No. 16-424

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR PETITIONER 1
I. The Government Concedes There Is A Circuit Split On The Question Presented. 1
II. The Question Presented Is Important. 3
III. This Case Is An Excellent Vehicle. 7
IV. The D.C. Circuit's Decision Was Contrary To This Court's Precedent. 9
CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 4, 11

Blackledge v. Perry, 417 U.S. 21 (1974) 1

Brady v. United States, 397 U.S. 742 (1970) 11

Haynes v. United States, 390 U.S. 85 (1968) 1, 10

Massaro v. United States, 538 U.S. 500 (2003) 6

Menna v. New York, 423 U.S. 61 (1975) 1

Parrilla-Fuentes v. United States, 137 S. Ct. 474 (2016) 7

Tollett v. Henderson, 411 U.S. 258 (1973) 11

United States v. Broce, 488 U.S. 563 (1989) 11

United States v. Knowles, 29 F.3d 947 (5th Cir. 1994) 2

OTHER AUTHORITIES

Brief in Opposition, *Muhlenberg v. United States*, No. 16-6135 (U.S. Nov. 23, 2016) 8

Brief in Opposition, *Parrilla-Fuentes v. United States*, 137 S. Ct. 474 (U.S. Oct. 12, 2016) (No. 16-5055) 7, 8

Fed. R. Crim. P. Rule 11 Advisory Committee's Notes to 1983 Amendment 3

Petition, *Carrasquillo-Penaloza v. United States*, No. 16-6076 (U.S. Sept. 19, 2016) 8

Petition for a Writ of Certiorari, *Muhlenberg v. United States*, No. 16-6135 (U.S. Sept. 20, 2016) 8

Sup. Ct. R. 10(a) 2

Sup. Ct. R. 10(c) 3

U.S. Courts, *U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits*, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_630.2016.pdf 6

REPLY BRIEF FOR PETITIONER

The government concedes that the courts of appeals are squarely divided on the Question Presented, and also acknowledges that the D.C. Circuit's decision below rested solely on that issue. The government further agrees with Petitioner that this Court's directly-on-point holding in *Haynes v. United States*, 390 U.S. 85 (1968), is fully in accord with Petitioner's position. These concessions are more than enough to warrant a grant of a writ of certiorari here.

As discussed below, this case presents a uniquely strong vehicle through which the Court should resolve the circuit split regarding the correct interpretation of this Court's decisions in *Haynes*, *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), and thereby answer the unsettled question of whether a guilty plea inherently waives all constitutional challenges to the statute of conviction. This is an issue of great importance to the orderly and efficient operation of the criminal justice system.

I. The Government Concedes There Is A Circuit Split On The Question Presented.

1. The government concedes, as it must, that the courts of appeals are deeply split on the question of whether, by pleading guilty, a defendant inherently waives his right to challenge the constitutionality of his statute of conviction. *See* BIO 11-12. Citing the very same cases that Petitioner presented, *see* Pet. 15-17, the government notes that the D.C., First, and Tenth Circuits flatly forbid such challenges on appeal, *see* BIO

11. Again citing the same cases relied on by Petitioner, *see* Pet. 18-21, the government next acknowledges that the Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have ruled to the contrary and allow at least certain constitutional challenges to the statute of conviction, with the Seventh and Eighth Circuits distinguishing between facial and as-applied claims. *See* BIO 11-13.[1]

The government also concedes that the D.C. Circuit's decision below rested exclusively on this exact question, with the D.C. Circuit relying on its established precedent to hold that Petitioner's guilty plea inherently waived his right to raise any constitutional challenge to his statute of conviction. *See* BIO 5-6. The deep split presented by this case is more than enough on its own to warrant granting a writ of certiorari. *See* Sup. Ct. R. 10(a).

Not only does the government concede a well-developed split, but the government also asserts that the caselaw from six circuits is "contrary [to] authority from this Court." BIO 12; *see also id.* at 9, 11. The government claims that these circuits' decisions—which sometimes label certain constitutional challenges as "jurisdictional"—cannot be "reconciled" with this Court's caselaw indicating that the constitutionality of a criminal statute "is not a question of subject-matter

[1] The government appears to dispute the precedential value of the Fifth Circuit's published decision in *United States v. Knowles*, 29 F.3d 947 (5th Cir. 1994), but the government later admits that the "Fifth Circuit follows the … decision [in *Knowles*]" as binding. BIO 12 n.3.

jurisdiction." BIO 9. The government's allegation that numerous circuit courts are disregarding this Court's precedent regarding jurisdiction is yet another reason to grant certiorari here. *See* Sup. Ct. R. 10(c).

