No.

IN THE

Supreme Court of the United States

CARLOS HERRERA, DANIEL SANCHEZ, AND ANTHONY RAY BACA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT—VOL. I OF II

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Federal Rule of Criminal Procedure 12, certain arguments—including those alleging "a defect in the indictment"—"must be raised by pretrial motion," or the argument "is untimely." Fed. R. Crim. P. 12(b)(3), (c)(3). In contrast, "[a] motion that the court lacks jurisdiction may be made at any time." Fed. R. Crim. P. 12(b)(2).

The question presented is:

Whether, under Federal Rule of Criminal Procedure 12, Petitioners were permitted to bring a facial constitutional challenge to their statute of conviction under the Commerce Clause by filing a post-trial motion rather than a pretrial motion.

RELATED PROCEEDINGS

This petition seeks reviews of the decision of the U.S. Court of Appeals for the Tenth Circuit in *United States v. Herrera*, No. 19-2126, *United States v. Sanchez*, No. 19-2141, and *United States v. Baca*, No. 19-2195 (consolidated judgment entered Oct. 27, 2022).

The petition arises from district court proceedings in *United States v. DeLeon et al.*, No. 2:15-CR-04268-JB25 (D.N.M.), in which judgment was entered on June 27, 2019 as to Mr. Herrera; on September 5, 2019 as to Mr. Sanchez; and on November 4, 2019 as to Mr. Baca.

Other defendants from the same district court case have appeals currently pending in the Tenth Circuit: *United States v. Garcia*, No. 19-2148; *United States v. Garcia*, No. 19-2152; *United States v. Troup*, No. 19-2188; *United States v. Gallegos*, No. 20-2056; *United States v. Gallegos*, No. 20-2058; *United States v. Martinez*, No. 22-2034; and *United States v. DeLeon*, No. 22-2036.

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INTRODUCTION

A facial constitutional challenge to a statute of criminal conviction, if successful, deprives the government of the power to prosecute and the court to enter judgment against any defendant—even if the defendant committed acts proscribed by statute. Since the adoption of the Federal Rules of Criminal Procedure, courts have frequently described such a challenge to a criminal prosecution as divesting the government and court of "jurisdiction" to convict. And the term lives on today in a timeliness provision that allows defendants to make a "motion that the court lacks jurisdiction … at any time while the case is pending." Fed. R. Crim. P. 12(b)(2).

That the term "jurisdiction" should have a particular meaning in a particular context is unsurprising: It is a "chameleon-like" word, taking on different meanings across the "legal lexicon." *United States v. Sabella*, 272 F.2d 206, 209 (2d Cir. 1959) (Friendly, J.). Outside the criminal context, modern jurisprudence has cabined the meaning of "jurisdiction" to refer to "subject matter jurisdiction": a court's power to adjudicate a case. But an enormous body of law predates that modern shift in terminology. Historically, courts, Congress, and others have not uniformly used the term "jurisdiction" to refer to "subject matter jurisdiction." In the criminal context in particular, the term "jurisdiction" has referred broadly to the government's power to hale a defendant into court, and the court's power to enter a judgment of conviction.

In the proceedings below, the Court of Appeals took the former approach, equating the term

"jurisdiction" with subject matter jurisdiction. After a jury convicted Petitioners, they moved in the district court to challenge the constitutionality of their statute of conviction, arguing that it exceeded Congress's Commerce Clause power. In other words, Petitioners argued that notwithstanding factual guilt of the conduct prohibited by statute, the court lacked the power to enter a judgment of conviction. The Court of Appeals determined that because a facial constitutional challenge does not affect a court's subject matter jurisdiction, it is not a challenge to "jurisdiction" under Rule 12(b)(2), and instead alleges a "defect in the indictment," such that it must be brought in a pretrial motion under Rule 12(b)(3) or is waived.

The Tenth Circuit's decision deepens a long-entrenched circuit split. The First, Second, and D.C. Circuits, like the Tenth Circuit, would have barred Petitioners' claim as "nonjurisdictional" because it does not implicate subject matter jurisdiction. In the Third, Sixth, Seventh, Ninth, and Eleventh Circuits, however, Petitioners' post-trial challenge would have been considered "jurisdictional" because it goes to the federal government's underlying authority to criminalize the charged conduct. This Court granted review to resolve a closely related split in *Class v. United States*, 138 S. Ct. 798 (2018), but its decision avoided the jurisdictional issue and thus left the split on jurisdiction intact—creating, if possible, even more confusion.

The Tenth Circuit's decision is also wrong: As the history of the Federal Rules of Criminal Procedure illustrates, "jurisdiction" in the criminal context does not refer to subject matter jurisdiction. If it did, Rule

12(b)(2) would serve little purpose: In light of the broad jurisdictional grant in 18 U.S.C. § 3231, it is difficult to imagine challenges to subject matter jurisdiction, strictly construed, that could plausibly be raised in a criminal case. Instead, as the Third, Sixth, Seventh, Ninth, and Eleventh Circuits have held, the term "jurisdiction" in criminal law—including in Rule 12(b)(2)—refers more broadly to the federal government's power to hale a defendant into court.

The Court should grant review to resolve the conflict.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals is reported at 51 F.4th 1226 and reproduced at Pet. App. 1a-132a. The relevant district court decision is unreported and reproduced at Pet. App. 133a-574a.

JURISDICTION

The Court of Appeals issued its opinion on October 27, 2022. On January 20, 2023, this Court extended the time to petition for a writ of certiorari to February 24, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Violent Crimes in Aid of Racketeering Act (VICAR), 18 U.S.C. § 1959, is reproduced at Pet. App. 575a-576a.

