No. _____

IN THE
Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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 a defendant's right to challenge the constitutionality of his statute of conviction?

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Petitioner Rodney Class respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The D.C. Circuit's July 5, 2016, opinion (Pet.App.1a) is unpublished.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.

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 Constitutional and Statutory Addendum.

INTRODUCTION

The circuit courts are deeply divided on an issue that has a significant impact on the orderly operation of the criminal justice system: whether a defendant, by pleading guilty, inherently waives his right to challenge the constitutionality of his statute of conviction.

In a tandem of cases decided in the 1970s, this Court held that a guilty plea does *not* "inevitably 'waive' all antecedent [*i.e.*, pre-plea] constitutional violations." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (*per curiam*); *accord Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (together, "*Blackledge/Menna*"). Rather, a plea inherently concedes only the defendant's "factual guilt," which "renders irrelevant" any claim that depends on challenging the government's evidence of guilt, *Menna*, 423 U.S. at 62 n.2, such as procedural defects or Fourth Amendment violations, *Blackledge*, 417 U.S. at 30.

However, a small set of constitutional claims do not depend on challenging factual guilt. In *Blackledge* and *Menna*, the defendants argued respectively that their prosecutions were barred by double jeopardy and vindictive prosecution, meaning that the government "may not convict [them] no matter how validly [their] factual guilt is established." *Menna*, 423 U.S. at 62 n.2. Such claims would succeed even if the government proffered overwhelming evidence that the defendants had violated the relevant statutes. Accordingly, these claims are not resolved by pleading guilty, and the defendant is therefore not *inherently* foreclosed from raising them on appeal.

In the intervening years, the circuits have sharply divided on how *Blackledge*/*Menna* applies where a defendant pleads guilty and appeals on the ground that the statute of conviction itself is unconstitutional. *See* Part I, *infra*. Some circuits—including the D.C. Circuit below—hold that a plea inherently waives the right to challenge the constitutionality of the statute of conviction, while other circuits broadly allow such challenges after a plea.

Resolving the split on this issue would make guilty plea proceedings more predictable, thereby benefitting defendants, prosecutors, and courts alike. *See* Part II.A, *infra*. Guilty pleas are a ubiquitous part of the criminal justice system. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The "horse trading" between prosecutors and defense counsel largely "determines who goes to jail and for how long." *Id.* (quotation marks omitted). During such negotiations, neither the prosecutor nor the defendant benefits from incomplete information regarding what claims could inherently survive a guilty plea. The lack of clarity also negatively affects the courts because district courts risk conducting misleading colloquys. Moreover, the split in the circuit courts means that the scope of review after a guilty plea varies significantly depending solely on where a defendant is indicted and pleads guilty.

Petitioner's case squarely presents the Court with an opportunity to resolve this issue. *See* Part II.B, *infra*. At the district court, Petitioner and the government thoroughly briefed Petitioner's constitutional challenges to his statute of conviction,

none of which concerned Petitioner's factual guilt. Petitioner subsequently pleaded guilty and was sentenced in accordance with his plea. Petitioner then appealed to the D.C. Circuit and re-raised his constitutional claims. The court refused to consider his attacks on the constitutionality of the statute, holding that Petitioner's guilty plea "waive[d]" all "claims of error on appeal, even constitutional claims." Pet.App.3a (quotation marks omitted).

The D.C. Circuit's ruling was directly contrary to this Court's holding in *Menna* that guilty pleas do *not* "inevitably 'waive' all antecedent constitutional violations" and that a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established." 423 U.S. at 62 n.2. The D.C. Circuit's ruling was also contrary to the rulings of the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, all of which interpret *Blackledge*/*Menna* to permit constitutional challenges to the validity of a statute following a guilty plea.

The Court should grant the petition, resolve the circuit split, and reverse the D.C. Circuit's improperly narrow interpretation of *Blackledge*/*Menna*.

STATEMENT OF THE CASE

A. Background Facts.

Petitioner is a retired veteran who resides in North Carolina. Petitioner has a concealed-carry firearm permit from North Carolina. During a May 2013 trip to Washington, D.C., Petitioner left his lawfully-owned

firearms secured out-of-sight in bags inside his locked vehicle, which he parked in a publicly-accessible parking lot on Maryland Avenue, S.W., about 1000 feet away from the foot of the U.S. Capitol Building. *See* J.A.125.[1]

Unbeknownst to Petitioner, the parking lot was considered part of the Capitol Grounds, where all weapons are prohibited pursuant to 40 U.S.C. § 5104(e). No signs indicated that the lot was part of the Capitol Grounds or that weapons were prohibited. J.A.125 n.1. A police officer looked into the cab of Petitioner's vehicle and saw what she mistakenly believed was a gun holster. J.A.125; J.A.162, ¶ 1. When Petitioner returned to his car, he was arrested, and his vehicle was searched. The object the officer saw was not a gun holster, but the search revealed three firearms that Petitioner had stored out-of-sight, as well as several knives. J.A.162, ¶¶ 2, 4.

