No. 22-827

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This case involves a 5-4 split of authority, which the Tenth Circuit acknowledged, on whether facial constitutional challenges are "jurisdictional" in the criminal-procedure context. The government spends most of its opposition debating the merits of the majority view: that "jurisdiction" here means something other than subject-matter jurisdiction. The sources the government cites confirm that the majority view prevailed in the 1940s, when Rule 12(b)(2) was adopted. And it effectively concedes that its interpretation of Rule 12(b)(2) would strip the provision of virtually all meaning.

But the question at this stage is not who is right on the merits. The entrenched 5-4 split needs resolution. The government does not and cannot dispute that there is a split, i.e., that Petitioners and the Tenth Circuit accurately described the cases on either side of the split and that their holdings are in conflict. *See* Opp. 13 & n.3. So the government tries to paint a picture of intra-circuit confusion and inconsistency to pick off individual circuits from the split. But its attempt falls apart under scrutiny; the cited cases are easily distinguishable from the issue here.

The government also raises purported vehicle issues, but none preclude review. The petition presents a clean vehicle to address a circuit split on an important question of criminal procedure that has long bedeviled the lower courts.

I. This Case Implicates An Acknowledged Circuit Split On Whether Facial Constitutional Challenges Are "Jurisdictional."

The government cannot escape the 5-4 circuit split on whether a facial constitutional challenge to a statute of conviction is "jurisdictional" in the criminal context. The Tenth Circuit acknowledged that the courts of appeals are deeply divided on this issue. Pet. App. 116a-117a. The government tries to diminish the split's importance—unsuccessfully. This Court's intervention is required to resolve the intractable split the Tenth Circuit deepened.

A. The government first contends that the circuits describing jurisdiction in the criminal context as the "statutory or constitutional authority to hale the defendant into court" rather than subject-matter jurisdiction, *e.g., United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011), would still reject Petitioners' argument. Opp. 13-16. According to the government, these courts have recognized that constitutional challenges do not implicate subject-matter jurisdiction and may accordingly be forfeited. *Id*. This misunderstands Petitioners' argument in two respects.

First, Petitioners do not contend that their challenge implicates subject-matter jurisdiction. The dispute about whether the term "jurisdictional" may "refer[] to a court's statutory … authority to hale the defendant into court," and "*not* … subject matter jurisdiction," is precisely what sets the Third, Sixth, Seventh, Ninth, and Eleventh Circuits apart from the

First, Second, Tenth, and D.C. Circuits. *Phillips*, 645 F.3d at 862 (emphasis added); Pet. 11-20.

Second, this case is not about forfeiting an issue never raised in the district court. Pet. 33. Petitioners presented their facial constitutional challenge to the district court,[1] which addressed it. Pet. 6-7. Constitutional challenges can be forfeited if not presented to the district court, but that does not resolve the interpretive Rule 12(b)(2) question, which concerns *when* the issue must be raised in the district court.

An example of this disconnect is the government's citation to *United States v. Al-Maliki*, 787 F.3d 784 (6th Cir. 2015). Opp. 14. The defendant there challenged Congress's authority to criminalize his conduct—but unlike here, he never raised his claim in the district court. *Al-Maliki*, 787 F.3d at 790-91. Accordingly, the question on appeal was whether the defendant forfeited his claim. *Id.* at 790. In evaluating that question, the Sixth Circuit recognized the "'many[] meanings' of the term 'jurisdiction,'" because the difference between "a court's subject-matter jurisdiction" and "Congress's 'jurisdiction' to pass [a] law" was critical to its decision. *Id.* at 791 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). Because the defendant hadn't raised "a challenge to subject-matter jurisdiction," the court held he "forfeit[ed] the challenge by failing to raise it below." *Id.*

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[1] The government erroneously suggests (at 4 & n.1) that Mr. Baca did not join Mr. Garcia's motion in the district court. *See* Pet. App. 121a, 260a.

Because Petitioners raised their constitutional challenge in the district court, *Al-Maliki*'s forfeiture analysis is irrelevant. Moreover, *Al-Maliki* did not disturb the Sixth Circuit's prior holdings that facial constitutional challenges—while not implicating "subject matter jurisdiction"—may be "jurisdictional" in the "distinct" sense that they go to "the Government's power to criminalize [the defendant's] (admitted) conduct." *United States v. Bacon*, 884 F.3d 605, 608, 610 (6th Cir. 2018); *see also* Pet. 13-14. Indeed, *Al-Maliki* recognizes that "Congress's 'jurisdiction' to pass the law" is a different kind of "jurisdictional matter[]." 787 F.3d at 791.

