process challenges to the statute. *Id.* at 13-14.

After oral argument, the D.C. Circuit affirmed Petitioner's conviction, refusing to address the merits of any of his constitutional claims. Pet. App. 1a-5a. The court acknowledged that Petitioner's plea agreement did not include any "explicit waiver of appeal rights . . . as to alleged errors in the indictment or in proceedings before the sentencing." *Id.* at 4a. The court nonetheless held that simply by entering a guilty plea, Petitioner had inherently waived his right to bring an appeal challenging the constitutionality of the statute under which he was convicted. *Id.* at 3a.

The court's holding was based on two premises. *First*, the court cited this Court's decision in *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973), for the "universally recognized law" that a guilty plea inherently "waive[s] the pleading defendant's claims of error on appeal, even constitutional claims." *Id.* at 3a-4a (alteration omitted) (quoting *United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004)). The court did not acknowledge that this Court's later decisions in *Blackledge* and *Menna* expressly rejected this reading of *Tollett*. *Blackledge*, 417 U.S. at 30-31; *Menna*, 423 U.S. at 62 n.2. In particular, the D.C. Circuit did not address *Menna*'s statement that *Tollett* does not "stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations," but rather stands for the proposition that a valid guilty plea admits factual guilt and thus removes that issue from the case. 423 U.S. at 62 n.2.

Second, the D.C. Circuit stated that where a defendant pleads guilty and does not expressly "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion" pursuant to Federal Rule of Criminal Procedure 11(a)(2), the only claims that can be raised on appeal are "the defendant's claimed right not to be haled into court at all," and a claim "that the court below lacked subject-matter jurisdiction over the case." Pet. App. 4a (quoting *Delgado-Garcia*, 374 F.3d at 1341). The court found neither category relevant to Petitioner and therefore refused to reach the merits of his claims regarding the unconstitutionality of § 5104. *Id.*

SUMMARY OF ARGUMENT

1. Petitioner's guilty plea did not expressly waive his right to directly appeal his conviction or to challenge the constitutionality of the statute under which he was convicted. Under the principles of contract law that generally govern guilty pleas, that should be the end of the matter: a court should not read into the parties' contract a term to which they did not agree.

The government and the court below nonetheless take the position that Petitioner's guilty plea *inherently* waived his right to challenge his statute of conviction. This Court's cases dictate otherwise. In a series of decisions, this Court has repeatedly and clearly distinguished between trial rights that can be waived, procedural or evidentiary claims that can be rendered irrelevant, and claims that go to the State's very power to prosecute the defendant for the crime alleged, which are neither waived nor rendered irrelevant by a voluntary, knowing, and intelligent guilty plea.

Petitioner's claim that he was convicted under an unconstitutional statute falls in this last category. Petitioner attacks the State's very power to validly prosecute and convict him; he does not take issue with his failure to receive a trial, or with the procedures by which the government might have attempted to convict him. Simply put, Petitioner's claim is that, no matter what procedures the government employed or what evidence the government amassed, the government could not validly prosecute and convict him for the crime alleged. Under this Court's precedent, Petitioner's mere act of pleading guilty does not waive or foreclose that claim.

The Court has drawn a similar line in its retroactivity jurisprudence. In that context, the Court has recognized that because a decision invalidating a criminal statute as unconstitutional leaves no valid basis for a prisoner's conviction, it is a "substantive" rule that should apply retroactively to cases on collateral review, even though most new "procedural" rules do not.

2. The court below failed to appreciate the distinction between different types of rights implicated by a guilty plea and held instead that a defendant cannot seek to invalidate his voluntary, knowing, and intelligent plea based on *any* alleged constitutional violation unless he has secured the permission of the prosecutor and the court to enter a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). But as that Rule's drafters made clear, the Rule has no applicability when the alleged constitutional violation would render it impossible for the government to obtain or sustain the conviction. Although the drafters also referred to the

"jurisdictional" nature of such claims, the drafters were using the term in a less-than-meticulous manner: a defendant is not limited to raising post-plea only those claims that implicate subject-matter or personal jurisdiction. Nor should a defendant be limited to raising only facial challenges to the statute under which he is convicted when an as-applied challenge would likewise bar a prosecution from ever taking place.

3. This Court should hold, as its precedent compels, that a guilty plea does not inherently waive or foreclose a defendant's right to challenge the constitutionality of his statute of conviction. If this Court holds otherwise, it should remand for a determination of whether Petitioner's plea was actually voluntary, knowing, and intelligent—an argument that Petitioner raised below, but the Court of Appeals failed to address.

ARGUMENT

I. Defendants Do Not Inherently Waive The Ability To Challenge The Constitutionality Of The Statute Of Conviction By Pleading Guilty.

Although courts disfavored plea agreements for many decades, *see, e.g.*, Albert W. Alschuler, *Plea Bargaining And Its History*, 79 Colum. L. Rev. 1, 5, 19-24 (1979), "the reality [is] 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). As of 2012, approximately "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions [were] the result of guilty pleas." *Id.; see also Brady v. United States*, 397 U.S. 742, 752 n.10 (1970) (noting that by 1970, it "ha[d] been estimated that about 90%, and

perhaps 95%, of all criminal convictions [were] by pleas of guilty," including "between 70% and 85% of all felony convictions"). Given that the vast majority of criminal cases today are resolved through plea agreements, this Court has addressed the contours and consequences of guilty pleas on numerous occasions.