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).[2]

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

[2] Petitioner was also charged with violating D.C. Code § 22-4504(a), but that charge was dropped after § 22-4504(a) was declared unconstitutional. *See Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

B. Petitioner Attacks The Constitutionality Of § 5104(e) At The District Court.

Petitioner filed numerous motions to dismiss the indictment, arguing *inter alia* that his storage of lawfully-owned weapons in his locked vehicle was protected by the Second Amendment. *See, e.g.*, J.A.32-33, J.A.36, J.A.43, J.A.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, which was freely accessible by the public. *See* J.A.39.

On April 7, 2014, the district court held a hearing where Petitioner presented arguments on his Second Amendment and due process claims. *See* J.A.65, 69. On April 16, 2014, the court issued an order that addressed Petitioner's arguments. *See* Pet.App.10a-16a; J.A.70-100. The court stated that "to the extent Defendant challenges his prosecution under the Second Amendment of the Constitution, the Government has not submitted a substantive response to this argument. The Court therefore lacks an adequate record on which to evaluate it." Pet.App.16a. The court ordered the government "to file further briefing on this issue." *Id.*

On May 1, 2014, the government filed a brief in response to the district court's order. J.A.101-21. 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), would prohibit Petitioner's prosecution. J.A.106-13. The government did not provide any

specific evidence or documentation to support its claimed substantial interest in prohibiting all weapons, even when securely stored in cars parked 1000 feet away from the Capitol. Instead, the government argued that all government property is inherently a "sensitive place" where there is no right to armed self-defense. J.A.112.

The government later filed motions that addressed many of the due process/notice arguments that Petitioner had previously 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"), J.A.124, 130; and (2) the statute defining the Capitol Grounds made a "clear reference," J.A.138, to the relevant parking lot when it designated "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" as being part of the Capitol Grounds. 40 U.S.C. § 5102(c)(1)(C).

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 did not address—and therefore

implicitly denied—Petitioner's due process/notice argument.

C. 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. J.A.145. He subsequently pleaded guilty to the one remaining charge of violating § 5104(e).

The plea conceded that Petitioner had violated § 5104, *see* J.A.161, but it did *not* contain any express waiver of the right to appeal Petitioner's conviction, nor did it concede in any way that § 5104 itself was constitutional, *see* J.A.157. The plea 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." J.A.159.

At the plea colloquy, the district court told Petitioner that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." S.A.102.[3]

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[3] Citations to "S.A." refer to the Supplemental Appendix filed at the D.C. Circuit on February 22, 2016.

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

Because the plea lacked any clause waiving his right to appeal his conviction, Petitioner immediately appealed to the D.C. Circuit and filed a *pro se* opening merits brief, focusing on his claim that his Second Amendment rights had been violated. The government did not move to dismiss the appeal as barred by the guilty plea. The D.C. Circuit then appointed counsel to serve as *amicus curiae* to argue in favor of Petitioner.

Amicus fully briefed the primary constitutional challenges that Petitioner had raised at the district court, and Petitioner expressly adopted the *amicus*'s arguments on appeal as his own.[4] Petitioner argued that the Second Amendment protects the right to "keep and bear arms" for self-defense, and that § 5104(e) infringed on that right by effectively banning law-abiding citizens from securely storing lawfully owned weapons in their cars parked in a publicly accessible lot.

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 and thus where weapons are banned. The statutory language defining the relevant portion of the Grounds is exceedingly confusing, making it unclear whether the Grounds

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[4] *See* Pet. Notice Adopting *Amicus* D.C. Cir. Br. (Nov. 30, 2015).

include the parking lot itself, or merely the land adjacent to it. Further, there were no signs in or around the lot that gave any warning that it was part of the Grounds or that weapons were banned. Petitioner argued that the lack of any notice, especially when combined with the government's argument that § 5104(e) had no *mens rea* requirement, violated due process.

In response, the government argued—for the first time, nearly 12 months after Petitioner 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 his right to raise any constitutional claims that accrued before he pleaded guilty, including his constitutional challenges to the statute. *See* Gov't D.C. Cir. Br. 28 & n.15.