II. The Question Presented Is Important.

The government's arguments that the Court should not grant the writ despite the existence of the circuit split are meritless.

1. The government first suggests that this Court need not resolve the split because the 1983 amendments to Rule 11 of the Federal Rules of Criminal Procedure were meant to overrule circuit courts that had adopted Petitioner's interpretation of *Blackledge* and *Menna*. *See* BIO 7. That is wrong. Rule 11's commentary made clear that the modifications to Rule 11 "should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application," because Rule 11 "has no application to such situations." Fed. R. Crim. P. 11 Advisory Committee's Notes to 1983 Amendment; Pet. 24. Further, the government's own brief shows that the circuit split has arisen *after* 1983, defeating any implication that the modifications to Rule 11 somehow mooted or modified this issue. *See* BIO 11-13.

2. The government next argues that the circuit courts themselves should sort out the split. *See* BIO 13 (arguing that circuits' disagreements with this Court's precedent "should be addressed in the first instance by the courts of appeals themselves"). This makeweight

argument ignores the sheer number of circuits that would have to go *en banc* to reverse their binding decisions, given that there is, at a minimum, a 6-3 circuit split. The government's argument also completely misunderstands the nature of the split, which exists because the lower courts cannot agree on the correct interpretation of *this Court's* rulings in *Haynes*, *Blackledge*, and *Menna*. It is this Court's prerogative—not the circuits'—to clarify and re-interpret prior Supreme Court decisions. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997).

3. The government also argues that the Question Presented arises only in a rare set of circumstances and therefore is "of limited practical importance." BIO 17-18. This claim is completely defeated by the fact that the government's own brief cites no less than 15 on-point circuit cases issued just since 1993. *See* BIO 11-13.[2]

4. The government next asserts that the split is not worth resolving because defendants like Petitioner would perhaps lose on the merits of their underlying

[2] To the extent the government suggests that future prosecutors can avoid this issue by drafting better plea agreements, *see* BIO 17, such an argument disregards the fact that several circuits hold that a facial challenge to a statute implicates the court's jurisdiction, *see* Pet. 20-21, meaning that such claims *cannot* be waived regardless of how artfully the government drafts its pleas. In any event, the government has been aware of this split for years and—as shown by this very case—prosecutors apparently have not become any more skilled at drafting their way around the split.

constitutional challenges *even if* they were permitted to raise them under *Blackledge/Menna*. *See* BIO 16-18. The government's argument is both irrelevant and wrong. Because the D.C. Circuit did not reach the merits below, the ultimate success of Petitioner's underlying constitutional claims is not before this Court. Rather, this Court is faced only with the narrow question of whether a constitutional challenge to a statute inherently survives a guilty plea—a question of great importance to the criminal justice system.

In any event, the government's argument disregards the significant collateral benefits of resolving the Question Presented. Establishing a uniform rule on which issues survive a guilty plea would promote a more efficient and orderly criminal justice system, thereby preserving scarce appellate court resources and providing predictability for defendants and prosecutors alike. Because of the current confusion over the interpretation of *Blackledge/Menna*, the courts often expend significant resources reviewing the parties' full merits briefs and then preparing for oral argument, resulting in a great drain of time even when the government ultimately "wins." Establishing a uniform national rule would ensure that proper claims (such as Petitioner's) receive full consideration, while improper claims are quickly dismissed, saving precious court resources. *See* Pet. 24.

Further, the government is incorrect to suggest that defendants like Petitioner will prevail less frequently than other criminal defendants. In fact, in the cases Petitioner cited where the circuit court

ultimately addressed the underlying constitutional merits, the defendant prevailed in over 7% of them—which is actually *higher* than the 4.8% overall reversal rate of federal convictions on direct appeal.[3] Considering that 95% of criminal convictions are obtained via guilty pleas, *see* Pet. 22, even a 7% success rate would equate to hundreds of meritorious claims that circuit courts are erroneously forgoing.[4]

This Court should grant the petition and establish a uniform and predictable national rule, which would benefit prosecutors, defendants, and the lower courts alike. *See* Pet. 23-24.

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[3] *Compare* Pet. 17-23 (citing *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994)), *with* U.S. Courts, *U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits*, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_630 .2016.pdf (for 12-month period ending June 30, 2016, 573 criminal cases were reversed, out of 11,873 total criminal cases terminated).

