No. 23-1022

IN THE

Supreme Court of the United States

NANCY MARTIN,

Petitioner,

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 TO BRIEF IN OPPOSITION

Matthew J. Rubenstein
Abby G. Oakland
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

Amanda K. Rice
Counsel of Record
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226
(313) 733-3939
arice@jonesday.com

Branden A. Bell
MORGAN PILATE LLC
926 Cherry Street
Kansas City, MO 64106

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

The Government admits that the decision below rejected the Fourth Circuit's holding in *United States v. McCoy*, 895 F.3d 358 (4th Cir. 2018), as "not the law in this circuit with regard to a scope-of-the-waiver argument." BIO 11 (emphasis and internal quotation marks omitted). In other words, Ms. Martin's scope-of-waiver argument lost below, even though it would have prevailed in the Fourth Circuit—for reasons that court accurately described as "reflected in the decisions" of several other courts of appeals. *McCoy*, 895 F.3d at 364. The Government's claim that "it is far from clear that the decision below stakes out a position on any meaningful disagreement in the courts of appeals," *see* BIO 11, is thus difficult to fathom.

The Government also never even attempts to dispute the importance of the Question Presented. Nor could it. As Ms. Martin explained, appeal waivers are a common feature of guilty pleas, which resolve the overwhelming majority of federal criminal cases. The issue thus recurs frequently, and can mark the difference between justice being done and a defendant serving prison time for a crime she did not commit.

The Government's remaining objections are make-weight. It disagrees with Ms. Martin on the correct answer to the Question Presented. But its arguments rest on the general principle that rights can be waived, without meaningfully grappling with whether this *specific right* (to appeal) can be waived in this *specific circumstance* (where the conduct to which the defendant admitted does not satisfy the elements of the offense). In any event, that is the very question that has divided the circuits and that this Court's

review is needed to resolve. And the Government's objection that Ms. Martin will not ultimately be able to "demonstrate Rule 11 error in this case," BIO 12—despite its concession below that her claim is "substantial," Pet.App.24a-27a—is nothing more than a question for the Tenth Circuit on remand.

In short: The split is all but conceded, the importance of the issue is undisputed, and the Government's remaining objections are no obstacle to review. This Court should grant certiorari.

ARGUMENT

I. THE CIRCUITS ARE SPLIT ON WHETHER AN APPEAL WAIVER CAN EVER BAR A FACTUAL-BASIS CLAIM.

As Ms. Martin explained in her petition, the courts of appeals are intractably split on the Question Presented. The First, Second, Fourth, Fifth, and Eleventh Circuits hold that an appeal waiver *cannot* bar a claim that a plea lacked an adequate factual basis, while the Ninth, Tenth, and D.C. Circuits hold that it *can*. Pet. 7-14. The Government attempts to wave away that split, claiming that "it is far from clear that the decision below stakes out a position on any meaningful disagreement in the courts of appeals." BIO 11. In so doing, the Government doubles down on the Tenth Circuit's attempt to cleave apart scope and voluntariness arguments, characterizing the *McCoy* side of the split as holding only "that an appeal waiver can be overcome in circumstances where the lack of a factual basis rendered the plea not knowing and voluntary." BIO 10. That argument misreads *McCoy* and misunderstands the relationship between scope and voluntariness.

1. As to *McCoy*, the Government suggests that the Tenth Circuit's decision below actually "mirrored the Fourth Circuit's" ruling. *See* BIO 11. To be sure, both courts rejected standalone voluntariness arguments on the ground that the respective defendants had not shown plain error as to voluntariness. Pet.App.7a-8a; *McCoy*, 495 F.3d at 362-63. But the similarities between the two rulings end there. As the Government ultimately acknowledges, the Tenth Circuit "stated that the *McCoy* holding 'is not the law in this circuit *with regard to a scope-of-the-waiver argument*.'" BIO 11 (quoting Pet.App.7a). And indeed, the two courts handled the scope arguments very differently.

In *McCoy*, the Fourth Circuit "agree[d]" that "a challenge to the factual basis of a plea falls outside the scope of a valid waiver." 895 F.3d at 360. It reached that conclusion even though the broad text of the waiver before it—encompassing "all such rights to contest the conviction" except for "claims of ineffective assistance of counsel" or "prosecutorial misconduct"—would otherwise plainly cover a factual-basis challenge. *Id.* The court then "turn[ed] to McCoy's contention that his plea lacks a factual basis." *Id.* at 364. To be sure, it analyzed that factual-basis claim under a plain-error standard, because McCoy had not raised that claim in the district court. *Id.* But that plain-error analysis went to the merits—*i.e.*, to whether McCoy's admissions supported the conviction—not to voluntariness or any other preliminary matter. *Id.* at 364-65.