This Court has explained that plea agreements are essentially contracts, and thus must be enforced as written. Where, as here, the defendant has not expressly waived his right to bring a direct appeal challenging the constitutionality of the statute of conviction, the plea may be read to waive that right only if there is a default rule that the mere act of pleading guilty inherently precludes such challenges. This Court's cases make clear that no such default rule exists. In so doing, they draw a line between rights that are rendered irrelevant by the defendant's voluntary, knowing, and intelligent admission of factual guilt, and thus cannot be subsequently raised as a basis to invalidate the conviction, and rights that call into question the government's power to validly convict the defendant of the crime alleged.

This line is analogous to the line the Court has drawn in its retroactivity jurisprudence, in which the Court has held that decisions that invalidate the statute of conviction on constitutional grounds are substantive rules that must apply retroactively because they implicate the government's power to hold the defendant at all. The same reasoning applies in the context of guilty pleas: a constitutional challenge to the statute of conviction questions the State's power to hold the defendant at all, no matter how perfect the procedures

it employs or how strong the evidence of factual guilt. It therefore survives a guilty plea.

A. It Is Undisputed That Petitioner's Guilty Plea Did Not Expressly Waive His Right To Challenge The Constitutionality Of The Statute Of Conviction.

"Plea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009); *accord* U.S. Dep't of Justice, U.S. Attorneys' Manual, Criminal Resource Manual § 626(2) ("A plea bargain is a contract between the prosecutor and the defendant" that "will depend upon the precise language used."). Consequently, plea agreements should ordinarily be interpreted in accordance with contract principles. Absent "mistake, fraud, unconscionability, or another invalidating cause," a court "must enforce [a contract] as drafted by the parties." 11 Richard A. Lord, *Williston on Contracts* § 31:5, at 461 (4th ed. 2012). This "general rule . . . prevents a court from adding terms or provisions to the contract." *Id.* § 31:6. Additionally, as in the case of statutory interpretation, when a contract contains "a series of two or more terms or things that should be understood to go hand in hand," the "sensible inference" is that "the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002); *see also* 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.28, at 315-16 (Joseph M. Perillo ed., rev. ed. 1998) (affirming the applicability of the *expressio unius* canon to contracts).

As both the government and the D.C. Circuit have acknowledged, Petitioner's plea agreement did not expressly waive his right to challenge the

constitutionality of the statute of conviction on appeal. Pet. App. 4a; *see also* Gov't D.C. Cir. Br. 16 (arguing that "it is not necessary for the plea agreement to contain an explicit waiver of appellate review" of claims that the statute of conviction is unconstitutional). Petitioner's plea agreement includes an "explicit waiver of appeal rights as to sentencing errors," but no explicit waiver of appeal rights as to the constitutionality of the statute of conviction, § 5104(e). Pet. App. 4a; J.A. 40-41. Indeed, Petitioner's plea agreement includes an entire section on "Appeal Rights" that describes the waived appeal rights in great detail, but does not include any mention of appeal rights as to Petitioner's conviction, or as to the constitutionality of § 5104(e). J.A. 40-41. In the courts of appeals, "there are numerous examples of appellate waivers that clearly encompass both the defendant's right to appeal his sentence *and* his right to appeal his conviction." *United States v. Spear*, 753 F.3d 964, 968 (9th Cir. 2014) (emphasis in original). Not so here.

To hold that Petitioner waived his right to challenge the constitutionality of the statute of conviction on appeal, this Court therefore would have to read an implicit waiver into the explicit terms of the parties' contract—it would have to hold, as the government argued below, that despite Petitioner's failure to explicitly waive his right to appeal his conviction on the grounds that the statute under which he was convicted was unconstitutional, "the guilty plea itself effects a waiver as a matter of law." Gov't D.C. Cir. Br. 16. As discussed below, such a reading of the plea agreement would be inconsistent with the default rules governing

guilty pleas set forth in decades of this Court's precedent.

B. A Constitutional Challenge To The Statute Of Conviction Calls Into Question Whether The Government Can Ever Obtain A Valid Conviction, And Therefore Is Not Waived Or Foreclosed By A Guilty Plea.

1. In establishing the default rules governing guilty pleas, the Court has generally divided the rights at issue into three categories. *First*, there are constitutional rights that simply "inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accuser." *Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)); *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002). The default rule is that these basic trial rights are automatically waived by a guilty plea so long as that plea is voluntary, knowing, and intelligent: because a guilty plea forecloses the possibility of a trial, it necessarily forecloses the assertion of the associated constitutional trial rights. *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969). However, the assertion of appellate rights does not fall within this category, because an appeal "cannot in any way be characterized as part of the trial." *Lafler*, 566 U.S. at 165.

Second, there are procedural rights that inhere in a criminal prosecution, but are rendered irrelevant (rather than waived) by a valid guilty plea. These rights include, for example, the Fourth Amendment's protection against unreasonable searches and seizures, *Haring v. Prosise*, 462 U.S. 306, 320-21 (1983); the Fifth

Amendment's guarantee against involuntary confessions, *McMann v. Richardson*, 397 U.S. 759, 771-72 (1970); and the Fourteenth Amendment's safeguard against racial discrimination in grand jury selection, *Tollett*, 411 U.S. at 266-68. These are fundamental constitutional protections that a defendant is ordinarily entitled to rely upon, but that become irrelevant after a defendant pleads guilty and thereby admits his factual guilt. The default rule with respect to this class of rights is that they cannot be asserted after a defendant has entered a voluntary, knowing, and intelligent guilty plea.