Federal Rule of Criminal Procedure 12(b) provides in pertinent part:

> (2) Motions That May Be Made at Any Time. A motion that the court lacks jurisdiction may be made at any time while the case is pending.
>
> (3) Motions That Must Be Made Before Trial. The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:
>
> (A) a defect in instituting the prosecution, including:
>
> (i) improper venue;
>
> (ii) preindictment delay;
>
> (iii) a violation of the constitutional right to a speedy trial;
>
> (iv) selective or vindictive prosecution; and
>
> (v) an error in the grand-jury proceeding or preliminary hearing;
>
> (B) a defect in the indictment or information, including;
>
> (i) joining two or more offenses in the same count (duplicity);
>
> (ii) charging the same offense in more than one count (multiplicity);
>
> (iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense….

Federal Rule of Criminal Procedure 12(c) provides in relevant part:

> (3) Consequences of Not Making a Timely Motion Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

STATEMENT OF THE CASE

Petitioners are convicted under the "position clause" of the Violent Crimes in Aid of Racketeering Act (VICAR)

This petition arises from the six-week joint trial involving three New Mexico state prisoners: Petitioners Carlos Herrera, Daniel Sanchez, and Anthony Ray Baca. Pet. App. 10a.

The government charged Petitioners and 28 other inmates in the New Mexico state prison system with crimes related to the operation of the prison gang Sindicato de Nuevo Mexico (SNM). Pet. App. 10a, 141a. The charges against Petitioners alleged their involvement in the murder of a prison inmate.[1] Pet. App. 10a. According to the government, Petitioners' conduct in

[1] Petitioner Baca faced further charges alleging his involvement in a conspiracy (ultimately unconsummated) to murder two corrections officials. Pet. App. 14a.

prison violated the "position clause" of the Violent Crimes in Aid of Racketeering Act (VICAR), 18 U.S.C. § 1959.

VICAR makes certain violent crimes ordinarily prosecuted in state courts *federal* offenses when committed with specified connections to "an enterprise engaged in racketeering activity." § 1959(a). As relevant here, the "position clause" makes it a federal crime to commit, attempt, or conspire to commit murder "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." § 1959(a)(1). The government alleged that SNM constituted an "enterprise" as defined by VICAR: a "group" "engaged in, or the activities of which affect, interstate or foreign commerce." § 1959(b)(2); Pet. App. 138a. It further alleged that Petitioners conspired to commit and aided and abetted the murder of a prison inmate for the purpose of enhancing their position in SNM. Pet. App. 112a.

The district court severed the case into multiple trials, and the jury convicted Petitioners at the first trial. Pet. App. 12a, 147a-148a.

The district court rejects Petitioners' post-trial constitutional challenge to the position clause on the merits

Post-trial, Petitioners joined a motion for acquittal brought by a separately tried co-defendant, Arturo Garcia. Pet. App. 113a, 121a, 182a n.10, 260a. The motion pressed three related arguments. First, it argued that VICAR's position clause is facially

unconstitutional because it "exceeds congressional power under … the Commerce Clause": Although the position clause requires proof that the *enterprise* affected interstate commerce, it does not require any proof that *the defendant's conduct* had any effect on interstate commerce. Pet. App. 182a-186a. The motion further argued that VICAR's position clause was unconstitutional as applied because the charged conduct did not involve interstate activity, and that the government's failure to establish a link to interstate commerce deprived the district court of subject matter jurisdiction. Pet. App. 182a-192a, 250a-261a.

The district court rejected each of these challenges on the merits. Pet. App. 391a, 416a-442a. It first held that Congress had not exceeded its authority under the Commerce Clause because VICAR's position clause includes an interstate commerce nexus requirement: The "enterprise" in which a defendant seeks to maintain or increase his position must be "engaged in, or … affect, interstate or foreign commerce." § 1959(b)(2); Pet. App. 422a-427a. The court then addressed together Petitioners' remaining arguments, finding that each was really a challenge to the "sufficiency of the evidence," Pet. App. 433a-434a, i.e., that the government had not established "an essential element of the crime"—its interstate commerce nexus requirement. Pet. App. 434a-438a. And the court concluded that, to the contrary, sufficient evidence connected SNM's activities with interstate commerce. Pet. App. 431a-433a, 438a-442a.

The Tenth Circuit holds Petitioners' constitutional challenge waived under Federal Rule of Criminal Procedure 12

Petitioners appealed, arguing as relevant here that "VICAR's 'position clause' exceeds Congress's power under" the Commerce Clause. Pet. App. 11a. In response, the government argued for the first time that Petitioners had waived their constitutional challenge under Federal Rule of Criminal Procedure 12 by raising the arguments in a post-trial motion rather than a pretrial motion. Pet. App. 113a. The Court of Appeals agreed with the government and declined to reach the merits of Petitioners' constitutional challenge. Pet. App. 119a, 122a.

The Court of Appeals framed its analysis around Rule 12. Under Rule 12(b)(2), "[a] motion that the court lacks jurisdiction may be made at any time." *See also* Pet. App. 114a. But an objection to prosecution based on a "defect in the indictment or information," including "failure to state an offense," must be brought in a *pretrial* motion. Fed. R. Crim. P. 12(b)(3)(B); Pet. App. 113a. Thus, the Court of Appeals posited, whether Petitioners had waived their constitutional challenges depended on whether those challenges were "jurisdictional" within the meaning of Rule 12(b)(2), or were instead "defect[s] in the indictment" within the meaning of Rule 12(b)(3). Pet. App. 113a-114a.

The Court of Appeals first addressed Petitioners' as-applied constitutional challenge. Applying circuit precedent, *see United States v. De Vaughn*, 694 F.3d 1141, 1153-54 (10th Cir. 2012), the court concluded

that an as-applied constitutional challenge does not present a jurisdictional issue and therefore "require[s] a pretrial motion" under Rule 12. Pet. App. 114a-115a; *cf. De Vaughn*, 694 F.3d at 1153-54 (holding an as-applied constitutional challenge does "not implicate a court's subject matter jurisdiction" and therefore does not survive a guilty plea).