Here, by contrast, the Tenth Circuit refused even to consider Ms. Martin's factual-basis claim—on plain-error review or otherwise—because it held that that

claim fell within the scope of her appeal waiver. *See* Pet.App.7a. The Government suggests that "the court went on to review petitioner's factual basis claim." BIO 11. But the portions of the Tenth Circuit decision it cites involve the application of plain-error review to what it saw as the threshold question of voluntariness, Pet.App.7a-8a, not the merits question of whether her admissions supported her conviction. The Fourth Circuit would have considered that claim, just as it did in *McCoy*.

2. The division of authority, moreover, extends beyond just the Fourth and Tenth Circuits. The Government "assum[es]"—and never contests—"that the Ninth and D.C. Circuits consider factual-basis challenges 'sometimes' rather than always." BIO 11. That squarely aligns those courts with the Tenth Circuit and against the Fourth, which *always* considers such challenges even in the face of an appeal waiver.

The Fourth Circuit's side of the split is broader, too. Recall that *McCoy* rejected the defendant's *standalone voluntariness claim* on plain-error grounds, just as the Tenth Circuit did here. 895 F.3d at 362-63. Nonetheless, *McCoy* held that *factual-basis claims* fall outside the scope of an appeal waiver for reasons related to voluntariness considerations. *Id.* at 363-64. As the Fourth Circuit explained, "a challenge to the factual basis of a plea falls outside the scope of a valid waiver" because such a challenge "present[s] claims that if true, would render the plea itself unknowing or involuntar[y]." *Id.* at 360, 363. As the court recognized, this "logic is reflected in the decisions of the Second, Fifth, and Eleventh Circuits, which have all held that a challenge to a plea's factual

basis survives an appellate waiver." *Id.* at 364 (citing *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1285 (11th Cir. 2015), *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008), and *United States v. Adams*, 448 F.3d 492, 502 (2d Cir. 2006)); *see also United States v. Torres-Vázquez*, 731 F.3d 41, 44 (1st Cir. 2013); Pet. 9-11. Although these decisions involved standalone voluntariness claims, the Fourth Circuit correctly understood that the same voluntariness concerns animate the scope-of-waiver inquiry.

II. THE GOVERNMENT CANNOT DISPUTE THAT THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The Government offers no response to Ms. Martin's argument that the Question Presented is both recurring and important. *See* Pet. 14-16. Indeed, the Government acknowledges that appeal waivers are important for the Government and defendants alike. BIO 7-8. It also admits that appeal waivers require defendants to relinquish core constitutional protections. *Id.*; *see McCarthy v. United States*, 394 U.S. 459, 465-66 (1969) (describing the importance of ensuring the integrity of the Rule 11 process to guarantee that constitutional rights are not involuntarily forgone).

As this case illustrates, the wrong answer to the Question Presented carries potentially devastating ramifications. The Tenth Circuit's rule permits an innocent person's conviction to remain in force, even when the absence of a factual basis is so egregious as to amount to plain error. There is no reason for defendants in the Ninth, Tenth, and D.C. Circuits to

run that risk, while those in the First, Second, Fourth, Fifth, and Eleventh Circuits do not.

III. THE TENTH CIRCUIT'S RULE IS WRONG.

As the Fourth Circuit correctly understood, a factual-basis challenge necessarily survives even an otherwise valid appeal waiver. *See* Pet. 16-20. The Government defends the Tenth Circuit's contrary, minority approach by invoking the general proposition that a defendant may waive constitutional and statutory protections if the decision to do so is knowing and voluntary. BIO 7-8. It also cites decisions upholding appeal waivers as a general matter. BIO 8. But none of that authority addresses—much less decides—the issue Ms. Martin's case presents.

Far from drawing support from these inapposite cases, the Tenth Circuit's rule contravenes this Court's prior holdings and undermines basic constitutional principles. As this Court has recognized, appellate challenges survive even a "valid and enforceable appeal waiver" if they are "outside [the waiver's] scope" or "unwaiveable." *Garza v. Idaho*, 139 S. Ct. 738, 744-45 (2019). And "because a guilty plea is an admission of all the elements of a formal criminal charge" it must be "knowing" and "voluntary." *McCarthy*, 394 U.S. at 466. Moreover, a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* These guardrails reflect the reality that plea agreements "affect core public interests" and thus require careful scrutiny. Cato Amicus Br. 12-13. And they help mitigate the immense leverage prosecutors wield in the plea bargaining process through their

control over charging decisions and the terms of any ensuing plea offer. *Id.* at 13-14.