In *Tollett v. Henderson*, 411 U.S. 258 (1973), and in the so-called "*Brady* trilogy" of *Brady v. United States*, 397 U.S. 742 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970), this Court explained that when a defendant pleads guilty, his right to assert that a violation of these procedural rights should invalidate his conviction is necessarily foreclosed. Because a criminal defendant has voluntarily, knowingly, and intelligently admitted his factual guilt—*i.e.*, he has "solemnly admitted in open court that he is in fact guilty of the offense with which he is charged"—he may not invalidate the plea based on mere procedural defects that the government could have remedied through different pre-trial procedures. 411 U.S. at 267-68. This is because such procedural defects might "only [have] delay[ed] the inevitable date of prosecution" rather than prohibited it entirely. *Id.*

Unlike the core trial rights in the first category that are inherently waived by a guilty plea, the procedural rights in this second category are not "waived" at all.

Rather, the concept at issue is akin to forfeiture. "A guilty plea represents a break in the chain of events which has preceded it in the criminal process," such that it forecloses further inquiry into most constitutional deprivations that occurred before the plea. *Id.* at 267-68. This Court has therefore held that "when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by" procedural or evidentiary errors like "an alleged Fourth Amendment violation because the conviction" rests on the defendant's admission of guilt, not "on evidence that may have been improperly seized." *Haring*, 462 U.S. at 321.

Finally, there are rights that go to the very power of the government to bring the prosecution and secure the conviction at all. These include, for example, the Fifth Amendment rights not to be put into double jeopardy or to be vindictively prosecuted. As this Court explained in *Blackledge* and *Menna*, these rights go to "the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, 417 U.S. at 30. The default rule with respect to these rights is that they are neither waived nor foreclosed by the act of pleading guilty.

The *Blackledge*/*Menna* rights in this third category are "fundamental[ly] distinct[]" from the *Tollett*/*Brady* rights in the second category, as this Court explained with the following illustration: "The defendants in *McMann v. Richardson*, for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been 'cured' through a

new indictment by a properly selected grand jury." *Blackledge*, 417 U.S. at 30. However, with respect to *Blackledge*/*Menna* rights, "the nature of the underlying constitutional infirmity is markedly different." *Id.* Defendants in this category are not "complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" *Id.* Instead, the right asserted is one "not to be haled into court at all upon the felony charge," having the "practical result" of "prevent[ing] a trial from taking place at all, rather than . . . prescrib[ing] procedural rules that govern the conduct of a trial." *Id.* at 30-31 (internal quotation marks omitted).

In *Menna*, this Court expanded upon this distinction between substantive rights that go to the very power of the State to bring the prosecution and procedural rights that do not, noting that with respect to the constitutional rights in the latter category, a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." 423 U.S. at 62 n.2. With respect to the rights in the former category, "the claim is that the State may not convict petitioner no matter how validly his factual guilt is established," because "the charge is one which the State may not constitutionally prosecute." *Id.*[3]

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[3] Judge Friendly summarized this Court's decisions in a similar manner. Reviewing *Blackledge*, *Menna*, *Tollett*, and the *Brady* trilogy, he described "the guiding principle of these decisions" as follows:

Most recently, this Court distinguished among these types of claims in *United States v. Broce*, 488 U.S. 563 (1989). The defendants in *Broce* pled guilty to two counts of conspiracy contained in two separate indictments, but later tried to raise a double jeopardy claim to vacate one of the conspiracy counts because a subsequent prosecution of a different defendant suggested that there may have been only one conspiracy. *Id.* at 566-67, 576. This Court declined to entertain the double jeopardy claim, emphasizing that it was "foreclosed by the admissions inherent in [defendants'] guilty pleas," including that the defendants entered into "two agreements which started at different times and embraced separate objectives." *Id.* at 571, 576.

In reaching this conclusion, the Court distinguished the double jeopardy claims at issue in *Broce* from the double jeopardy claims at issue in *Menna*. In *Broce*, the defendants could not "prove their claim without contradicting" the indictments to which they pled guilty, meaning that their claims were foreclosed under the

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> A defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be cured.

United States v. Curcio, 712 F.2d 1532, 1538-39 (2d Cir. 1983) (alterations and internal quotation marks omitted).

logic of *Tollett* and the *Brady* trilogy. *Id.* at 576. By contrast, in *Menna*, "the indictment was facially duplicative of the earlier offense of which the defendant had been convicted"; the facts the defendant admitted could not "conceivably be construed" as anything other than "a redundant confession to the earlier offense" and thus, a double jeopardy violation. *Id.* at 575-76. *Broce* therefore follows the *Tollet*/*Brady* line of cases in finding that a guilty plea prohibits further inquiry into constitutional violations that become irrelevant once a defendant admits that he is guilty of facts the government may criminalize. At the same time, it reaffirms that under *Blackledge* and *Menna*, "a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute." *Id.* at 575 (emphasis in original) (quoting *Menna*, 423 U.S. at 62 n.2).

2. The right not to be prosecuted and convicted pursuant to an unconstitutional statute clearly falls into the *Blackledge*/*Menna* category of rights and is neither waived nor foreclosed automatically by a plea of guilty. Such a challenge goes to the government's very power to prosecute or convict a defendant. It, by contrast, does not concern the evidentiary disputes and procedural errors that formed the basis of the constitutional challenges in *Tollett* and the *Brady* trilogy.

