No. 16-1548

In the Supreme Court of the United States

ALESTEVE CLEATON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Federal Circuit held that a federal law enforcement officer is "convicted" under 5 U.S.C. § 7371, and subject to mandatory and immediate removal, upon mere entry of a withdrawable guilty plea. That decision is wrong. In response, the Government misreads this Court's precedent, ignores the statutory text and context, misstates the statute's purpose, and dismisses (but does not dispute) the absurd consequences that follow from its reading. Because the Federal Circuit has exclusive jurisdiction, its erroneous decision will now govern the more than 100,000 federal law enforcement officers in the Nation. There is also broad confusion among courts of appeals over the meaning of the terms "convicted" and "conviction" in various provisions of the U.S. Code and federal regulations. And this Court has not addressed the meaning of those terms in decades.

This case is an ideal vehicle to decide the question presented. Petitioner was removed from his position as a federal law enforcement officer based exclusively on the entry of a guilty plea. Petitioner never received any sentence as a result of that plea; the plea was withdrawable with the consent of the court; and no final judgment was entered. Instead, petitioner's indictment was ultimately dismissed. Further review is warranted.

I. The Government's Defense Of The Federal Circuit's Decision On The Merits Does Not Withstand Scrutiny And Does Not Counsel Against Further Review

The Federal Circuit's definition of "convicted" in § 7371 is inconsistent with this Court's precedent,

cannot be squared with the statute, and leads to absurd results. Nothing in the Government's opposition lends support to the decision below.

1. In holding that mere entry of a withdrawable guilty plea constitutes a conviction under § 7371, the Federal Circuit simply ignored this Court's decision in *Lott v. United States*, 367 U.S. 421 (1961). The Government does much of the same. The opposition's two-sentence response (at 13) is that the Federal Circuit did not have to consider *Lott* because, in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), the Court limited *Lott* to its particular facts and *Lott* was not cited in petitioner's opening brief on appeal. Neither argument withstands scrutiny.

The first argument is just wrong. In *Dickerson*, the Court distinguished *Lott* on three grounds: (1) *Lott* "did not deal with the situation where probation is imposed on the basis of the plea"; (2) the plea was withdrawable in *Lott* (but not in *Dickerson*); and (3) the procedural rule at issue in *Lott* did not reflect a "congressional intent to rule broadly to protect the public" (unlike in *Dickerson*). *Dickerson*, 460 U.S. at 113 n.7, 115-16; *see* Pet. 11-12. The Court nowhere suggested that it was limiting *Lott* to Federal Rule of Criminal Procedure 34 or to its particular facts. And even if these three distinguishing features were intended to narrow the holding in *Lott*, this case falls squarely within those limits: probation was not imposed as a result of the First Plea or May Order; the First Plea was withdrawable; and there is no evidence of legislative intent remotely comparable to *Dickerson* (*see* Part I.3, *infra*). *See* Pet. 8-14.

The second argument is fatally incomplete. *Lott* was not cited in petitioner's opening brief because the

Government had consistently argued that *Virginia* law controlled whether petitioner was "convicted" under § 7371, and the MSPB likewise grounded its decision in state law. *See* Pet'r Br. 18 n.4, ECF No. 13; Pet. App. 24a-26a; Joint Appendix ("A___") at A1055-57, A1088-89, A1139, ECF Nos. 32, 33. When the Government suddenly reversed course and argued that federal law controlled in its response brief on appeal (*see* Resp. Br. 22-27, ECF No. 23), petitioner immediately turned to *Lott* in his reply (Pet'r Reply 14-22, ECF No. 28; *see id.* at 5-7). And *Lott* featured prominently at oral argument. Not surprisingly, the Federal Circuit never claimed to be ignoring a controlling decision of this Court on waiver grounds. *Cf. Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1356 (Fed. Cir. 2001) ("[A] new issue" is "not required to be raised and discussed in [appellant's] opening brief," and "[w]hen a potentially material issue or argument in defense of the judgment is raised for the first time in the appellee's brief, fundamental fairness requires that the appellant be permitted to respond . . . ."); 16AA *Federal Practice & Procedure* § 3974.3 (online 4th ed. 2017) (same).

Application of *Lott* to the facts of this case should have led inexorably to the conclusion that petitioner was not "convicted" when the withdrawable First Plea was entered on May 6, 2014. *See* Pet. 8-12. The Government does not seriously dispute this. And the Federal Circuit's failure to adhere to (or even cite) *Lott* on an issue over which it has exclusive jurisdiction counsels in favor of review.

2. The Government also fails to confront § 7371's text and context. As discussed in the petition (at 15), § 7371(d) guarantees that an officer's removal will be set aside if "the conviction" is overturned on appeal. In

order for subsection (d) to have its full effect, the "conviction" must be appealable. Since a guilty plea or finding of guilt alone is not appealable, "convicted" must be read to refer to a judgment of conviction in context of the whole statute. The Government simply has no response.