No Tenth Circuit precedent, however, squarely addressed whether a facial constitutional challenge was "jurisdictional." Pet. App. 115a-116a. And, the Court of Appeals observed, its sister circuits were "divided" on the question: The "First, Second, Sixth, and D.C. Circuits have held that facial constitutional challenges are nonjurisdictional," the court remarked, while "the Third, Seventh, Eighth, Ninth, and Eleventh Circuits have held that [they] *are* jurisdictional." Pet. App. 116a-117a.

Confronting the question for the first time, the Court of Appeals sided with the minority approach and held that facial constitutional challenges are not "jurisdictional." Pet. App. 117a-119a. The Court of Appeals reasoned that "jurisdiction involves a court's power to adjudicate a case and … deciding the constitutionality of a statute is squarely within the power of the federal courts." Pet. App. 118a. Further, it observed, if facial constitutional challenges "implicated subject-matter jurisdiction," courts would have to resolve facial constitutional challenges in every case, even *sua sponte*, in contravention of "Supreme Court precedent declining to address constitutional issues not put at issue by the parties." Pet. App. 118a (quoting *United States v. Baucum*, 80 F.3d 539, 541 (D.C. Cir. 1996)).

The Court of Appeals identified further support for its position in Petitioners' "presentation" of the facial constitutional challenge. Pet. App. 118a-119a. In its view, the fact that Petitioners had raised a separate, fact-based challenge to the court's subject matter jurisdiction showed that Petitioners viewed their constitutional challenge as nonjurisdictional. Pet. App. 119a.

Having decided that Petitioners' facial constitutional challenge was not "jurisdictional" within the meaning of Rule 12(b)(2), the Court of Appeals determined that "[t]he challenge instead rested on a defect in the indictment" and should therefore have been brought in a pretrial motion under Rule 12(b)(3). Pet. App. 119a. Petitioners' failure to file such a pretrial motion—or show good cause for the untimeliness—meant that the challenge had been waived under Rule 12(c)(3). Pet. App. 119a. The Court of Appeals further found that the government had not waived the waiver by failing to raise it in the district court. Pet. App. 119a-122a. Under controlling Tenth Circuit precedent, even plain-error review is unavailable for issues not timely raised under Rule 12(b)(3). *See United States v. Bowline*, 917 F.3d 1227, 1231-38 (10th Cir. 2019) (acknowledging a separate circuit split on this question). Relying on *Bowline*, the Court of Appeals thus declined to address Petitioners' facial constitutional challenge. Pet. App. 122a.[2]

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[2] Petitioners also raised several other issues on appeal, in addition to their Commerce Clause challenge to the VICAR position clause. They argued, for example, that the government

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Deeply Split Over Whether Facial Constitutional Challenges Are "Jurisdictional."

As the Tenth Circuit acknowledged, the courts of appeals are intractably divided on the question of whether a facial constitutional challenge to a criminal statute of conviction is "jurisdictional." Pet. App. 116a. The Third, Sixth, Seventh, Ninth, and Eleventh Circuits are in the majority, viewing such challenges as "jurisdictional."[3] Pet. App. 117a. The First, Second, and D.C. Circuits, by contrast, find that facial constitutional challenges are "nonjurisdictional." Pet. App. 116a-117a. The Tenth Circuit has now added its weight to the minority side, bringing this to a 5-4 split.

This split reflects longstanding and deep-seated confusion about the nature of a "jurisdictional" challenge. After all, "[j]urisdiction, it has been observed,

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failed to timely disclose exculpatory evidence—including records of prison phone calls by two of the government's cooperating witnesses—in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); that the district court erred in declining to sever their trials; and that the district court erred in denying continuance requests. Pet. App. 4a-10a. The Court of Appeals rejected those arguments, which are not at issue in this petition.

[3] The Tenth Circuit misread the relevant Sixth Circuit precedent and thus wrongly placed the Sixth Circuit in the camp that considers facial constitutional challenges nonjurisdictional. *See infra* at 14 n.4. In the Eighth Circuit, also mentioned by the Tenth Circuit, the fate of a defendant's facial constitutional challenge is uncertain. *See infra* at 23-24.

is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quotation marks omitted). The Court was potentially poised to resolve the split on whether constitutional challenges to a criminal statute of conviction were "jurisdictional" when it granted review in *Class v. United States*, 138 S. Ct. 798 (2018). But its decision in that case ultimately resolved the question presented on relatively narrow grounds specific to the guilty-plea context, and the Court did not address whether a constitutional challenge should be considered "jurisdictional" or "nonjurisdictional." The Court simply held that a guilty plea by itself does not bar a criminal defendant from appealing his conviction on the ground that the statute of conviction is unconstitutional. 138 S. Ct. at 801-02. As a result, the pre-*Class* split over whether a facial constitutional challenge counts as "jurisdictional" persists in the lower courts, and indeed continues—as here—to rear its head outside the guilty-plea context. The Court should grant review in this case to clear up the continuing and widespread confusion.

A. Five circuits recognize that a facial constitutional challenge to a criminal statute is "jurisdictional."

In five courts of appeals, Petitioners' facial constitutional challenge would have been deemed jurisdictional and therefore not waived by filing a post-trial motion instead of a pretrial motion. In the view of these courts, "[t]he term 'jurisdictional,'" in the context of criminal procedure, "refers to a court's statutory or constitutional authority to hale the defendant into court; it does not refer to subject matter

jurisdiction." *United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011). And because a facial constitutional challenge implicates the federal government's power to prosecute—even if not the court's power to adjudicate—it counts as a "jurisdictional" issue.