As noted above, a guilty plea forecloses further inquiry only into "constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Menna*, 423 U.S. at 62 n.2. Here, however, Petitioner's claim is that the statute

under which he has been convicted is unconstitutional and thus "the charge is one which the State may not constitutionally prosecute"; in other words, "the State may not convict [Petitioner] no matter how validly his factual guilt is established." *Id.* "The guilty plea, therefore does not bar the claim." *Id.*

As this Court recently reaffirmed, a "conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Montgomery*, 136 S. Ct. at 730-31 (quoting *Ex parte Siebold*, 100 U.S. at 376) (internal quotation marks omitted). Put another way, "'an unconstitutional law is void, and is as no law,'" and any penalty imposed pursuant to that law "is, by definition, unlawful." *Id.* (quoting *Ex parte Siebold*, 100 U.S. at 376). Thus, the assertion that the underlying statute is unconstitutional most certainly would "stand in the way of conviction, [even] if factual guilt is validly established," *Menna*, 423 U.S. at 62 n.2, since the State has no lawful basis for convicting a defendant in the absence of a valid statute criminalizing his conduct.

Because Petitioner's due process and Second Amendment claims are challenges to the very power of the government to criminalize his conduct, he retained the right to pursue those challenges after pleading guilty. If Petitioner is correct that the Second Amendment precludes the government from enacting a law that criminalizes storage of lawfully-owned firearms in a locked vehicle in a publicly accessible parking lot approximately 1,000 feet from the entrance to the Capitol building, then Petitioner's conviction cannot stand. So too with respect to Petitioner's due process

notice challenge. For these reasons, Petitioner's guilty plea did not foreclose his right to appeal his conviction with a challenge to the constitutionality of § 5104.

3. That Petitioner's guilty plea did not implicitly waive his challenge to § 5104 is particularly clear because, at the time it decided *Blackledge* and *Menna*, this Court had already recognized that a defendant's challenge to the constitutionality of the statute of conviction survives a guilty plea. In *Haynes v. United States*, 390 U.S. 85 (1968), the defendant was a convicted felon charged with failing to register a firearm under the National Firearms Act, *id.* at 86-87. The defendant moved to dismiss the indictment, arguing that because he was a convicted felon and thus prohibited from owning a firearm, requiring him to register that firearm violated his Fifth Amendment right against self-incrimination. *Id.* at 86, 90. The court denied the motion to dismiss the indictment and the defendant thereafter pled guilty, admitting that he had indeed failed to register a firearm in violation of the law. *Id.* at 86-87. The defendant then appealed his conviction on the grounds that the registration requirement was unconstitutional both on its face and as applied to him. *Id.* at 87; *see also Haynes v. United States*, 372 F.2d 651, 652-54 (5th Cir. 1967), *judgment rev'd*, 390 U.S. 85 (1968). The Fifth Circuit reached the merits of his claims, noting that while a "guilty plea is a waiver of all nonjurisdictional defects and defenses and admits the facts charged, . . . [w]here, prior to his guilty plea, a defendant appropriately raises the unconstitutionality of the applicable statute, an appeal, directed to that

issue, is not foreclosed." *Haynes*, 372 F.2d at 652 (citing *Ex parte Siebold*, 100 U.S. 371).

After the Fifth Circuit upheld the defendant's conviction, this Court granted certiorari. Like the Fifth Circuit, this Court also reached the merits of defendant's claims, considering it quite obvious that "Petitioner's plea of guilty did not, of course, waive his previous claim of the constitutional privilege." *Haynes*, 390 U.S. at 87 n.2. While the Court did not further explain its rationale for this statement, it seems clear that the Court was animated by the same concerns in *Haynes* as it was in *Blackledge* and *Menna*—a guilty plea conceding factual guilt does not resolve questions about the government's very ability to bring the prosecution. Ultimately, this Court not only reached the merits of the defendant's claims in *Haynes*, it held the statute unconstitutional as applied to the defendant and reversed, finding it unnecessary to remand because "any proceeding in the District Court must inevitably result in the reversal of petitioner's conviction." *Id.* at 101. Like *Blackledge* and *Menna*, *Haynes* thus demonstrates that a guilty plea is not an automatic bar to a constitutional challenge to the statute of conviction.

4. Indeed, some of this Court's most historic rulings on constitutional rights arose from circumstances in which defendants pled guilty and later mounted constitutional challenges to their statutes of conviction. In *Loving v. Virginia*, 388 U.S. 1 (1967), for example, Richard and Mildred Loving pled guilty to violating Virginia's ban on interracial marriages. *Id.* at 3. After they were sentenced, the Lovings filed a motion to vacate the judgment against them and set aside their

sentences, "asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid." *Loving v. Commonwealth*, 147 S.E.2d 78, 79 (Va. 1966), *judgment rev'd*, 388 U.S. 1 (1967). The government never argued that the Lovings' pleas foreclosed their constitutional challenge, and this Court certainly did not view their pleas as a bar, ultimately holding that because "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations . . . [t]hese convictions must be reversed." 388 U.S. at 12.

C. This Court's Retroactivity Jurisprudence Confirms That Constitutional Challenges To Criminal Statutes Raise Heightened Concerns.

In several other contexts discussed by Petitioner's amici, such as standing doctrine and pre-enforcement review of criminal statutes, this Court has recognized that challenges to the constitutionality of criminal statutes raise heightened concerns and warrant special solicitude. This is particularly true in the context of the Court's retroactivity jurisprudence. This parallel body of case law supports a holding that a guilty plea does not inherently waive a defendant's challenge to the constitutionality of the statute of conviction.