[4] The government also suggests that constitutional challenges to the statute of conviction should be raised in a 28 U.S.C. § 2255 motion. *See* BIO 18. However, this would subject defendants to a Catch-22. On direct appeal, the government would argue that the constitutional claims can be raised only in habeas—and then when the defendant filed a habeas petition, the government would argue that the claims were procedurally improper because they had not been presented on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). The government's suggestion would also result in a further waste of judicial resources by forcing courts to address claims in a collateral setting that easily could have been resolved on direct appeal.

III. This Case Is An Excellent Vehicle.

The government's arguments about the suitability of this case to resolve the Question Presented are easily disposed of—and actually highlight that Petitioner's case is a superior vehicle because it lacks the procedural complications that plagued other cases raising a similar Question Presented.

1. The government first notes that this Court recently denied certiorari in *Parrilla-Fuentes v. United States*, No. 16-5055, 137 S. Ct. 474 (2016), and suggests that the Court "should do the same here." BIO 6. However, *Parrilla-Fuentes* is easily distinguishable. As the government's brief in opposition noted, the *Blackledge/Menna* issue was irrelevant in that case because the defendant's ability to appeal was independently barred by an express term in his guilty plea specifically waiving his right to directly appeal his underlying *conviction*. BIO 3, *Parrilla-Fuentes*, No. 16-5055 (U.S. Oct. 12, 2016).

That is not the case here. The D.C. Circuit correctly held that Petitioner's guilty plea "*lack[s]* … an explicit waiver" of his right to directly appeal his conviction or the judgment against him. Pet.App.4a (emphasis added). That omission is especially important given that Petitioner's plea further contained an integration clause stating that there were no "understandings" or "promises" between Petitioner and the government "*other than those contained in writing herein*." D.C. Cir. J.A.159 (emphasis added). The government never argues otherwise, and accordingly it is undisputed that

the terms of Petitioner's plea do *not* independently bar his constitutional challenges, unlike in *Parrilla-Fuentes*.[5]

2. Also unlike *Parrilla-Fuentes*, Petitioner's case presents properly preserved as-applied *and* facial challenges. *See* Pet. 25-26.[6] While conceding that Petitioner raised an as-applied Second Amendment challenge below, the government suggests that it is not "clear" whether Petitioner's separate vagueness challenge was facial. BIO 14-15. That is wrong. The government candidly admits that the "government's own brief [at the D.C. Circuit] apparently treated the vagueness argument as facial." BIO 15. The government cannot create a vehicle issue simply by attempting to disclaim its own prior position.

The government also argues that the vagueness challenge was not sufficiently briefed at the district court, though it concedes the issue was fully briefed in the D.C. Circuit. *See* BIO 16. The record does not

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[5] The two pending cases that the government cites are distinguishable for the same reason. *See* BIO 6 n.1. The guilty pleas in *Carrasquillo-Penaloza v. United States*, No. 16-6076 (U.S. Sept. 19, 2016), and *Muhlenberg v. United States*, No. 16-6135 (U.S. Nov. 23, 2016), both contained express waivers of the defendant's right to directly appeal their *convictions*. Pet. 2, *Carrasquillo-Penaloza*, No. 16-6076; BIO 3, *Muhlenberg*, No. 16-6135.

[6] *See* BIO 4, *Parrilla-Fuentes*, No. 16-5055. The government's other two cases likewise failed to preserve both types of challenges. *See* Pet. i, *Carrasquillo-Penaloza*, No. 16-6076; BIO 14, *Muhlenberg*, No. 16-6135.

support the government's theory. At the district court, Petitioner repeatedly argued that he had no clear warning as to the boundaries of the Capitol Grounds, *see* D.C. Cir. J.A.39, 65, and the government responded with numerous briefs attempting to explain why the incomprehensible language of the statute was actually "clear." *See, e.g.*, D.C. Cir. J.A.124, 130-38; Pet. 7.[7]

Accordingly, unlike the government's cases, Petitioner's case presents an excellent vehicle because it raises both facial and as-applied claims that were squarely before the lower courts, and (as the D.C. Circuit itself held) those claims are *not* independently barred by any waiver clause in Petitioner's guilty plea. *See* Pet.App.4a.

IV. The D.C. Circuit's Decision Was Contrary To This Court's Precedent.

The government spends the vast majority of its brief arguing the merits of the Question Presented, attacking the reasoning of the circuits that agree with Petitioner, while praising the circuits that disagree. *See* BIO 6-14. By focusing its fire so heavily on the merits, the government only highlights that the Question Presented is important and that Petitioner's case is an excellent vehicle through which to resolve it.