Start with the Sixth Circuit, which has recognized that facial constitutional challenges go to "the Government's power to criminalize [the defendant's] (admitted) conduct." *United States v. Bacon*, 884 F.3d 605, 610 (6th Cir. 2018) (internal quotation marks omitted). It accordingly treats such challenges as jurisdictional. The Sixth Circuit established this principle in *United States v. Skinner*, where a defendant sought to vacate his conviction on appeal on the ground that the relevant criminal statute was unconstitutionally vague. 25 F.3d 1314, 1315 (6th Cir. 1994). The government argued that the defendant's guilty plea foreclosed this constitutional challenge. *Id.* at 1317. But the Sixth Circuit disagreed, recognizing that "[a]lthough a guilty plea waives all *non-jurisdictional* defects and fact issues, a vagueness challenge is a *jurisdictional defect*." *Id.* (emphasis added). The Sixth Circuit later applied this rule beyond guilty pleas to a jury verdict in *United States v. Dettra*, 238 F.3d 424 (6th Cir. 2000) (table decision). Even though the defendant's challenge there had "not [been] presented to the district court," the Sixth Circuit held that "his challenge to the constitutionality of

[the statute] asserts a jurisdictional defect which may be raised for the first time on appeal." *Id.*[4]

The Seventh Circuit is aligned with the Sixth Circuit's approach. It has long held "that the claim that the applicable statute is unconstitutional is a jurisdictional claim." *United States v. Bell*, 70 F.3d 495, 497 (7th Cir. 1995). Like the Sixth Circuit, the Seventh Circuit has been careful to explain that it distinguishes "[t]he term 'jurisdictional'" in the criminal context from the concept of "subject matter jurisdiction." *Phillips*, 645 F.3d at 862 ("The term 'jurisdictional' refers to a court's statutory or constitutional authority to hale the defendant into court; it does not refer to subject matter jurisdiction."). As *Phillips* explained: "A jurisdictional issue is one that stands in the way of conviction—even when factual guilt is validly established." *Id*. Viewed in this way, "a facial attack on a statute's constitutionality is jurisdictional" because it "strip[s] the government of its ability to obtain a conviction against any defendant." *Id.* at 863.

The Ninth Circuit's approach mirrors that of the Sixth and Seventh Circuits. In *Journigan v. Duffy*,

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[4] The Tenth Circuit misclassified the Sixth Circuit by misreading *Bacon*. Pet. App. 116a-117a. The court in *Bacon* stated that the defendant there brought "no *true* jurisdictional claims," because the defendant's arguments did not implicate subject matter jurisdiction. *Bacon*, 884 F.3d at 608-10 (citing *United States v. Martin*, 526 F.3d 926, 933-34 (6th Cir. 2008)). Reading *Bacon* together with *Skinner*, the Sixth Circuit is clear that an issue may be "jurisdictional" for certain purposes even if it does not implicate subject matter jurisdiction, given the varying usages of the term "jurisdiction." *Bacon,* 884 F.3d at 610; *Skinner*, 25 F.3d at 1317.

the Ninth Circuit explained that a facial constitutional challenge "go[es] to the power of the state to invoke criminal process against the defendant," and a guilty plea therefore does not foreclose the defendant from raising such a challenge on appeal. 552 F.2d 283, 289 (9th Cir. 1977); *see also United States v. Brown*, 875 F.3d 1235, 1238-39 & n.2 (9th Cir. 2017) (interpreting "jurisdictional claims" to mean "those [claims] challenging a conviction independently of the question of factual guilt" and to encompass facial constitutional challenges); *United States v. Cortez*, 973 F.2d 764, 766-67 (9th Cir. 1992) (recognizing that "jurisdictional claims" arise where "the government constitutionally may not prosecute," including because a "statute is facially unconstitutional").

The Eleventh Circuit is in agreement. In *United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011), the court held that the defendants' guilty pleas did not prevent them from arguing on appeal that their statute of conviction violated the Constitution. The Eleventh Circuit explained that, in the criminal context, "[w]hether a claim is 'jurisdictional' depends on whether the claim can be resolved by examining the face of the indictment … without requiring further proceedings." *Id.* at 1208. And if defendants succeeded on their claim that "Congress exceeded its authority in enacting the [statute]," "the government would lack the power to prosecute" defendants regardless of their "factual[] guilt[]." *Id.* The court thus held that "the constitutionality of" the statute of conviction was "a jurisdictional issue." *Id.*; *see also United States v. Brown*, 586 F.3d 1342, 1350 (11th Cir. 2009) (similar).

In these circuits, courts have explained that the term "jurisdiction" in the criminal context is not synonymous with the concept of "subject matter jurisdiction." An issue is "jurisdictional" in this setting if it would bar the government from convicting the defendant even if the defendant committed the acts proscribed by statute. Thus, in the Sixth, Seventh, Ninth, and Eleventh Circuits, courts would have treated Petitioners' facial constitutional challenge to their statute of conviction as "jurisdictional" for purposes of Rule 12.[5] That is squarely contrary to the theory, relied upon by the Tenth Circuit below, that such constitutional challenges are not "jurisdictional" within the meaning of Rule 12(b)(2) because "jurisdiction involves a power to adjudicate a case and … deciding the constitutionality of a statute 'is squarely within the power of the federal courts.'" Pet. App. 118a (quoting *De Vaughn*, 694 F.3d at 1153-54).

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[5] The Third Circuit has also held that facial challenges to criminal statutes of conviction are jurisdictional. *Uni States v. Bishop*, 66 F.3d 569, 572 n.1 (3d Cir. 1995) (holding "alleged constitutional invalidity" "goes to the jurisdiction of the district court"); *United States v. Rodia*, 194 F.3d 465, 469 (3d Cir. 1999) (accord); *United States v. Manna*, 92 F. App'x 880, 886 n.6 (3d Cir. 2004) (accord). On that basis, the Third Circuit has declined to hold that such challenges may be waived by a guilty plea. *Bishop*, 66 F.3d at 572 n.1; *Rodia*, 194 F.3d at 469. The Third Circuit has not elaborated upon its reasoning, or explained in any detail what it means by the use of the term "jurisdiction" in this context. Regardless, because Petitioners' claims would have been considered jurisdictional in the Third Circuit, this case would have come out the other way there too.