1. As early as *Ex parte Siebold*, 100 U.S. 371 (1879), this Court recognized that while a prisoner generally could not use the writ of habeas corpus to attack "a conviction and sentence by a court having jurisdiction of the cause," he *could* obtain relief in habeas if "the want of jurisdiction . . . or some other matter render[ed] [the

original court's] proceedings void." *Id.* at 375.[4] The Court then held that a challenge to the constitutionality of the statute of conviction fell within this narrow class of cases in which a court could afford habeas relief. As the Court explained, if the petitioners' argument was "well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Id.* at 376-77.

The Court's modern retroactivity jurisprudence recognizes the same principle. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," but are challenged in collateral proceedings. *Id.* at 310 (plurality opinion). The Court imposed two exceptions, however: "a new rule" applies retroactively on collateral review if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prosecute'"—what has become known as a

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[4] *Siebold* stated that "if the laws [of conviction] are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." *Id.* at 377. As discussed *infra*, however, the use of the term "jurisdiction" has not always been consistent, and the *Siebold* Court's invocation of that word is best understood as meaning that the government lacked authority to criminalize the defendants' actions—not that the court lacked jurisdiction in the modern sense of authority to decide the case. *See United States v. Williams*, 341 U.S. 58, 66 (1951).

"substantive rule"—or if it "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding"—what the Court termed a "watershed rule[] of criminal procedure." *Id.* at 311 (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971)).

Subsequent cases have expanded on the distinction between substantive rules, which apply retroactively, and most procedural rules, which do not. Substantive rules "include[] decisions that narrow the scope of a constitutional statute by interpreting its terms, . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citing *Bousley v. United States*, 523 U.S. 614, 20-21 (1998); *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Teague*, 489 U.S. at 311 (plurality opinion)). "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley*, 523 U.S. at 620). While the government might be able to proscribe the same conduct under a more aptly or narrowly drawn law going forward, the government cannot continue to hold the defendant under a statute that is not constitutionally drawn. *See, e.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1265-67 (2016).

By contrast, new rules of procedure generally do not apply retroactively. That is because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility

that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 1265 (quoting *Schriro*, 542 U.S. at 352) (quotation marks omitted). New procedural rules, in other words, do not impact the State's ability to prosecute the specific defendant for the conduct at issue, and they are generally surmountable by the government: even if the defendant shows that a different procedure should have been followed, the government normally would be free to re-try the defendant using those procedures, or to show that any error was harmless. For this reason, procedural rules have a "speculative connection to innocence." *Schriro*, 542 U.S. at 352. Unlike substantive rules, they do not necessarily undermine the determination that the defendant is guilty of the crime.

In this way, the Court's distinction between substantive rules, which always apply retroactively, and procedural rules, which usually do not, echoes the distinction between the *Blackledge*/*Menna* and *Tollet*/*Brady* lines of cases. Substantive rules apply retroactively because they go to the State's very power to validly prosecute the defendant, just as *Blackledge*/*Menna* claims survive a guilty plea because they too challenge the State's power to hold the defendant for the crime alleged. By contrast, procedural challenges generally do not apply retroactively, because, like *Tollett*/*Brady* claims, they raise concerns that go to the particular procedures used to obtain a conviction.

Concerns with the finality of a conviction are also parallel in the two contexts. In the retroactivity cases, this Court has explained that while the State often has a "weighty interest[] in ensuring the finality of convictions

and sentences," *Montgomery*, 136 S. Ct. at 732, where the conviction or sentence is not authorized by law, "finality interests are at their weakest," *Welch*, 136 S. Ct. at 1266. "As Justice Harlan wrote, '[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" *Id.* (quoting *Mackey*, 401 U.S., at 693 (opinion of Harlan, J.)); *see also Montgomery*, 136 S. Ct. at 732 (noting that *Teague*'s concerns with finality and expenditure of State's resources "has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose"). The same is true in the context of a challenge to the constitutionality of a statute following a guilty plea: because the State simply cannot convict someone of an act the law does not make criminal, the State lacks a viable interest in maintaining the finality of such a conviction on appeal.

Finality interests are stronger, however, for both *Tollett*/*Brady* claims and claims relying on the retroactive application of procedural rules. *See McMann*, 397 U.S. at 774 (explaining that permitting defendants to pursue claims of antecedent constitutional violation post-plea "would be an improvident invasion of the State's interests in maintaining the finality of guilty-plea convictions"); *Teague*, 489 U.S. at 309 (plurality opinion) ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."). In those cases, "[i]f a new rule regulates only the procedures for

determining culpability . . . [t]he chance of a more accurate outcome under the new procedure normally does not justify the cost of vacating a conviction whose only flaw is that the procedures 'conformed to then-existing constitutional standards.'" *Welch*, 136 S. Ct. at 1266 (quoting *Teague*, 489 U.S. at 310 (plurality opinion)). Therefore, the "balance generally tips in favor of finality." *Id.*

In sum, this Court has recognized in the retroactivity context that challenges to the constitutionality of the statute of conviction are different in kind from challenges to the particular procedures followed to prove a defendant's factual guilt. The retroactivity case law thus supports holding that a defendant who pleads guilty may nonetheless raise a challenge to the constitutionality of the underlying statute on appeal, just as a habeas petitioner may benefit in post-conviction proceedings from the invalidation of an unconstitutional statute after his own conviction has become final.