3. Instead of confronting *Lott* and the statutory text and context, the Government turns to *Dickerson*. But as the Government tacitly admits, *Dickerson* also required "'more' than the plea itself." Opp. 10 (quoting *Dickerson*, 460 U.S. at 113).

And contrary to the Government's contention (at 10), the circumstances in *Dickerson* are *not* "closely analogous" to the circumstances here. The Government concedes that, in *Dickerson*, the Court found a qualifying conviction where the state court had placed the defendant "on probation." *Id.* (citation omitted). The Government also does not dispute that, unlike in *Dickerson*, petitioner was not sentenced to probation as a result of the May Order. And the Government concedes that the plea in *Dickerson* was not subject to withdrawal, while the petitioner's First Plea was subject to withdrawal. *Id.* at 11.

The Government's attempt to bridge these gaps lack merit. First, the Government argues that a "written adjudication of guilt" can substitute for the absence of any sentence and that there was a "written adjudication of guilt" here. Opp. 11. That ignores the fact that the plea could still have been withdrawn because no sentence (of probation or otherwise) was entered. Second, the Government contends that the "most recent" state-court order did include a sentence of "supervised probation." *Id.* (citation omitted). But the decisions below relied *exclusively* on the May

Order; the Government cannot defend an agency's decision on new grounds; and the "most recent" state-court order expressly stated that a "finding of guilt was withheld" (A1141). *See Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) ("[A] court may uphold agency action only on the grounds that the agency invoked when it took the action." (citing *SEC v. Chenery*, 318 U.S. 80, 87 (1943))).

Third, the Government argues that the First Plea was not formally withdrawn and that the "theoretical" possibility of withdrawal should not matter. Opp. 11-12. As an initial matter, the Government does not (and cannot) dispute (i) that the Virginia court could not have entered a judgment of conviction based on two different pleas to the same offense; (ii) that the Virginia court could not have later dismissed the indictment if the First Plea was formally entered but not withdrawn; or (iii) that the ultimate disposition (including dismissal of the indictment) tracked the Controlling Plea. *Compare* A1055, A1059 (explaining certain conditions of First Plea), *with* A1141-49 (withholding judgment and finding of guilt on Controlling Plea without those conditions); *see* Pet'r Reply 9-14, 23-24.

More fundamentally, the mere possibility of withdrawal (or lack thereof) was critical to this Court's decisions in *Lott* and *Dickerson*. *Dickerson* did not distinguish *Lott* based on whether the plea actually was withdrawn—it focused on whether the plea "could" be withdrawn. *Dickerson*, 460 U.S. at 113 n.7. And this Court's decision in *Lott* expressly turned on the mere possibility that "before [the] sentence is imposed . . .

the plea *may be withdrawn*." 367 U.S. at 426-27 (emphasis added).[1]

Nor would recognizing the withdrawable nature of a plea "require a federal definition riddled with state-specific exceptions and difficult state-by-state distinctions." Opp. 12. That a plea can be withdrawn before sentencing *is* the federal rule. *See* Fed. R. Crim. P. 11(d), (e). And if a uniform rule were needed, this Court could certainly hold that a federal law enforcement officer does not have a qualifying conviction until he is sentenced or final judgment is entered—regardless of whether a specific plea was withdrawable under state law. And even if courts were to look to state law on a case-by-case basis, the Government points to nothing suggesting that state-law standards vary widely (if at all) on this question.[2]

4. The Government also invokes § 7371's purpose and sparse legislative history and contends that they support a "broad construction" like *Dickerson*. But as explained in the petition, there is a dramatic difference between the two. *See* Pet. 16-18.

The federal firearms statute at issue in *Dickerson* came with an extensive legislative record that made clear Congress's specific intent '"to rule broadly"' and

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[1] That a final conviction can be subject to "collateral attack on constitutional grounds," *Lewis v. United States*, 445 U.S. 55, 65 (1980) (cited at Opp. 11-12), says nothing about whether a cognizable conviction existed in the first place.

[2] Moreover, the reach of § 7371 already varies according to state law, since state law determines whether certain conduct qualifies as a "felony." *See* Oral Argument 17:12-47 (noting Government did not contest that state law would govern this question); 18 U.S.C. § 3156(a)(3); *cf. Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

"'keep guns out of the hands'" of those who simply "'demonstrated that "they may not be trusted to possess a firearm without becoming a threat to society."'" *Dickerson*, 460 U.S. at 112 (quoting *Lewis v. United States*, 445 U.S. 55, 63 (1980)). And the Government fails to acknowledge that the statute in *Dickerson* imposed restrictions not just on the convicted, but also on those "under indictment," "fugitive[s] from justice," and "drug addict[s] or user[s] of certain drugs." *Id.* at 115-16 (citing 18 U.S.C. § 922(g), (h)); *see also* 18 U.S.C. § 922(d)(1), (d)(2), (n), (s)(3).