B. Four circuits hold that facial constitutional challenges to criminal statutes are "nonjurisdictional."

Four circuits take a contrary approach on the question presented. These courts treat "jurisdiction" in criminal procedure as limited to subject matter jurisdiction, and reason that a federal court "acts within its subject-matter jurisdiction" whenever it "exercises its power under a presumptively valid federal statute." *United States v. Baucum*, 80 F.3d 539, 540 (D.C. Cir. 1996). Because a "constitutional defect does not work to divest th[e] court of its original jurisdiction," these courts hold that facial constitutional challenges may be waived as nonjurisdictional claims. *Id.* at 541.

The D.C. Circuit's decision in *Baucum* announced this view. The defendant, convicted after trial on a federal drug charge, sought for the first time on appeal to challenge on Commerce Clause grounds the constitutionality of a "schoolyard-statute" that increased his sentence due to the proximity of his crime to a school. 80 F.3d at 540, 544. The D.C. Circuit concluded that he had waived his challenge because "facial constitutional challenges to presumptively valid statutes [are] nonjurisdictional." *Id.* at 540. The court analyzed whether challenges like the defendant's "implicated subject matter jurisdiction." *Id.* at 541. It reasoned that because "[s]ubject-matter jurisdiction presents a threshold question" that "federal courts[] hav[e] an obligation to address … *sua sponte*," treating facial constitutional challenges as "jurisdictional" would "run afoul of established Supreme Court precedent declining to address constitutional questions not put in issue by the parties." *Id.* at 540-41.

Baucum expressly recognized the line of authority "referr[ing] to facial constitutional claims as jurisdictional" because they concern "the power of the government 'to hale [a defendant] into court.'" *Id.* at 542-43. But the D.C. Circuit reasoned that the defendant in *Baucum* did not bring a "jurisdictional" claim in this sense because he challenged a statute that merely "increase[d] the penalty" for his crime. *Id.* at 543-44. The D.C. Circuit has since applied *Baucum* to hold that facial constitutional challenges in general are nonjurisdictional and subject to waiver, regardless of whether they target only a penalty-enhancing statute. *See, e.g.*, *United States v. Drew*, 200 F.3d 871, 876 (D.C. Cir. 2000) (Second and Fifth Amendment challenges to statute criminalizing firearm possession waived by a guilty plea); *United States v. David*, 96 F.3d 1477, 1482 (D.C. Cir. 1996) (Commerce Clause challenge to statute of conviction waived on appeal after jury trial because defendant failed to raise the challenge in district court and it was "not jurisdictional").

The First Circuit has followed the D.C. Circuit. In *United States v. Cardales-Luna*, 632 F.3d 731 (1st Cir. 2011), the dissenting judge would have overturned a jury verdict on the ground that the statute of conviction was facially unconstitutional—even though the defendant "never raised" that challenge "below or on appeal." *Id.* at 737-38; *see id.* at 751 (dissent). But the panel majority, citing *Baucum*, held that the court could not address the question *sua sponte* because a facial constitutional challenge does not "involve[] the subject matter jurisdiction of the court," and the challenge was therefore waived. *Id.* at 737. The First Circuit has held in subsequent cases, citing *Cardales-*

Luna, that facial challenges to a statute of conviction are in general nonjurisdictional for this reason and are therefore waived by either a defendant's guilty plea or a defendant's failure to raise the issue in the district court. *United States v. Carrasquillo-Peñaloza*, 826 F.3d 590, 592-93 & n.3 (1st Cir. 2016); *United States v. Nueci-Peña*, 711 F.3d 191, 196-97 (1st Cir. 2013).

The view that facial constitutional challenges to criminal statutes of conviction are nonjurisdictional because they do not implicate subject matter jurisdiction has also taken hold in the Second Circuit. In *United States v. Le*, the Second Circuit held that a defendant waived a facial constitutional challenge on appeal, after a jury trial, because he had not raised the challenge in district court and it was nonjurisdictional. 902 F.3d 104, 109 (2d Cir. 2018). The Second Circuit supported its decision with precedent holding that "post-plea appeals that call into question the government's authority to bring a prosecution or congressional authority to pass the statute in question are generally not 'jurisdictional' in the sense" that those defects would not deprive the trial court of subject matter jurisdiction. *United States v. Yousef*, 750 F.3d 254, 260-61 (2d Cir. 2014).

The Tenth Circuit in this case has aligned itself with the latter courts. Embracing the reasoning in *Baucum*, it framed the question of waiver under Rule 12 as whether Petitioners' facial constitutional challenge implicates "subject-matter jurisdiction." Pet. App. 113a. So framed, it held that facial constitutional attacks do not implicate subject matter jurisdiction and are therefore not "jurisdictional." *See* Pet. App.

118a. The Tenth Circuit expressly acknowledged that, in so ruling, it was taking sides in an entrenched conflict in the circuits. Pet. App. 116a-117a.

C. The issue is important, and confusion on the "jurisdictional" character of facial constitutional challenges persists in the wake of *Class*.

The question whether a facial constitutional challenge is "jurisdictional" has often arisen when a defendant sought to challenge a statute of conviction after entering a guilty plea. Courts had long held that guilty pleas "waive[] … all nonjurisdictional defects and defenses." *E.g., United States v. Gallagher*, 183 F.2d 342, 344 (3d Cir. 1950) (citing *Rice v. United States*, 30 F.2d 681, 681 (5th Cir. 1929)).[6] Many cases in the split discussed above address whether a facial constitutional challenge is "jurisdictional" in that context. But while the Court granted review in *Class* and ultimately held that a guilty plea on its own does not preclude an appeal on the ground that the statute of conviction is unconstitutional, 138 S. Ct. at 801-02, the Court's opinion did not address the question in jurisdictional terms. Following *Class*, the courts of appeals continue to diverge in their approaches to what constitutes a "jurisdictional" issue in the criminal procedure context. If anything, the decision has added to the confusion in the lower courts.

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[6] This formulation eventually made its way into the Advisory Committee's Notes on Federal Rule of Criminal Procedure 11, *see* Fed. Rule Crim. Proc. 11 advisory committee's notes to 1983 amendments, although not into the text of the Rule itself.