2. To hold otherwise would make little sense. In its Brief in Opposition, the government argued that if this Court were to conclude that a defendant who pleads guilty is inherently precluded from challenging on direct appeal the constitutionality of the statute of conviction, he could nonetheless "seek[] the benefit of a substantive ruling establishing that the statute of conviction is unconstitutional [by] seek[ing] relief under 28 U.S.C. 2255." BIO 18. However, as Petitioner noted in reply, the government likely would contend at that point that the defendant had forfeited the claim by failing to raise it on direct review. *See* Pet. Reply 6 n.4 (citing *Massaro v. United States*, 538 U.S. 500, 504 (2003)). That would

place the defendant in an impermissible Catch-22: on direct appeal, the government would argue that the constitutional claims can be raised only in habeas—and then in habeas, the government would take the position that the claims were procedurally improper for having not been raised on direct review.

Moreover, even if a defendant who is barred from raising a claim on direct appeal were able to do so on collateral review, that rule would result in a substantial waste of resources. It would require courts to address claims on collateral review that easily could have been resolved on direct appeal. It also would force defendants who have been prosecuted under unconstitutional statutes to further languish in the criminal justice system while they await relief in habeas. And it would leave unconstitutional statutes on the books for longer, chilling protected conduct. Such a result would extract great cost from defendants and the judicial system alike with little or no corresponding benefit.

II. Rule 11(a)(2) Does Not Require That A Constitutional Challenge To The Statute Of Conviction—Facial Or As-Applied—Be Expressly Preserved In A Plea Agreement.

The court below got the default rules wrong. Without even mentioning this Court's decisions in *Blackledge* and *Menna*, the D.C. Circuit erroneously held that it could not entertain Petitioner's constitutional challenges to the statute under which he was convicted. The court rested its decision on the fact that Petitioner did not enter a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2), which provides that "[w]ith the consent of the court and the

government, a defendant may enter a conditional plea of guilty . . . , reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." *See* Pet. App. 4a. The D.C. Circuit held that in the absence of a conditional plea entered under Rule 11(a)(2), all claims of error are waived by a guilty plea, and that there were only "two recognized exceptions to this rule": "the defendant's claimed right not to be haled into court at all" and a claim that the court lacked subject-matter jurisdiction over the case. Pet. App. 4a (quoting *Delgado-Garcia*, 374 F.3d at 1341). The court then found that neither "exception" applied in this case.

By not engaging with *Blackledge* and *Menna* or Petitioner's arguments, the D.C. Circuit failed to appreciate that Rule 11(a)(2) has no application to this case. As explained by the Advisory Committee that drafted it, Rule 11(a)(2) applies only when *Blackledge* and *Menna* do not. For the reasons set forth in Part I, Petitioner's Second Amendment and due process challenges fall squarely within the *Blackledge*/*Menna* doctrine, and therefore he did not need to expressly reserve those claims in writing or obtain the government's or the court's permission to preserve those claims for appeal. Nor does it matter, as some lower courts and the government have suggested, whether those claims are considered "jurisdictional," or whether they are presented as facial or as-applied challenges.

1. Like the D.C. Circuit, the government has relied on Federal Rule of Criminal Procedure 11(a)(2) to support the argument that a defendant who pleads

guilty inherently waives his right to challenge the statute of conviction on appeal. BIO 7-8. Yet the Rule in fact favors Petitioner's view, because it reiterates the distinction between *Tollett*/*Brady* claims, to which the Rule applies, and *Blackledge*/*Menna* claims, to which it does not.

Adopted in 1983, Rule 11(a)(2) was enacted to resolve a circuit split on the permissibility of conditional pleas that reserve a defendant's right to "have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2); *see also* Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments. Rule 11(a)(2) sanctioned the practice, but it imposed two conditions on defendants who wished to take advantage of the new rule. First, defendants were required to "reserv[e] in writing" those claims that they wished to preserve. Second, they had to obtain "the consent of the court and the government." Fed. R. Crim. P. 11(a)(2).

Importantly, the Advisory Committee explained that Rule 11(a)(2)'s new requirements did not apply to *all* pretrial motions—specifically, the requirements did not apply to pretrial motions raising *Blackledge*/*Menna* claims about the very power of the State to prosecute the defendant. As the Advisory Committee explicitly noted: "The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. . . . *Subdivision 11(a)(2) has no application to such situations*, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." Fed. R. Crim. P. 11 advisory committee's

note to 1983 amendments (emphasis added). Thus, the Advisory Committee clarified that where a constitutional objection falls into the *Blackledge*/*Menna* category, there is no need for a defendant to reserve in writing his right to bring the constitutional objection, or to obtain the permission of the court or the government to appeal.

Such a qualification is eminently reasonable given the nature of claims under *Blackledge* and *Menna*. It would make little sense to require the defendant to obtain the permission of the prosecutor to preserve a challenge to the very power of the prosecutor over the defendant. Such a requirement would leave defendants "at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Considering the vast leverage that prosecutors wield in plea negotiations, *see, e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 109-12 (2005), establishing a default rule that would require defendants to affirmatively preserve a constitutional challenge to the statute of conviction would not only render the Advisory Committee's notes about *Blackledge* and *Menna* meaningless, it would render the very doctrine of *Blackledge* and *Menna* meaningless.