The government commits the same error relying (at 14-15) on *United States v. Rogers*, 270 F.3d 1076 (7th Cir. 2001). The question there was, again, whether a constitutional challenge could be "present[ed] … for the first time on appeal." *Id.* at 1078. And again, the court held the challenge forfeited because it did not implicate subject-matter jurisdiction. The government ignores the Seventh Circuit's later explicit holding that "[t]he term 'jurisdictional'" can encompass facial constitutional challenges to the statute of conviction where, as here, the term "does not refer to subject matter jurisdiction." *Phillips*, 645 F.3d at 862-63. Indeed, *Rogers* itself recognized that "[c]ourts sometimes call the link between a statute and a source of national authority a 'jurisdictional' requirement." 270 F.3d at 1078.

Likewise, the Ninth Circuit's holding that a facial constitutional challenge was forfeited because it was "not preserved" and did not implicate "subject-matter jurisdiction" is not relevant to Petitioners' argument.

United States v. Ghanem, 993 F.3d 1113, 1131 n.6 (9th Cir. 2021); Opp. 15. The government buries in a footnote the Ninth Circuit cases recognizing a different species of "jurisdictional claim[]": those "challenging a conviction independently of the question of factual guilt"—like facial constitutional challenges. Opp. 15 n.4 (quoting *United States v. Brown*, 875 F.3d 1235, 1238 (9th Cir. 2017)).

In sum, it does not matter if facial constitutional challenges do not implicate subject-matter jurisdiction and cannot be raised for the first time on appeal. Opp. 17. The question here is whether a facial constitutional challenge is "jurisdictional" under Rule 12(b)(2) and may therefore be raised in a post-trial motion. That question squarely implicates the cited 5-4 split.

B. The government also makes meritless attempts to pick off the Third and Eleventh Circuits.

United States v. Grimon, 923 F.3d 1302 (11th Cir. 2019), Opp. 16, does not alter the Eleventh Circuit's alignment with the majority side of the split. There, the Eleventh Circuit rejected an *as-applied* constitutional challenge to a conviction obtained by guilty plea. The court held that "[w]hether … [the defendant's] factual proffer sufficiently demonstrated[] an interstate nexus is … a non-jurisdictional challenge to the sufficiency of the evidence." *Id.* at 1307. That holding has no relevance here.

The government says the Third Circuit's position is "far from clear," but does not dispute that the Third Circuit has repeatedly "held that facial challenges to

criminal statutes of conviction are jurisdictional." Opp. 16. While these decisions are not detailed, the Third Circuit reaches the same conclusions in the same circumstances as the Sixth, Seventh, Ninth, and Eleventh Circuits—contrary to the First, Second, Tenth, and D.C. Circuits—on what counts as "jurisdictional" in this context. Pet. 16 n.5.

C. Last, the government points out (at 16) that *Class v. United States*, 138 S. Ct. 798 (2018), addressed whether facial constitutional challenges survive guilty pleas. As Petitioners explained (at 20-22), *Class* did so on narrow grounds specific to guilty pleas, and did not resolve whether such claims are "jurisdictional" in the criminal-procedure context more broadly. The government ignores the analytical gap—and the ongoing confusion *Class* left in its wake. Pet. 22-24. The split persists after *Class*. *E.g.*, Pet. App. 116a-117a; Pet. 24 (discussing *United States v. Harcevic*, 999 F.3d 1172, 1179 (8th Cir. 2021)).

II. "Jurisdiction" In Rule 12 Does Not Mean Subject-Matter Jurisdiction.

Petitioners do not dispute that the term "jurisdiction" *can* refer to subject-matter jurisdiction. Opp. 8. But "it is commonplace for the term to be used" in a different sense. *Steel Co.*, 523 U.S. at 90. Particularly in the criminal context, "jurisdiction" has been understood to "refer[] to a court's statutory or constitutional authority to hale [a] defendant into court." Pet. 12-13 (quoting *Phillips*, 645 F.3d at 862); *see Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (an issue was jurisdictional because the court lacked "the power and authority to deprive an accused of his life or liberty").

That is the sense in which Rule 12(b)(2) uses "jurisdiction."

The government claims that "jurisdiction" has always referred to subject-matter jurisdiction. Opp. 8. But repeated statements from this Court and others say the opposite. *Supra* at 2-3; Pet. 25-26.