1. The question presented in *Class* was whether "a guilty plea bar[s] a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution." 138 S. Ct. at 801-02. As the petitioner there indicated in both his petition for certiorari and merits brief, and as explained above, the lower courts' varying answers to that question reflected in sizeable part efforts to distinguish between "jurisdictional" and "nonjurisdictional" challenges—the source of "significant confusion." Pet'r's Br. at 39, *Class v. United States*, No. 16-424 (U.S. May 12, 2017); *see* Pet. for Cert. at 15-21, 23, *Class*, No. 16-424 (U.S. Sept. 30, 2016).

Class held that a guilty plea does not by itself bar a constitutional challenge to the statute of conviction on direct appeal. 138 S. Ct. at 802. The Court found support for its holding in legal history specific to guilty pleas. *See id.* at 804-05. The Court's precedent explained that "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 803-04 (quoting *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975)). This is because a plea is "a confession of all the facts charged in the indictment" and "the evil intent imputed to the defendant." *Id*. at 804. By pleading guilty, a defendant inherently waives the right to trial by jury and certain procedural rights, but not other constitutional claims. *Id.* at 803-04. In *Class*, the petitioner's constitutional claim did not "contradict … [his] admission that he did what the indictment alleged" but instead "call[ed] into question the Government's power to 'constitutionally prosecute' him." *Id.* at 804-05. The Court

concluded that "[a] guilty plea does not bar a direct appeal in these circumstances." *Id.* at 805.

In its analysis in *Class*, the Court did not address the question presented in jurisdictional terms. Indeed, it made no mention of the fact that the prevailing, if not virtually universal, framework in the courts of appeals for addressing the question presented—whether a plea waived the defendant's ability to bring a constitutional challenge to the statute of conviction on appeal—had been the framework of "jurisdiction." Thus, although *Class* made clear that constitutional challenges survive a guilty plea, it did not resolve the underlying split on whether facial constitutional challenges are "jurisdictional" for that or any other purpose.

2. Following *Class*, the courts of appeals remain divided, the pre-existing split persists, and the lower-court confusion continues on the jurisdictional question.

Because *Class* did not speak in jurisdictional terms, courts have reached divergent conclusions on the extent to which *Class* affects their prior cases on whether issues are "jurisdictional" in the criminal context. For example, while acknowledging that "*Class* did not speak in terms of jurisdiction," the Eleventh Circuit reads *Class* to suggest that a statutory argument that the facts admitted by a defendant in a plea "do not constitute a crime at all" under the charged statute would be "jurisdictional" and therefore would not be waived by a guilty plea. *United States v. St. Hubert*, 909 F.3d 335, 343-44 (11th Cir. 2018); *see also United States v. Ignasiak*, 808 F. App'x

709, 714 (11th Cir. 2020) ("[A] guilty plea waives all non-jurisdictional defects …, [but] [the defendant] may still challenge the indictment on jurisdictional grounds."). The First Circuit, meanwhile, has reaffirmed its view that, notwithstanding *Class*, facial constitutional challenges are not jurisdictional and may be waived where a guilty plea is not involved. *United States v. Ríos-Rivera*, 913 F.3d 38, 42-43 (1st Cir. 2019) ("*Class* does not contradict our characterization" of constitutional challenges as nonjurisdictional). Because the split on "jurisdiction" persists, it continues to impact other issues in the criminal context evaluated in "jurisdictional" terms—including in particular the Rule 12 issue here.

Class's failure to clarify the law in this area has also "sow[n] new confusion" in the lower courts. *Class*, 138 S. Ct. at 814 (Alito, J., dissenting). The Eighth Circuit is one example. Prior to *Class*, the Eighth Circuit held in *United States v. Seay* that a defendant's Second Amendment challenge to his statute of conviction was "jurisdictional" and could therefore be pressed on appeal despite his guilty plea. The Eighth Circuit rejected the government's argument that "jurisdiction" in this context referred to the "*modern* concept of jurisdiction," i.e., subject matter jurisdiction—a court's "power to adjudicate the case." 620 F.3d 919, 922-23 (8th Cir. 2010) (emphasis added). In line with the approaches of the Sixth, Seventh, Ninth, and Eleventh Circuits outlined above, *supra* at 12-16, the Eighth Circuit explained that a "jurisdictional" argument in this context includes a claim that "the government 'may not constitutionally prosecute' him." *Id.* at 923 (quoting *Menna*, 423 U.S. at 62 n.2).

Yet the Eighth Circuit has retreated from this approach after *Class*. *See United States v. Harcevic*, 999 F.3d 1172, 1179 (8th Cir. 2021). In *Harcevic*, the defendants were charged with providing material support to terrorists; they moved to dismiss the indictment on the ground that the Executive Branch had granted them immunity as lawful combatants in the Syrian civil war. *Id.* at 1175-76. After the district court denied their motion to dismiss, the defendants pleaded guilty, but sought to raise the lawful-combatant issue on appeal. *Id.* at 1176-77. They argued that lawful-combatant immunity was a "jurisdictional" issue that survived their guilty plea. *Id.* at 1177. The Eighth Circuit recognized that this immunity "challenges the very power of the Government to bring the prosecution and secure the conviction." *Id.* at 1180. But it found the immunity defense did not survive the defendants' guilty plea, because it was not a facial constitutional challenge, as in *Class*, and did not implicate subject matter jurisdiction. *Id.*

* * *

In short, the circuit split on whether facial constitutional challenges are "jurisdictional" is deep and well-established, and continues to plague the lower courts after *Class*, with impacts beyond the guilty plea context. This Court's intervention is warranted.