2. Although the Advisory Committee was explicit about the inapplicability of Rule 11(a)(2)'s requirements to *Blackledge*/*Menna* claims, the Committee unhelpfully couched its broader discussion of Rule 11(a)(2) in terms of "jurisdiction." In discussing Rule 11(a)(2) generally, the Advisory Committee noted that "the availability of a conditional plea under specified circumstances will aid

in clarifying the fact that traditional, unqualified pleas do constitute a waiver of *nonjurisdictional* defects." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments (emphasis added). Many lower courts have also used this language, holding that only challenges to a court's "jurisdiction" survive a guilty plea, and pointing to *Blackledge* and *Menna* as examples of such "jurisdictional" challenges. *See, e.g.*, *United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011); *United States v. Andrade*, 83 F.3d 729, 731 (5th Cir. 1996) ("A plea of guilty typically waives all non-jurisdictional defects in the proceedings below"). By using the terms "jurisdictional" and "nonjurisdictional" in a "less than meticulous" manner, *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), the Advisory Committee and the lower courts have generated significant confusion.

The Advisory Committee's note does not mean that the class of rights protected by *Blackledge* and *Menna* implicates a court's jurisdiction in the formal sense of subject-matter or personal jurisdiction. *See Kontrick*, 540 U.S. at 454. Rather, the Advisory Committee and those courts that have properly understood the scope of *Blackledge* and *Menna* have used the term "jurisdiction" as shorthand for the idea that the government has no power to criminalize the conduct at issue.[5] The Seventh

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[5] The D.C. Circuit appears to have understood that *Blackledge*/*Menna* claims are not themselves "jurisdictional," because it conceptualized the "exception" for "jurisdictional" claims as distinct from the "exception" for claims that raise the defendant's right "not to be haled into court at all," like those in *Blackledge* and *Menna*. *See* Pet. App. 4a (discussing *Delgado-Garcia*, 374 F.3d at

Circuit has acknowledged as much with respect to its own use of the term in the guilty plea context, noting that "'jurisdictional' . . . does not refer to subject matter jurisdiction." *Phillips*, 645 F.3d at 862. Instead, "[a] jurisdictional issue is one that stands in the way of conviction—even when factual guilt is validly established—and prevents a court from entering any judgment in the case." *Id.* (citing *Blackledge*, 417 U.S. at 30). Other courts have similarly explained their use of the words "jurisdictional" and "nonjurisdictional" in this context. *See, e.g.*, *United States v. DeVaughn*, 694 F.3d 1141, 1152-53 (10th Cir. 2012) (acknowledging that the court's previous statement that guilty pleas waive all "nonjurisdictional defects" is a misnomer in light of *Blackledge* and *Menna*); *United States v. Johnston*, 199 F.3d 1015, 1019 n.3 (9th Cir. 1999) ("jurisdictional" defects in the context of a guilty plea include "claims in which . . . the charge in question is one which the state may not constitutionally prosecute").

Blackledge and *Menna* themselves make clear that they are not limited to claims that are formally "jurisdictional" in nature—*i.e.*, those "prescriptions delineating the class of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455. After all, the due process and double jeopardy challenges in those cases would not meet that test: they are not jurisdictional in the sense that, if valid, they would demonstrate that the court

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1341). As discussed *infra*, however, the D.C. Circuit interpreted the "haled into court" language in an unduly narrow fashion.

lacks "adjudicatory authority" over the case. *See id.*; *DeVaughn*, 694 F.3d at 1153-54; *Phillips*, 645 F.3d at 862-63; *United States v. Baucum*, 80 F.3d 539, 542-43 (D.C. Cir. 1996).

3. Similarly misguided was the D.C. Circuit's holding that Petitioner's claims were foreclosed because they did not involve the "right not to be haled into court at all." Pet. App. 4a (quotation marks omitted). Although it did not mention *Blackledge*, the court was presumably referencing *Blackledge*'s statement that the due process right asserted in that case was "the right not to be haled into court at all upon the felony charge." 417 U.S. at 30. The D.C. Circuit offered an extraordinarily narrow view of that statement, apparently holding that Petitioner forfeited his constitutional claims by appearing in court to answer the charges against him. That is, of course, not what *Blackledge* held. Rather, as explained above, *Blackledge* was about the power of the State to obtain a valid conviction. *See id.* at 30-31; *Menna*, 423 U.S. at 62 & n.2.

Again, *Blackledge* and *Menna* themselves make clear that the "haled into court" language does not literally limit the types of challenges that may be raised following a guilty plea to those in which a defendant never has to appear in court to answer the charges against him. In both *Blackledge* and *Menna*, the defendants were in fact "haled into court" and required to litigate their constitutional challenges following their guilty pleas from the trial courts through the courts of appeals and to the Supreme Court. 417 U.S. at 30; 423 U.S. at 61-62. As explained above, the correct inquiry under *Blackledge* and *Menna* is not about being

physically "haled into court." Rather, it is about whether the defendant's claim, if successful, would forever prevent a valid prosecution or trial from taking place. Petitioner's constitutional challenges meet this test, and he should have been permitted to pursue them on appeal without expressly reserving them pursuant to Rule 11(a)(2).

4. Although the D.C. Circuit did not reach the issue, some other courts of appeals have further confused the scope of *Blackledge* and *Menna* by holding that guilty pleas inherently waive as-applied, but not facial, constitutional challenges to the statute of conviction. *See United States v. Aranda*, 612 F. App'x 177, 178 n.1 (4th Cir. 2015); *Phillips*, 645 F.3d at 863; *United States v. Seay*, 620 F.3d 919, 922-23 (8th Cir. 2010). This distinction makes little sense and contravenes this Court's own precedent. Where the claim is that the State is without power to prosecute, it does not matter whether the challenge is facial or as applied.