Petitioner argued in response that his constitutional challenges survived his guilty plea pursuant to this Court's holdings in *Blackledge* and *Menna*. Like the defendants in those cases, Petitioner was not challenging his "factual guilt"—*i.e.*, whether the government could properly satisfy each element of the statute. Rather, Petitioner argued that, even assuming that factual guilt was shown, Petitioner still could not be validly convicted because § 5104 itself was unconstitutional. Petitioner argued that the plea did not address that issue, and therefore the court should reach the merits of his constitutional challenges to the statute.

After oral argument, the D.C. Circuit issued an opinion on July 5, 2016, affirming Petitioner's conviction and refusing to address the merits of any of his claims. Pet.App.1a-5a. The court's holding was based on two premises. *First*, the court cited *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." Pet.App.3a-4a (quotation marks and alteration omitted). The court did not address *Menna*'s rejection of this interpretation of *Tollett*. 423 U.S. at 62 n.2.

Second, the D.C. Circuit cited its own precedent holding that a claim survives under *Blackledge/Menna* only where the constitutional violation is so flagrant that the defendant could not even be "haled into court" to defend himself, Pet.App. 4a (quoting *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004)), even though the defendants in *Blackledge* and *Menna* themselves had to appear in court to answer the charges against them. 417 U.S. at 30; 423 U.S. at 61-62.

REASONS FOR GRANTING THE PETITION

The Court should grant *certiorari* to address the important questions of law presented herein, which have divided the lower courts.

The circuit courts are deeply split on the proper interpretation of this Court's decisions in *Blackledge* and *Menna*. Some circuits, including the D.C. Circuit below, have narrowed *Blackledge* and *Menna* to their facts and held that a plea inherently waives *every* underlying constitutional claim except the double jeopardy and vindictive prosecution claims that were at issue in *Blackledge* and *Menna* themselves. Other circuits, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, recognize that *Blackledge* and *Menna* are based on the principle that a guilty plea concedes factual guilt—but does not necessarily concede or waive the constitutionality of the statute of conviction itself. These circuits hold that a plea does not inherently waive the right to raise facial or as-applied challenges to the constitutionality of the statute of conviction. A third group of circuits, including the Fourth, Seventh, and Eighth Circuits, strikes a middle ground, allowing facial—but not as-applied—challenges to survive a guilty plea.

Resolving this split is important for all participants in the criminal justice system because the lack of clarity causes significant unpredictability in guilty plea negotiations and especially the subsequent proceedings, where the circuit courts are often confused about which claims they must address after a plea. This issue is also recurrent. "Criminal justice

today is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012), as evidenced by the fact that pleas account for 95% of criminal case resolutions in federal court, Lindsey Devers, Bureau of Justice Assistance, U.S. Dep't of Justice, *Plea and Charge Bargaining* 1 (2011), https://www.bja.gov/Publications/PleaBargaining ResearchSummary.pdf. The criminal justice system is essentially a series of plea negotiations—and yet the parties to those negotiations are operating without a clear understanding of the necessary consequences of the plea itself. Whether a defendant can plead guilty and then argue that his or her statute of conviction is unconstitutional depends at the present time simply on the circuit in which the defendant is convicted. Thus, a defendant raising the same claims in the D.C. Circuit would necessarily be subject to a different outcome in the Third, Fifth, Sixth, Ninth, or Eleventh Circuits.

Petitioner's case is an excellent vehicle for resolving this issue. His Second Amendment and due process claims were raised at both the district court and circuit court. Further, his Second Amendment claim was as-applied, while his due process claim was both as-applied and facial. Accordingly, this case presents the Court with the opportunity to address how *Blackledge* and *Menna* apply to both facial and as-applied challenges. Further, Petitioner's guilty plea did not expressly waive his right to appeal his convictions, meaning that his arguments are not independently barred by such a clause.

Finally, the D.C. Circuit's holding below was wrong. The court's ruling that a plea inherently waives any ability to challenge the constitutionality of the statute of conviction is directly contrary to this Court's holding in *Menna* that guilty pleas do *not* "inevitably 'waive' all antecedent constitutional violations." 423 U.S. at 62 n.2. Indeed, the D.C. Circuit's test for which claims survive a plea—*i.e.*, only those claims where the defendant would not even have to come to court to raise them—is so narrow that not even the challenges in *Blackledge* and *Menna* themselves would satisfy it.

The Court should grant the petition.