II. The Tenth Circuit's Rule 12 Analysis Is Wrong.

The Tenth Circuit is on the wrong side of the split on the question presented. A facial constitutional challenge to a criminal statute of conviction does not

implicate a federal court's subject matter jurisdiction. That is why courts are not required to address *sua sponte* constitutional challenges not raised by the parties. Pet. App. 118a (quoting *Baucum*, 80 F.3d at 541). But a facial constitutional challenge is nonetheless "jurisdictional" for purposes of Rule 12 because it goes to the government's power to hale a defendant into court and the court's power to enter a judgment of conviction.[7]

1. As Judge Friendly once said, "the legal lexicon knows no word more chameleon-like than 'jurisdiction.'" *Sabella*, 272 F.2d at 209; *see also Steel Co.*, 523 U.S. at 90 ("Jurisdiction … is a word of many, too many, meanings."). Even "[t]his Court … has sometimes been profligate in its use of the term." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). As Justice Scalia acknowledged in *Steel Co.*, "it is commonplace for the term [jurisdiction] to be used" to mean something *other than* subject matter jurisdiction. 523 U.S. at 90 (collecting examples); *see also Prou v. United*

[7] Given the widespread semantic confusion regarding the meaning of "jurisdiction," Petitioners in their briefing below did sometimes use the phrase "subject matter jurisdiction" to describe Rule 12(b)(2)'s reach. But the argument advanced was the position adopted in the Sixth, Seventh, Ninth, and Eleventh Circuits: That a facial constitutional challenge is jurisdictional because it implicates the government's "authority to hale the defendant into court." *Phillips*, 645 F.3d at 862; *cf.* CA10 Reply at 39 ("Even though a court proceeds with jurisdiction to decide the constitutional issue, if the VICAR position clause was found to be unconstitutional, the district court would ultimately lose jurisdiction over the underlying acts."). The Tenth Circuit clearly understood this to be Petitioners' argument, as it identified the split at issue and ultimately sided with the First, Second, and D.C. Circuits.

States, 199 F.3d 37, 45 (1st Cir. 1999) (discussing "[t]he unfortunate penchant of judges and legislators to use the term 'jurisdiction' to describe the … court's authority to issue a specific type of remedy," rather than "the threshold requirements of subject-matter and personal jurisdiction").

"[I]n recent decisions," this Court has endeavored to use more precise language to distinguish issues implicating subject matter jurisdiction from issues that do not. *Arbaugh*, 546 U.S. at 510. But an enormous body of law predates those efforts. Thus, the question presented is not about "what the term [jurisdiction] means today" in its technical sense. *United States v. Cotton*, 535 U.S. 625, 625 (2002). It is what the term "jurisdiction" means in criminal procedure, particularly in Rule 12(b)(2). *See United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 40 (1st Cir. 1999) (the meaning of "[t]he word 'jurisdiction'" must be evaluated "depending on the context in which it is used").

2. The original Rule 12(b), enacted in 1944, provided as follows:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment … other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial…. Failure to present any such defense or objection … constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment … to charge an

> offense shall be noticed by the court at any time during the pendency of the proceeding.

The 1944 Advisory Committee notes explained that Rule 12(b)(2) "classif[ied]" motions "into two groups": "In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver." Fed. R. Crim. P. 12(b) advisory committee's note to 1944 rules. The Committee gave examples of what fell in the latter group of motions that could be raised at any time: "such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc." *Id.*

The inclusion of "former jeopardy," "former conviction," and "former acquittals" in the Committee notes as arguments that could be raised at any time under the Rule is particularly instructive. The Double Jeopardy Clause goes "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974). It provides that a defendant may "not … be haled into court at all" in certain circumstances. *Id.* A successive prosecution after "former jeopardy" in violation of the Double Jeopardy Clause is therefore not a "failure of the indictment … to charge an offense"; the constitutional problem has nothing to do with the

indictment's contents. *See infra* at 32.[8] So jeopardy must have been a "jurisdictional" argument in the 1944 Rule 12(b) framework.

Thus, in 1944, Rule 12(b) used the term "jurisdiction" in the sense of "a court's statutory or constitutional authority to hale the defendant into court." *Phillips*, 645 F.3d at 862. It was not limited to the court's subject matter jurisdiction, as the Tenth Circuit wrongly concluded below. And this use of the term was not aberrational, but was instead consistent with its historical use in the criminal context. *E.g.*, *Ex parte Yarbrough*, 110 U.S. 651, 654 (1884) (observing, when considering "whether [a] law of congress … is warranted by the constitution," that "[i]f the law which defines the offense and prescribes its punishment is void, the court was *without jurisdiction*, and the prisoners must be discharged." (emphasis added)).

For almost seventy years, the substance of Rule 12 remained the same (although the language was rephrased and reordered). *See, e.g.*, Fed. R. Crim. P. 12(b) advisory committee's note to 2002 amendments (observing "[n]o change in practice is intended"). In 2014, however, the Rule was amended, as relevant

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[8] A double jeopardy argument involving *concurrent* prosecution is different. An indictment is multiplicitous if it charges the same offense in more than one count. Fed. R. Crim. P. 12(b)(3)(B)(ii). Technically, multiplicity implicates the Double Jeopardy Clause because a defendant is charged twice for the same offense, but the Rule and courts treat it as a defect in the indictment rather than the kind of categorical bar to prosecution that arises with successive prosecution after "former jeopardy." *E.g., United States v. Anderson*, 783 F.3d 727, 740 (8th Cir. 2015); Fed. R. Crim. P. 12(b)(3)(B)(ii).

here, "to remove language that allowed the court at any time … to hear a claim that the 'indictment … fails … to state an offense'" in light of this Court's decision in *Cotton*, 535 U.S. at 629-31, which overruled *Ex parte Bain*, 121 U.S. 1 (1887). *See* Fed. R. Crim. P. 12(b) advisory committee's note to 2014 amendments. Thus, in the modern version of the Rule, "failure to state an offense" is an argument going to "a defect in the indictment" that must be raised pretrial. Fed. R. Crim. P. 12(b)(3)(B)(v).

The 2014 amendments to Rule 12 did not, however, revise Rule 12(b)'s "lack of jurisdiction" prong. Thus, today as in 1944, the word "jurisdiction" in Rule 12(b) is best read to refer not to the technical concept of subject matter jurisdiction, but instead more broadly to the government's authority to prosecute a defendant and hale the defendant into court.