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[7] In any event, this Court would not need to address the merits of Petitioner's underlying constitutional challenges, which would be remanded for consideration in the first instance by the D.C. Circuit.

In any event, the government's discussion of the merits is off-base. It repeatedly ignores or dismisses this Court's precedent, offering a view of what the government believes the law should be, rather than what this Court has actually held.

1. As Petitioner argued, several circuits are ignoring this Court's decision in *Haynes v. United States*, 390 U.S. 85 (1968). This Court can resolve the split by granting the Petition and reaffirming the holding in *Haynes*, which is directly on point and *rejected* the government's position regarding waiver. *See* BIO 9-10. As the government admits, in *Haynes* "a defendant had raised in district court, before pleading guilty, an as-applied constitutional challenge to the statute under which he had been charged, and the [Supreme] Court permitted the renewal of that challenge on appeal." BIO 9-10.

Here, Petitioner likewise raised his constitutional challenges to the statute before he pleaded guilty, *see* Pet. 6-7, but the D.C. Circuit refused to consider Petitioner's constitutional claims, directly contrary to *Haynes*. The government never argues that this Court has overruled *Haynes*. The best the government can muster is that *Haynes* should not be followed because, in the government's opinion, this Court allegedly "did not analyze" the issue sufficiently before reaching its holding. BIO 10.[8] Needless to say, that is not a valid

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[8] The government also argues that *Haynes* pre-dates the modifications to Rule 11, *see* BIO 9-10, but again that argument disregards the fact that the circuit split has arisen after the Rule 11 modifications were issued in 1983. *See* Part II.1, *supra*. The

reason for lower courts to disregard the binding decision in *Haynes*.

2. The government next suggests that *United States v. Broce*, 488 U.S. 563 (1989), silently overruled or modified the *Blackledge/Menna* rule. *See* BIO 6-7. This suggestion is especially bewildering because *Broce* itself stated that the "decisions in *Blackledge* … and *Menna* … ha[ve] no application to the case at bar." *Broce*, 488 U.S. at 574. The government's theory also ignores the fact that the circuit split has intensified in the years *after* this Court issued *Broce*. *See* Pet. 15-21; BIO 11-13.

3. The government next tries to defend the D.C. Circuit's decision as being consistent with this Court's decisions in *Tollett v. Henderson*, 411 U.S. 258 (1973), and *Brady v. United States*, 397 U.S. 742 (1970), *see* BIO 6-7, but the government does not offer a single word in response to Petitioner's argument that *Menna* unequivocally rejected the D.C. Circuit's and the government's interpretation of *Tollett* and *Brady*: "Neither *Tollett* … nor … *Brady* … stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." *Menna*, 423 U.S. at 62 n.2; Pet. 27.

Adopting in full the D.C. Circuit's position, the government next claims that *Blackledge* and *Menna* do not apply here because in those cases, "'the very act of

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government also disregards the rule that lower courts are bound by this Court's decisions until this Court sees fit to overrule them. *Agostini*, 521 U.S. at 237-38.

haling the defendants into court completed the constitutional violation[s]'" of double jeopardy and vindictive prosecution, meaning the defendants did not even need to appear to defend themselves. BIO 8 (quoting *United States v. Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015)). The government fails to offer any response to Petitioner's argument refuting this exact point. *See* Pet. 30. Jeopardy does not attach merely because the government files a second indictment, and even a *successful* claim of vindictive prosecution does not relieve a defendant from his obligation to appear in court. *See id.* (citing *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 267-68 (1982)).

Accordingly, merely haling a defendant into court a second time cannot possibly "complete" a violation of the double jeopardy clause or amount to a successful claim of vindictive prosecution. The government's and D.C. Circuit's rationale is nothing more than an attempt to label *Blackledge* and *Menna* as *sui generis* decisions that lack any underlying rationale.

The correct inquiry under *Blackledge*/*Menna* is whether the defendant's claim—if successful—would forever prevent any trial from taking place. *See* Pet. 27-28. Petitioner's constitutional challenges easily meet that test, and accordingly he should have been allowed to raise them on appeal. *Id.* at 28.

* * *

The government concedes that the circuit courts are directly divided on the Question Presented and that the

D.C. Circuit below rested its holding solely on that same issue. Petitioner's case is a perfect vehicle because it raises both facial and as-applied claims, and also because Petitioner's guilty plea does *not* contain an independent waiver of his right to directly appeal his conviction. Pet.App.4a.

Resolving this split and providing a uniform rule will benefit not only defendants and the government, but also the lower courts themselves, which are in complete disarray about which constitutional challenges must receive full merits consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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