I. THE CIRCUIT COURTS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED.

The decision below stated that it was "universally recognized" that a guilty plea inherently waives all "constitutional claims." Pet.App.3a-4a (quotation marks omitted). However, that is far from accurate. The circuit courts are split into three distinct groups on the issue. Three circuits, including the court below, hold that a plea waives every constitutional challenge to the statute of conviction. Five circuits correctly hold that a plea does not waive facial or as-applied challenges to the statute of conviction. And three circuits hold that a plea waives as-applied—but not facial—challenges. This disarray in the circuits means that two defendants raising the same exact constitutional claims in different circuits could have

vastly different outcomes. This Court's intervention is needed to address this situation.

A. Three Circuits Hold That A Guilty Plea Inherently Waives All Constitutional Challenges To The Statute Of Conviction.

The court below, along with the First and Tenth Circuits, has strictly limited *Blackledge* and *Menna* to their facts. These three courts hold that while the specific constitutional claims at issue in *Blackledge* and *Menna*—double jeopardy and vindictive prosecution—can survive a plea, no other claims can survive, including even a facial challenge to the statute.

D.C. Circuit. In its decision below, the D.C. Circuit refused to address Petitioner's Second Amendment and due process challenges to § 5104(e) because "unconditional guilty pleas ... waive the defendant's claims of error on appeal, *even constitutional claims*." Pet.App.3a (alterations and quotation marks omitted; emphasis added). The court held that the only exceptions to this rule are (1) "the defendant's claimed right not to be haled into court at all," and (2) a claim that "the court below lacked subject matter jurisdiction." Pet.App.4a (quotation marks omitted). The court concluded without analysis that Petitioner's Second Amendment and due process challenges to § 5104(e) did not fit either of these exceptions. *Id.*

The decision below repeatedly cited the D.C. Circuit's prior precedent in *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), where the

defendants argued that the statute of conviction violated the due process clause. *Id.* at 1343. The court held that the guilty plea in that case inherently waived "a claim that the due process clause limits the substantive reach of the conduct elements" of the statute of conviction. *Id.* (citing *Blackledge* and *Menna*). Thus, the plea waived any claim that the statute's scope was unconstitutional. The court further held that even if the statute was unconstitutional, the defendants would "still need to come to court to answer the charge brought against them," and therefore the claim did not qualify under *Blackledge/Menna*. *Id.* (quotation marks omitted); *accord United States v. Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015) (citing *Blackledge* and *Menna* for proposition that guilty plea inherently waived claim that statute of conviction exceeded Congress's Article I powers).

Accordingly, the D.C. Circuit has effectively narrowed *Blackledge* and *Menna* to their facts: except for double jeopardy and vindictive prosecution, no claims survive a guilty plea.[5]

First Circuit. Relying on D.C. Circuit caselaw, the First Circuit has likewise held that, after a defendant pleads guilty, the court will consider *only* the exact claims from *Blackledge* and *Menna* themselves: a "'due process challenge arising from repetitive, vindictive prosecution' and a double jeopardy challenge." *United*

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[5] That is, aside from the universally-accepted rule that any party can raise a lack of subject matter jurisdiction at any time. Pet.App.4a.

States v. Diaz-Doncel, 811 F.3d 517, 518 n.2 (1st Cir. 2016) (citing *Blackledge* and *Menna*). Aside from those *sui generis* "exception[s]," in the First Circuit, "a guilty plea waives all objections," including a claim that Congress exceeded its authority under Article I to pass the statute of conviction. *Id.*; *accord United States v. Gonzalez*, 311 F.3d 440, 442 (1st Cir. 2002).

Tenth Circuit. The Tenth Circuit has a similarly grudging interpretation of *Blackledge* and *Menna*. In *United States v. De Vaughn*, 694 F.3d 1141 (10th Cir. 2012), the court refused to consider a defendant's claim that the statute to which he had pleaded guilty violated the First Amendment. The court stated that a guilty plea waives all such claims, and "*Blackledge* and *Menna* merely carved out exceptions for two types of constitutional claims"—double jeopardy and vindictive prosecution. *Id.* at 1152. No other claims survive this "narrow exception." *Id.* at 1145, 1152-54.

B. Five Circuits Broadly Allow Post-Plea Challenges To The Constitutionality Of The Statute Of Conviction.

At the opposite end of the spectrum, a group of circuits, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, have correctly held that a guilty plea does not inherently waive a defendant's right to challenge his statute of conviction, regardless of whether the challenge is styled as facial or as-applied. Had Petitioner been charged in any of these circuits, the circuit court would have addressed the merits of

both his Second Amendment and his due process claims.