3. A contrary construction of "jurisdiction" in the Rule 12 context would largely deprive the rule of meaning.

18 U.S.C. § 3231 grants "[t]he district courts of the United States … original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." As the D.C. Circuit explained, echoed by the Tenth Circuit here, a federal court "acts within its subject matter jurisdiction pursuant to § 3231" when it "exercises its power under a presumptively valid federal [criminal] statute." *Baucum*, 80 F.3d at 540. In other words, federal courts generally have subject matter jurisdiction over federal criminal prosecutions so long as the government "alleg[es] that the defendant violated a federal

criminal statute." *Yousef*, 750 F.3d at 259. Under that theory, it is hard to hypothesize plausible challenges to subject matter jurisdiction in a federal criminal case. *Cf. Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999) (Easterbrook, J.) ("Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231, and …. [t]hat's the beginning and the end of the 'jurisdictional' inquiry.").

There are, however, many constraints on the government's "authority to hale the defendant into court." *Phillips*, 645 F.3d at 862. For example, "double jeopardy bars additional punishment and successive prosecution," *United States v. Dixon*, 509 U.S. 688, 696 (1993), and "the presumption against extraterritoriality bars the government from" applying U.S. criminal statutes abroad, *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018). But none of those implicate subject matter jurisdiction as that phrase is used in *Baucum*. Indeed, the government has argued, and the Second Circuit agreed, that even foreign sovereign immunity does not deprive a court of subject matter jurisdiction over a federal prosecution, in light of "the comprehensive scope of Article III courts' jurisdiction over 'all' federal criminal offenses" under 18 U.S.C. § 3231. Br. for the United States at 13, *Turkiye Halk Bankasi A.S. v. United States*, No. 21-1450 (U.S. Dec. 14, 2022); *see also United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 347 (2d Cir. 2021), *cert. granted*, No. 21-1450 (foreign sovereign immunity is not a question of subject matter jurisdiction).

If the reach of Rule 12(b)(2) is limited to challenges to subject matter jurisdiction, the government's position in *Turkiye Halk Bankasi* illustrates

that the universe of challenges to subject matter jurisdiction in a criminal case would be rendered so small as to make the Rule all but meaningless. Federal district courts would lack subject matter jurisdiction under § 3231 to adjudicate a federal criminal prosecution alleging on its face a violation of State law, but it is exceedingly unlikely the government would attempt to bring such a prosecution. Such a fanciful scenario cannot be the sole reach of Rule 12(b)(2).

4. The Tenth Circuit's decision was wrong in another respect, too. Even if a facial constitutional challenge is not "jurisdictional" within the meaning of Rule 12(b)(2), it is not necessarily "a defect in the indictment" under Rule 12(b)(3), and is therefore not waived even if not raised in a pretrial motion. *Cf.* Pet. App. 119a. Indeed, the narrower the construction given to the term "jurisdiction" in Rule 12(b)(2), the more challenges cannot be plausibly characterized as challenging either jurisdiction or a defective indictment.

As discussed above, Rule 12(b)(2) allows "[a] motion that the court lacks jurisdiction [to] be made at any time while the case is pending." But the Rule does not require that *all* other motions must be raised pretrial. To the contrary, it provides a specific enumeration of the "defenses, objections, and requests" that "must be raised by pretrial motion." Fed. R. Crim. P. 12(b)(3). As noted above, the two broad categories of such motions are those alleging "a defect in instituting the prosecution" and those alleging "a defect in the indictment or information." Fed. R. Crim. P. 12(b)(3)(A), (B).

At issue here is the category of defects in the indictment. Pet. App. 119a. Petitioners' argument illustrates why facial constitutional challenges to criminal statutes do not allege defects in the indictment under Rule 12(b)(3). They argued below that Congress lacked authority under the Commerce Clause to enact the position clause of VICAR. Pet. App. 114a. The alleged "failing" or "shortcoming," *see Defect*, Oxford English Dictionary, https://tinyurl.com/4uycmp7r, lies not with the prosecutor's charging instrument, but with Congress's statute—or rather, Congress's lack of power to regulate the conduct proscribed by statute. Unlike the (admittedly nonexhaustive) examples of defects in an indictment listed in Rule 12(b)(3)(B)—duplicity, multiplicity, lack of specificity, improper joinder, and failure to state an offense—there is nothing the prosecutor can do to salvage the prosecution. No technical amendment to the charging instrument will cure the problem: Congress's lack of authority to enact the position clause.

In sum, it would severely distort language and grammar to say that the "defect" here is in the indictment. And if Petitioners' facial constitutional challenge is not a defect in the indictment, Fed. R. Crim. P. 12(b)(3), then it is not waived under Rule 12(c)(3) by failure to file a pretrial motion, whether or not the issue is jurisdictional.

III. This Case Is A Good Vehicle For Review.

Two factors make this case an ideal vehicle to review the question presented.

First, Petitioners' facial constitutional challenge, although not raised in a *pretrial* motion, was raised to the district court in a post-trial motion. *Supra* at 6-7; Pet. App. 113a, 182a n.10, 260a. It is thus unlike other (more common) cases where the defendant never presses an argument in the district court at all and then seeks to raise it for the first time on appeal—which adds a complicating forfeiture overlay to the issue. *E.g., Ríos-Rivera*, 913 F.3d at 42. Because there is no forfeiture problem, this case cleanly presents the Rule 12 question for review, and thus provides an ideal opportunity to address the meaning of the word "jurisdiction" in this criminal procedure context.

Second, the Tenth Circuit did not reach the merits of Petitioners' facial constitutional challenge. To the contrary, circuit precedent holds that the Tenth Circuit cannot review arguments not timely raised under Rule 12(b)(3) at all—not even under the plain-error standard. *Bowline*, 917 F.3d at 1237-38.[9] There is thus no alternative holding that would preclude this Court's review of the question presented.

[9] As *Bowline* acknowledges, there is a separate circuit split on this question. 917 F.3d at 1236-37 (collecting cases).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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