Blackledge and *Menna* themselves involved as-applied challenges. In *Blackledge*, the claim was that the State was, "*under the facts of this case*, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court." 417 U.S. at 30 (emphasis added). Likewise, in *Menna*, the defendant's claim was that *because of the particular facts of that case*, the "Double Jeopardy Clause precluded the State from haling him into court on the charge to which he had pleaded guilty." 423 U.S. at 62. Similarly, in *Haynes*, this Court reversed the petitioner's conviction following a guilty plea even though it agreed with the government that a *facial*

challenge to the statute at issue was "inappropriate." 390 U.S. at 99.

To the extent the *Blackledge*/*Menna* category is limited to "facial" claims, it is limited only by the concept of "facial" set forth in *Broce*, in which the Court declined to entertain defendants' claim of double jeopardy because the defendants could not "prove their claim by relying on those indictments and the existing record" at the time of the plea. 488 U.S. at 576. Thus, *Broce* held that the *Blackledge*/*Menna* claim must be apparent "on the face" of the record as it exists at the time of the plea. *Id.* at 569 (majority opinion); *id.* at 583 (Blackmun, J., dissenting). *Broce*'s holding that defendants cannot rely on later-established facts should not be misconstrued as a categorical prohibition of as-applied claims.

It would be odd indeed to allow a defendant to bring facial but not as-applied constitutional challenges post-plea, given that facial challenges are generally "disfavored" by the Court. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Facial challenges can "run contrary to the fundamental principle of judicial restraint" because they often ask the court to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotation marks omitted); *see also Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (noting that the "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect"). There is no reason to hold that a defendant must seek to invalidate a statute in all instances in order to argue that the statute cannot make him a criminal in a particular circumstance. This Court

should clarify that Petitioner is permitted to bring both his facial and as-applied challenges on appeal.

III. In The Alternative, The Court Should Remand For A Determination Of Whether Petitioner's Plea Was Voluntary, Knowing, And Intelligent.

For all of the reasons discussed above, this Court should hold that a guilty plea does not inherently waive the defendant's right to challenge the constitutionality of the statute of conviction. Nonetheless, if this Court disagrees and establishes a new default rule requiring defendants to expressly preserve such rights in their plea agreements pursuant to Rule 11(a)(2), the Court should remand for the lower courts to determine whether Petitioner's plea was voluntary, knowing, and intelligent—an issue that Petitioner raised below, but that the Court of Appeals failed to address.

This Court has long held that a guilty plea "is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady*, 397 U.S. at 748); *see also, e.g.*, *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). If the Court concludes that despite the lack of any express waiver in his plea agreement, Petitioner's guilty plea nonetheless waived his right to directly appeal the constitutionality of the statute of conviction, serious questions remain regarding whether the plea was voluntary, knowing, and intelligent. *See Tollett*, 411 U.S. at 267 (reaffirming principle that even where a guilty plea eliminates the right to raise a challenge based on a preceding constitutional violation, the defendant

remains free to "attack the voluntary and intelligent character of the guilty plea").

Although Petitioner consulted "off and on" with stand-by counsel, he was *pro se* when he pled guilty. J.A. 53. Yet rather than receive a clear explanation of the consequences of his plea from the district court, he was informed that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." JA. 63. Thereafter, when the court asked Petitioner if he "want[ed] to give up most of [his] rights to an appeal," Petitioner responded that he was willing to give up those rights "[o]ther than what [the court] mentioned." J.A. 66. The court did not seek to establish what Petitioner meant by this statement or whether Petitioner understood what the court meant when it informed Petitioner that he could "appeal [his] conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." J.A. 63, 66; *cf. United States v. Warwar*, 478 F.2d 1183, 1184-85 (1st Cir. 1973) ("[W]hen it affirmatively appears that the defendant may be under a misapprehension as to the effect of a guilty plea upon the preservation of any of his rights, it becomes the duty of the court to take appropriate corrective action. In the present case, the court should have informed the appellant that, by pleading guilty, he might be waiving a claim which he apparently intended to preserve . . . .").

The court's statement, coupled with the plea agreement's omission of an express waiver of the right to appeal his conviction among the express listing of other waived rights, strongly corroborates Petitioner's assertion that he did not make a voluntary, knowing, and

intelligent decision to waive his right to appeal. That Petitioner did not understand the scope of his plea's appellate waiver to include a challenge to the constitutionality of his statute of conviction is particularly clear considering Petitioner's course of conduct in filing a notice of appeal four days after he was sentenced. *See* D.C. Cir. J.A. 24-25.

Although Petitioner challenged below the voluntary, knowing, and intelligent nature of his plea, the D.C. Circuit never addressed the issue. It did not find the argument waived or lacking on the merits; it simply did not discuss it at all. In these circumstances, if this Court holds that Petitioner's plea waived his right to challenge the constitutionality of the statute of conviction on appeal, it should nonetheless remand for a determination as to whether the plea was voluntary, knowing, and intelligent. *See, e.g.*, *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.28 (2010) ("When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration . . . ."); *Bousley v. United States*, 523 U.S. 614, 623 (1998) (remanding for consideration of actual innocence claim not addressed by lower courts).

CONCLUSION

The judgment of the District of Columbia Circuit should be reversed.

Respectfully submitted,

JESSICA RING AMUNSON
Counsel of Record
ERICA L. ROSS
JOSHUA M. PARKER
CORINNE M. SMITH
LEONARD R. POWELL*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

*Admitted in California only;
supervised by principals of the firm