Third Circuit. In *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002), the defendant entered into an unconditional guilty plea and then appealed on the ground that the statute of conviction was "unconstitutional as applied to the facts of her case" because it exceeded Congress's powers under the Commerce Clause. *Id.* at 260. The Third Circuit reached the merits of the claim, finding that it was "properly … within the narrow scope of review not barred by a guilty plea." *Id.* at 262. Other Third Circuit opinions have held likewise. *See United States v. Bishop*, 66 F.3d 569, 572 n.1 (3d Cir. 1995) (citing *Blackledge* and *Menna*); *United States v. Rodia*, 194 F.3d 465, 469 (3d Cir. 1999).

Fifth Circuit. The Fifth Circuit has relied on *Menna* to broadly hold that "a guilty plea does not waive the right of the defendant to challenge the constitutionality of a statute under which he is convicted." *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994). While *Knowles* was an as-applied challenge, a prior Fifth Circuit decision strongly suggests that a defendant could widely challenge the constitutionality of a statute because a plea inherently resolves "only … violations of those *procedural rights* guaranteed by due process which are incident to the criminal investigation and prosecution." *Askew v. Alabama*, 398 F.2d 825, 825 n.1 (5th Cir. 1968) (*per curiam*) (emphasis added).

Sixth Circuit. The Sixth Circuit has also held that "it is well settled that a guilty plea does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted." *United States v. Skinner*, 25 F.3d 1314, 1316-17 (6th Cir. 1994) (citing *Blackledge*). The Sixth Circuit has applied this rule both to facial challenges, *id.* at 1316, and as-applied challenges, *United States v. Dettra*, 238 F.3d 424, 2000 WL 1872046, at *1, *3 (6th Cir. 2000) (unpublished table decision) (citing *Skinner*, 25 F.3d at 1317).

Ninth Circuit. The Ninth Circuit has also held that a challenge to the validity of a statute outlasts a guilty plea. In *Journigan v. Duffy*, 552 F.2d 283 (9th Cir. 1977), the court held that "[e]ven if the guilty plea establishes as a factual matter that [the defendant] did the acts charged, a successful constitutional attack on the statute violated by those acts would undermine the foundation of the criminal prosecution, making those acts noncriminal." *Id.* at 289 (citing *Blackledge* and *Menna*).

Pursuant to *Journigan*, the court held in *United States v. Sandsness*, 988 F.2d 970 (9th Cir. 1993), that a guilty plea did not bar a defendant's facial or as-applied vagueness challenges on appeal. *Id.* at 971-72.; *accord United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979) (reaching merits of defendant's as-applied vagueness challenges).

Eleventh Circuit. In *United States v. Palacios-Casquete*, 55 F.3d 557 (11th Cir. 1995), the Eleventh Circuit reached the merits of a facial challenge because

a "guilty plea … does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted." *Id.* at 561. In *United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011), the court indicated that this rule would apply not just to facial challenges but also to any challenge that could be determined based on "the record at the time of the plea." *Id.* at 1208 (quotation marks omitted).

C. Three Circuits Allow Facial—But Not As-Applied—Challenges To The Statute Of Conviction.

Between these two poles, three circuits have charted a middle course. The Fourth, Seventh, and Eighth Circuits hold that facial—but not as-applied—challenges to a statute can survive a defendant's guilty plea. These circuits draw this distinction despite the notable fact that *Blackledge* and *Menna* themselves were *as-applied* challenges. 417 U.S. at 30; 423 U.S. at 61-62. These courts would refuse to consider Petitioner's as-applied Second Amendment challenge, but they would likely still review Petitioner's due process challenge. *See infra* at 31 n.10 (discussing the numerous flaws in these circuits' facial versus as-applied distinction).

Fourth Circuit. In unpublished decisions, the Fourth Circuit has addressed facial challenges, *see United States v. Aranda*, 612 F. App'x 177, 178 n.1 (4th Cir. 2015) (citing *Menna*), but has refused to address the merits of as-applied claims, finding such claims were waived, *see United States v. Kelly*, 102 F. App'x

838 (4th Cir. 2004) (citing *Menna*). The court has not offered a rationale for the distinction.

Seventh Circuit. The Seventh Circuit likewise addresses facial but not as-applied challenges to a statute post-plea. The court has explained that "[w]hile a facial attack on a statute's constitutionality is jurisdictional, an as-applied vagueness challenge is not." *United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011) (citing *Blackledge* and *Menna*). Accordingly, in the Seventh Circuit, a plea cannot waive a facial challenge.

Eighth Circuit. In *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010), the Eighth Circuit addressed a facial challenge, but held that as-applied challenges are inherently waived by a plea because they are not "jurisdictional in nature." *Id.* at 922-23 (citing *Blackledge* and *Menna*).