The sources the government cites confirm the point. Take the 1933 edition of Black's Law Dictionary. The cited excerpt omits critical content: Jurisdiction is defined as "[t]he power and authority constitutionally conferred upon … a court or judge to pronounce the sentence of the law, *or to award the remedies provided by law*." Black's Law Dictionary 1038 (3d ed. 1933) (emphasis added). The latter piece is important, because the court's power to provide a remedy is "technically distinct" from its power to adjudicate the case. *Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999). The fact that the 1933 edition of Black's Law Dictionary treated *both* as jurisdictional supports Petitioners.

Elsewhere the government concedes that courts previously recognized a more "expansive notion of 'jurisdiction'" in the criminal context than elsewhere. *Custis v. United States*, 511 U.S. 485, 494 (1994); Opp. 10. Historically, that was because this "Court's authority to issue a writ of habeas corpus was limited to cases in which the convicting court had no jurisdiction." *United States v. Cotton*, 535 U.S. 625, 630 (2002) (quotation marks omitted). "The Court's desire to correct obvious constitutional violations led to a 'somewhat expansive notion of "jurisdiction."'" *Id.* (quoting *Custis*, 511 U.S. at 494).

This historical practice supports Petitioners' interpretation of Rule 12(b)(2), adopted in 1944. As late as 1938, the Supreme Court, evaluating a habeas petition under the old "jurisdictional" rule, granted relief because the federal district court lacked "the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Johnson*, 304 U.S. at 463. In other words, while the district court had the power to adjudicate the case under 18 U.S.C. § 3231, it lacked the power to *convict* the defendant. This Court treated that defect as jurisdictional. Notably, it was this 1938 *Johnson* decision that *Custis* later described as articulating "a somewhat expansive notion of jurisdiction." 511 U.S. at 494.

True, in 1942, this Court held in *Waley v. Johnston* that habeas relief was "not restricted to those cases where the judgment of conviction is void for want of jurisdiction." 316 U.S. 101, 104-05 (1942). *Waley* signaled that, going forward, courts did not need to stretch to find jurisdictional issues in habeas cases. But *Waley* did not disavow the "expansive" interpretation of jurisdiction the Court had reaffirmed four years prior. Indeed, that did not happen until 2002. *Cotton*, 535 U.S. at 629-31.

It may be descriptively accurate to say that the "expansive notion of 'jurisdiction'" articulated by *Ex parte Yarbrough* and *Johnson* was motivated by strict limits on habeas review. Opp. 10. But that does not change the fact that this was the prevailing conception of jurisdiction in criminal law in the mid-20th century, when Rule 12(b)(2) was adopted.

The two cases the government cites from the 1940s, Opp. 8, are not to the contrary. *Pon v. United States*, 168 F.2d 373 (1st Cir. 1948), was a forfeiture case and is therefore distinguishable, *supra* at 3, and the language the government quotes is dicta. *United States v. Holdsworth*, 9 F.R.D. 198 (D. Me. 1949), is directly on point—and supports Petitioners. There, the defendant brought a venue challenge in the district court. *Id*. at 201. Today, Rule 12(b)(3)(i) requires such a challenge be brought in a pretrial motion. At the time of *Holdsworth*, however, that provision did not exist. The district court instead considered the venue argument under Rule 12(b)(2), because "Article III, section 2, clause 3 [of the U.S. Constitution] provides that 'The Trial of all Crimes … shall be held in the State where the said Crimes shall have been committed.'" *Id*. at 203. The *Holdsworth* court thus understood "jurisdiction" in Rule 12(b)(2) to refer expansively to the court's constitutional authority to convict a defendant—not its power to adjudicate the case under 18 U.S.C. § 3231. Pet. 12-16. *Holdsworth* further demonstrates that this conception was prevailing late into the 1940s.

The government also misapprehends Petitioners' invocation of the 1944 Advisory Committee Notes. The text of the 1944 Rule required all motions to be filed pre-trial—except for motions arguing a "lack of jurisdiction" or "fail[ure] … to charge an offense." Pet. 26-27. The Advisory Committee Notes explained that, under this Rule, "former jeopardy, former conviction, former acquittal, statute of limitations, [and] immunity" could be raised by motion at any time. Pet. 27 (citing Fed. R. Crim. P. 12(b) advisory committee's note to 1944 rules). For these examples to fall within the

scope of the Rule's text at the time, they must either "fail[] to show jurisdiction in the court or [fail] to charge an offense." Pet. 26. These examples fit comfortably in the then-prevailing conception of criminal jurisdiction.[2]