Section 7371, in contrast, applies only to those "convicted" and has no remotely comparable legislative record. Indeed, the incident that prompted its passage, and the only example given, was a law enforcement officer who remained on the federal payroll for six months while *confined in jail* for a felony fraud conviction. *See* 146 Cong. Rec. S2617-18 (daily ed. Apr. 12, 2000) (statement of Sen. Grassley). The "purpose" of § 7371 was to avoid financial waste and prevent undermining the morale of law enforcement officers. *See id.* at S2617 (noting that the statute was needed to avoid "undermin[ing] morale in the ranks" and "cost[ing] taxpayers a big chunk of money"). There is no reason to *compel* removal of a federal law enforcement officer upon mere entry of a withdrawable guilty plea to achieve those purposes. Morale among federal law enforcement officers would be equally (if not better) served by affording such public servants procedural protections and avoiding the absurd consequences that could follow removal before sentencing (*see infra* at 8).

5. The Government's reliance on *Deal v. United States*, 508 U.S. 129 (1993), fares no better. The absurdity rationale underlying that decision compels the opposite result here. *See* Pet. 14.

If the Federal Circuit decision is correct, a federal law enforcement officer would stand "convicted" even if his guilty plea were withdrawn and the charges dismissed (as occurred here) or even if he were later acquitted at trial. *See id.* at 15-16. The Government does not dispute that those are absurd and exceedingly troubling results. Its only response is to note that the Federal Circuit left "open the possibility" that such an officer "may be able to argue that his conviction is eliminated nunc pro tunc." Opp. 12. Neither the Government nor the Federal Circuit explain how. To the contrary, the Federal Circuit emphasized that the statute only allows such relief when a conviction is overturned "on appeal." Pet. App. 7a. That neither the Federal Circuit nor the Government are willing to accept the logical consequence of their position speaks volumes.

II. The Government Seriously Understates The Importance Of The Question Presented

The Government suggests that the question presented is not important enough to merit review because there is no direct conflict on the question presented and because there are few reported decisions under § 7371. Of course, there never will be any conflict over the meaning of "convicted" in § 7371 because the Federal Circuit has exclusive jurisdiction. *See* 28 U.S.C. § 1295(a)(9). And as the Government acknowledges (at 15), the lack of reported decisions tells us very little. Absent this Court's review, the Federal Circuit's erroneous interpretation of the term

"convicted" in § 7371 will be the law that governs tens of thousands of federal law enforcement officers.

Notably, the Government does not dispute that the question of what constitutes a "conviction" sufficient to trigger collateral consequences under a federal statute is a recurring and important one that has caused significant confusion in the circuits. *See* Pet. 19-22. That the terms "convicted" and "conviction" do not have the same meaning in every statute is no answer to this broader tension. Opp. 14. Courts routinely rely on decisions defining those terms in other contexts. Indeed, that is precisely what the Federal Circuit did here: it applied Federal Circuit precedent defining "conviction" under a veterans' benefits statute and this Court's decision in *Dickerson*. Pet. App. 5a-7a; *see* Pet. 18-19. It is has been two decades since this Court last spoke to this issue. Further guidance is badly needed.

The Government also seeks to downplay the importance of this issue by noting that an officer who pleads guilty to a felony offense could potentially be removed for other reasons. *See* Opp. 15. But petitioner's removal was premised on § 7371. The MSPB did not rely on 5 U.S.C. § 7513, and the Government cannot assert other potential grounds for removal now. *See Chenery*, 318 U.S. at 94. More generally, Congress plainly thought the issue important enough to enact a separate mandatory removal provision in § 7371—but one that is strictly limited to those "convicted" of a qualifying felony.

If anything, the Government's reliance on § 7513 directly undercuts its purported concern that requiring a sentence before a "conviction" could trigger § 7371 mandatory removal means that "someone who has admitted to committing a felony could remain a law

enforcement officer until he is sentenced" and could "remain on the job, and on the federal payroll . . . simply because he is awaiting the imposition of a sentence." Opp. 9, 12-13. Section 7513 empowers an agency to remove any employee without advance notice if there is "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." 5 U.S.C. § 7513(b)(1). Because an agency has that option, there was no reason for the Federal Circuit to adopt an expansive interpretation of "convicted" in § 7371.

III. There Are No Vehicle Issues

The Government contends that this case is an "unsuitable vehicle" for providing further guidance on the meaning of "convicted" because the May Order included a finding of guilt and was not the "mere entry" of a withdrawable guilty plea. Opp. 15-16. That seems to misunderstand the question presented. The "mere" simply distinguishes the entry of a guilty plea alone from the entry of a guilty plea and sentence. There can be no dispute that petitioner was never sentenced based on the May Order; that no formal judgment issued as a result; and that the First Plea was withdrawable at that time and until sentencing (which never occurred). Whether entry of the guilty plea included a finding of guilt (as is often the case) does not matter to the question presented and certainly does not pose a vehicle impediment. To the contrary, and as set forth in the petition (at 22-23), this case is a particularly appropriate vehicle because it would allow the Court to provide much-needed guidance on the contours of "conviction" under federal law when the only relevant plea was withdrawable and superseded and the indictment was ultimately dismissed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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