* * *

As the deep split in circuit authority shows, the circuit courts lack clarity on the scope of the *Blackledge/Menna* doctrine. In the forty-plus years since *Blackledge* and *Menna* were issued, this Court has addressed the doctrine only once, *see United States v. Broce*, 488 U.S. 563 (1989), in a decision that did not elucidate the rationale or scope of *Blackledge/Menna* but merely re-affirmed that the constitutional determinations must be made using the "existing record" at "the time the plea was entered." *Id.* at 575-76.

It is time for this Court to address the effects of a guilty plea on a defendant's ability to raise constitutional challenges on appeal. All sides to this split have been fully aired in the courts of appeals. Only this Court can resolve the disagreement.[6]

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

A. This Issue Is Recurring And Important.

Resolving this issue is important because the vast majority of federal criminal cases are resolved via guilty plea—yet, because of the lack of clarity in this area, the prosecutor, defendant, and courts lack complete information about what claims will survive the plea.

1. Guilty pleas account for approximately 95% of all resolved federal criminal cases. *See* Devers, *supra*, 1; *Lafler*, 132 S. Ct. at 1388. Given these numbers, it is

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[6] The only circuit with criminal jurisdiction that has not fully weighed in on this issue is the Second Circuit, whose caselaw is unclear. In *United States v. Curcio*, 712 F.2d 1532 (2d Cir. 1983), Judge Friendly's opinion for the court correctly summarized the *Blackledge/Menna* rule: "[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." *Id.* at 1539 (quotation marks omitted). However, more recently, the court has suggested without explanation that an unconditional plea waives all constitutional challenges. *See United States v. Lasaga*, 328 F.3d 61, 63 (2d Cir. 2003).

unsurprising that the question presented here arises with frequency in the courts of appeals, as shown by the significant number of cases that have weighed in on the split. *See* Part I, *supra*. But the current state of confusion resulting from *Blackledge* and *Menna* reduces the predictability of plea negotiations and, in particular, the subsequent plea proceedings and appeals. Thus, a ruling clarifying this area of law would greatly benefit defendants, prosecutors, and courts alike.

During guilty plea negotiations, the defendant and the government both benefit from having a complete picture of all relevant facts, including what kinds of claims could survive the plea. "[I]nformed consideration of [significant consequences of a plea] can only benefit both the State and … defendants during the plea-bargaining process." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). When the parties know all the relevant facts, they can meaningfully and knowingly account for them in their bargaining. Thus, by "bringing [such] consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id.*

But neither side benefits when the law is unclear about the "likely consequences" of a plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). The government can be surprised when a defendant appeals on a claim the government thought had been conceded; and a defendant can be surprised when a court refuses

to consider a claim that he believed was inherently preserved.

The same rule is true for the courts themselves. In the plea colloquoy, the district court must adequately inform the defendant of the rights he is waiving. *See, e.g.*, Fed. R. Crim P. 11. That is difficult where the law is unclear as to what effect the plea itself will have on the defendant's right to raise certain claims on appeal. Circuit courts likewise would benefit from clarity on this issue because they may be improperly foreclosing claims that they have a duty to address, or perhaps are wasting resources by requiring full briefing on the merits of claims that should *not* be heard.

2. The importance of this issue is not diminished by the fact that Rule 11(a)(2) provides a limited mechanism for defendants to preserve certain claims for appeal. *See* Fed. R. Crim P. 11(a)(2). *First*, the procedure in Rule 11(a)(2) is entirely separate from the constitutional rule established in *Blackledge* and *Menna*, a point that the Advisory Committee on Rules made clear: "Subdivision 11(a)(2) … should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application," because "Subdivision 11(a)(2) has no application to such situations." Fed. R. Crim P. 11 Advisory Committee's Notes to 1983 Amendment (emphasis added). Thus, Rule 11(a)(2) was designed solely to provide a means for preserving claims that challenge factual guilt, which do not inherently survive under *Blackledge/Menna*.

Second, Rule 11(a)(2) requires the prosecutor's permission for the defendant to preserve a claim. *See* Fed. R. Crim. P. 11(a)(2). But a defendant should not have to rely on "the mercy of *noblesse oblige*" just to invoke his pre-existing constitutional rights under *Blackledge* and *Menna*. *United States v. Stevens*, 559 U.S. 460, 480 (2010).

For these reasons, a decision by this Court on the question presented would greatly improve the predictability and fairness of guilty plea negotiations and proceedings.