The government concedes that virtually no challenges to subject-matter jurisdiction can be brought in a federal criminal prosecution given 18 U.S.C. § 3231. Opp. 8-9, 12; *cf. Turkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940, 944-45 (2023). That concession illustrates the implausibility of the government's interpretation of Rule 12(b)(2). It does not dispute that limiting the provision's reach to challenges to subject-matter jurisdiction would render the provision effectively meaningless: It would apply only when an indictment, on its face, does not allege the violation of any federal statute. Opp. 12. The government asserts that "the universe of such cases is likely to be small" but is not "a null set." *Id.* This understates how unlikely it is that a federal prosecutor would file criminal charges that do not even *allege* the violation of any federal criminal statute. The Rule need not, and should not, be read to be virtually useless.

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[2] The government observes that the Advisory Committee Notes list motions challenging "lack of jurisdiction" separately and alongside motions on "former jeopardy, former conviction, former acquittal, statute of limitations, [and] immunity." Opp. 11. One way to harmonize the Notes with the Rule text is to view the Committee as explaining that lack of subject-matter jurisdiction, former jeopardy, former conviction, former acquittal, statute of limitations, and immunity are all "jurisdictional" issues within the meaning of Rule 12(b)(2).

III. The Asserted Vehicle Problems Are Meritless.

A. Petitioners' arguments are preserved and were passed upon.

The government mistakenly suggests Petitioners are advancing a "new" argument about Rule 12(b)(2). Opp. 9-10. As the Petition freely acknowledged, Petitioners used the phrase "subject-matter jurisdiction" at times in their briefing below—unsurprising, given "the widespread semantic confusion" about the term "jurisdiction." Pet. 25 n.7. But the *substance* of the argument has been the same all along: The district court cannot enter a judgment of conviction in this case, not because 18 U.S.C. § 3231 doesn't authorize the district court to adjudicate the prosecution, but because the Commerce Clause does not permit "jurisdiction over the underlying acts." Pet. 25 n.7 (quoting CA10 Reply at 39). The Tenth Circuit understood Petitioners' argument and identified the split implicated here. Pet. 12-20. In sum, the question was both pressed and passed upon.

The government is also incorrect in urging that Petitioners' "alternative" argument regarding Rule 12(b)(3) is undeveloped and unpreserved. Opp. 12 n.2. That the Petition analyzes the plain text of the Rule, citing dictionaries rather than cases, Pet. 31-32, hardly amounts to a "fail[ure] to develop the argument." Opp. 12 n.2. As for preservation, Petitioners advance, at most, "a new argument to support … [their] consistent claim: that" they did not waive their facial constitutional challenge by not raising it in a pretrial motion. *Lebron v. Nat'l R.R. Passenger Corp.*,

513 U.S. 374, 379 (1995). Even if Petitioners' 12(b)(3) argument were new, this Court "permits review of an issue not pressed so long as it has been passed upon." *Id.* (alterations omitted). The government argued below that Petitioners' facial constitutional challenge "alleg[ed] a defect in [the] indictment" under Rule 12(b)(3). CA10 Response Br. at 170. The Tenth Circuit agreed. Pet. App. 119a. This Court may review that conclusion. And it makes sense to consider Rule 12(b)(2) and Rule 12(b)(3) together, as the Tenth Circuit did, because Petitioners' argument implicates the structure and interpretation of Rule 12 as a whole.

B. The Tenth Circuit's recent decision does not preclude this court's review.

The government suggests that Petitioners' constitutional claim is "insubstantial." Opp. 17. But the underlying merits are not before the Court, and Petitioners' prospects of success on remand should not alter the grant calculus. The Court's review is warranted whenever a case would "provide a vehicle for the Court to consider important questions," irrespective of "the ultimate outcome of the litigation." Gov't Cert. Reply at 10, *Match-E-Be-Nash-She-Wish Band v. Patchak*, 2011 WL 5856209 (U.S. Nov. 22, 2011). That criterion is met here. As Petitioners explained, this case presents a uniquely strong vehicle to address a compelling criminal-procedure issue dividing the lower courts. Pet. 33.

Petitioners' claim may ultimately succeed or fail on the merits. *See United States v. Garcia*, 65 F.4th 1158, 1174-75 (10th Cir. 2023). But it is not Petitioners' burden here to prove that it will persuade the

Tenth Circuit to "reverse course" on remand. *Contra* Opp. 18. Regardless, a win for Petitioners will have enormous practical effect: ensuring that Petitioners and other criminal defendants are not subjected to an overly restrictive reading of Rule 12(b)(2).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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