Federal Rule of Criminal Procedure 11(b)(3) implements these principles by requiring a district court to "determine 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information … to which the defendant has pleaded guilty.'" *McCarthy*, 394 U.S. at 467 (quoting Fed. R. Crim. P. 11, Advisory Comm. Notes (1966)). This mandate "'protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *Id.* (quoting Fed. R. Crim. P. 11, Advisory Comm. Notes (1966)).

Only the majority approach to appeal waivers protects these bedrock constitutional principles and Rule 11's role in ensuring that core constitutional rights are not involuntarily forgone. As the Fourth Circuit explained in *McCoy*, following the "logic" of opinions addressing voluntariness claims, factual-basis challenges necessarily survive an appeal waiver, because "the very purpose of requiring a district court to 'satisfy itself that there is a factual basis for the plea before entering judgment' is to ensure 'the plea is made voluntarily with understanding of the nature of the charge.'" *McCoy*, 895 F.3d at 364 (quoting Fed. R. Crim. P. 11, Advisory Comm. Notes (1966)); *see also McCarthy*, 394 U.S. at 465-66. Whether couched purely in terms of voluntariness, or as a scope holding informed by voluntariness considerations, the bottom line is the same: Factual-basis claims are not subject to appeal waivers.

After all, a plea that lacks an adequate factual basis can never be "the result of a knowing and voluntary decision," *McCoy*, 895 F.3d at 364, because no defendant would willingly plead guilty, and subject themselves to a criminal penalties, if he or she truly understood that the conduct that the prosecution charges does not actually amount to a crime, Cato Am. Br. 10-11 (citing *Hume v. United States*, 132 U.S. 406, 411 (1889)). Only the majority approach honors that insight; the minority approach forsakes it.

Even more troubling, a footnote in the Government's brief suggests an even more misguided approach than any court of appeals has endorsed. According to the Government, factual-basis challenges are inherently inconsistent with guilty pleas, such that a defendant who has pleaded guilty may *never* raise such a challenge—regardless of whether their plea agreement contains an appeal waiver. *See* BIO 10 n.2. That radical position cannot be squared with the cases on either side of the split over whether defendants may *always* or just *sometimes* bring such claims. To the extent that footnote reflects the Government's view, this Court's intervention is all the more warranted.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE.

Finally, Ms. Martin's factual-basis claim presents an unusually good opportunity for this Court to resolve the Question Presented because her underlying claim is unusually strong. *See* Pet. 20-21. Neither of the two purported vehicle problems the Government raises is any reason to deny review.

First, the Government claims that Ms. Martin has "offer[ed] no meaningful response to the court of

appeals' determination that her factual-basis claim is subject to plain-error review" or to its "procedural ruling that she forfeited any entitlement to relief under that standard by failing to argue plain error on appeal." BIO 11-12. But as explained above, the Tenth Circuit applied plain-error review to the voluntariness argument—not to Ms. Martin's underlying factual-basis challenge, as it would have had it followed *McCoy*'s lead. *See supra* at 2-4. And because Ms. Martin's appeal was resolved on the Government's threshold motion to dismiss her appeal, she never had the chance to brief the case on the merits and argue that her underlying factual-basis claim clears the plain-error bar. Whether or not she will ultimately be able to establish plain error is a question for remand. *See, e.g.*, *Tapia v. United States*, 564 U.S. 319, 335 (2011) (holding that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation" and "leav[ing] to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed" on remand); *United States v. Marcus*, 560 U.S. 258, 266-67 (2010) ("As the Court of Appeals has not yet considered whether the error at issue in this case satisfies this Court's 'plain error' standard … we remand the case to that court so that it may do so.").

Second and relatedly, the Government claims there was no Rule 11 error in this case because the conduct Ms. Martin admitted establishes the elements of her crimes of conviction. BIO 12-14. That, too, is an issue for remand. Below, the Government and District Court both agreed that Ms. Martin's factual-basis challenge is "substantial." Pet.App.24a-27a.

And the Tenth Circuit never reached the merits of that claim because of its view on the Question Presented. The fact that the merits have not yet been litigated—which will be true of any petition presenting this threshold question—is no reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be granted.

June 4, 2024

Respectfully submitted,

Matthew J. Rubenstein
Abby G. Oakland
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

Amanda K. Rice
Counsel of Record
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226
(313) 733-3939
arice@jonesday.com

Branden A. Bell
MORGAN PILATE LLC
926 Cherry Street
Kansas City, MO 64106

Counsel for Petitioner