B. This Case Is An Excellent Vehicle.

This case provides an excellent vehicle to resolve the three-way split in the circuits.

First, Petitioner has raised both as-applied and facial challenges to his statute of conviction. His Second Amendment and due process challenges were extensively briefed at the district court prior to the plea,[7] and then were raised again at the circuit court.[8] In fact, the district court ordered the government to further brief the Second Amendment claim, giving the government a full opportunity to develop the record.

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[7] *See* J.A.32-33, J.A.36, J.A.39, J.A.43, J.A.46, J.A.65, J.A.69, J.A.70-121, J.A.124-40, Pet.App.10a-16a.

[8] *See Amicus* D.C. Cir. Opening Br. 16-56; Gov't D.C. Cir. Br. 33-61; *Amicus* D.C. Cir. Reply Br. 15-29.

Accordingly, this case presents this Court with the opportunity to address how *Blackledge*/*Menna* applies to both facial and as-applied claims, giving the Court the option of adopting any of the three competing interpretations of *Blackledge*/*Menna*.

Second, Petitioner's guilty plea does not contain an explicit waiver of his right to appeal his conviction. *See* Pet.App.4a; J.A.157. Thus, there is no obstacle to this Court reaching the question presented here.

Third, a ruling in Petitioner's favor would serve as a bulwark against prosecutorial overreach, without the risk of flooding the circuit courts with frivolous appeals. Pre-plea procedural and evidentiary claims—which amount to the vast majority of constitutional claims that defendants raise pre-trial—would *still* be rendered moot by a plea, just as this Court held in *Blackledge* and *Menna*, because such claims inherently challenge the defendant's factual guilt. *See* 417 U.S. at 30-31.

III. THE D.C. CIRCUIT'S DECISION IS WRONG.

The Court should grant review for the additional reason that the D.C. Circuit's decision below is contrary to this Court's precedent. The D.C. Circuit has effectively limited *Blackledge* and *Menna* to their facts, concluding that a guilty plea waives all pre-plea claims, except for *sui generis* exceptions for claims of double jeopardy and prosecutorial vindictiveness. And the D.C. Circuit's explanation for why those two claims survive is actually inconsistent with *Blackledge* and *Menna* themselves.

1. The court below relied on *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973), for the proposition that a plea inherently "waives" all "claims of error on appeal, even constitutional claims." Pet.App.3a-4a. However, this Court in *Menna* expressly rejected that interpretation of *Tollett*: "Neither *Tollett* … nor [the Court's prior guilty plea decisions] stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." *Menna*, 423 U.S. at 62 n.2; *see also Blackledge*, 417 U.S. at 29.

Menna recognized that what a plea actually does is establish factual guilt, *i.e.*, it serves as "an admission of all the elements of a formal criminal charge." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). This admission "renders irrelevant" claims that depend on challenging factual guilt—such as evidentiary disputes and procedural errors. *Menna*, 423 U.S. at 63 n.2.

But a plea says nothing about challenges that do *not* depend on disputing the evidence of factual guilt. *Id.* In those cases, the defendant is arguing that "the State may not convict [him] no matter how validly his factual guilt is established." *Id.* Stated another way by Judge Friendly: "a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be cured" by the government. *United States v. Curcio*, 712 F.2d 1532, 1539 (2d Cir. 1983) (quotation marks omitted).

Viewed through this framework, it is clear that a challenge to the constitutionality of the statute of conviction fits well within the scope of claims that survive under *Blackledge*/*Menna*. If § 5104(e)—the statute under which Petitioner was convicted—is unconstitutional, then the government "may not convict [Petitioner] no matter how validly his factual guilt is established," *Menna* 423 U.S. at 63 n.2, and the "practical result is to prevent a trial from taking place at all," *Blackledge*, 417 U.S. at 31 (quotation marks omitted). The government could establish conclusive evidence on each element of § 5104(e)—and yet Petitioner would still be entitled to prevail. Or, in the words of Judge Friendly, an unconstitutional statute cannot be "cured" no matter what procedures the government uses. 712 F.3d at 1539.[9]

Indeed, this Court has expressly allowed defendants to challenge the constitutionality of a statute even after pleading guilty. For example, in *Haynes v. United*

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[9] The test for which claims survive under *Blackledge* and *Menna* is very similar to this Court's test for when a habeas claim is based on a substantive rule, as opposed to a procedural rule. In habeas cases, substantive rulings—such as where this Court finds a statute is unconstitutional—apply retroactively. *See Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). However, procedural rulings—such as Fourth Amendment decisions—do not apply retroactively. *See id.* *Blackledge* itself relied on this distinction and contrasted a double-jeopardy claim with the "procedural rules that govern the conduct of a trial." 417 U.S. at 31 (quotation marks omitted); *accord Askew*, 398 F.2d at 825 n.1 (guilty plea renders irrelevant only "those *procedural rights* guaranteed by due process which are incident to the criminal investigation and prosecution" (emphasis added)).

States, 390 U.S. 85 (1968), a case that pre-dates *Blackledge/Menna*, this Court held that the defendant's "plea of guilty did not, of course, waive" his claim that the statute of conviction "violated his privilege against self-incrimination." *Id.* at 86, 87 n.2; *see also Halbert v. Michigan*, 545 U.S. 605, 621-22 (2005) (holding that "[o]ne who pleads guilty or *nolo contendere* may still raise on appeal '*constitutional defects that are irrelevant to his factual guilt*, double jeopardy claims requiring no further factual record, [and] jurisdictional defects'" (emphasis added)).

2. The D.C. Circuit's misunderstanding of *Blackledge/Menna* is confirmed by the illogical test that the court uses for determining which claims would actually survive a plea. The D.C. Circuit has held that the *Blackledge/Menna* doctrine applies only where the constitutional claim is so manifest that the defendant would not even have "to come to court to answer the charge brought against [him]." *Delgado-Garcia*, 374 F.3d at 1343 (quotation marks omitted); *accord* Pet.App.4a.

That test cannot be correct, however, because in *Blackledge* and *Menna* themselves, the defendants still had to appear in court, answer the charge, and proffer evidence showing that the prosecution was barred by double jeopardy or vindictive prosecution. 417 U.S. at 24-25; 423 U.S. at 61. It is difficult to imagine what claim could ever survive the D.C. Circuit's test, given that every defendant must "come into court to answer the charge brought." Petitioner is aware of no authority allowing a district court to *sua sponte* dismiss

a criminal indictment on constitutional grounds, without the defendant even appearing or raising an argument.

To avoid contradicting the outcomes in *Blackledge* and *Menna* themselves, the D.C. Circuit has held that double jeopardy and vindictive prosecution claims are *sui generis* because in those cases "the very act of haling the defendant[] into court completed the constitutional violation." *Miranda*, 780 F.3d at 1190. However, that is simply incorrect. Double Jeopardy is not triggered until the jury is actually empaneled, meaning that the "very act of haling" the defendant into court does *not* "complete[] the constitutional violation" of double jeopardy. *See, e.g.*, *Crist v. Bretz*, 437 U.S. 28, 38 (1978). This Court has likewise indicated that even a successful claim of vindictive prosecution does not mean the defendant has no obligation to appear in court, but rather that he has a right to "a new trial free of the taint of vindictiveness." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 267-68 (1982) (citing *Blackledge*, 417 U.S. at 30).

In other words, just like Petitioner, a defendant alleging double jeopardy or vindictive prosecution still must "come to court to answer the charge brought against [him]." *Delgado-Garcia*, 374 F.3d at 1343 (quotation marks omitted).

3. The practical result of the D.C. Circuit's jurisprudence is that *Blackledge* and *Menna* have been strictly narrowed to their facts, with no possibility of other constitutional claims surviving a plea.

This Court should grant the petition and hold that *Blackledge* and *Menna* did not announce a *sui generis* rule lacking any underlying principle. Rather, the rationale of those cases extends directly to claims that the statute of conviction is unconstitutional, whether framed as a facial or an as-applied challenge. Accordingly, the D.C. Circuit erred by refusing to consider the merits of Petitioner's constitutional claims.[10]

* * *

This case directly presents a recurring issue on which the circuit courts are deeply split and which is of

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[10] Likewise erroneous are the circuits that allow facial—but not as-applied—challenges to survive. *See* Part I.C, *infra*. That distinction makes little sense given that *Blackledge* and *Menna* themselves involved as-applied challenges. 417 U.S. at 30; 423 U.S. at 61-62. Also, this Court stated in *Broce* that a *Blackledge/Menna* claim could be based on *either* the face of the indictment *or* the "existing record" at "*the time the plea was entered*," indicating that the circuit court must consider the particular facts proffered at the district court. *Broce*, 488 U.S. at 575 (emphasis added). Further, this Court has made clear that the "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Finally, such a rule would encourage defendants to needlessly raise facial challenges rather than narrower as-applied ones, in direct contravention of this Court's dictate that facial challenges "run contrary to the fundamental principle of judicial restraint" because they 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." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quotation marks omitted).

significant importance to the orderly and predictable operation of the federal criminal justice system. The Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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