No. 23-_____

In The
Supreme Court of the United States

FAISAL ASHRAF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK G. PARENTI
PARENTI LAW PLLC
800 Town & Country Blvd.
Suite 500
Houston, TX 77024

November 16, 2023

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton St.
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner pleaded guilty to three counts under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, pursuant to a plea agreement that included an appeal waiver. After petitioner's plea, this Court decided *Van Buren v. United States*, 141 S. Ct. 1648 (2021), which petitioner believed rendered the factual basis for his plea insufficient as a matter of law. He timely appealed, but the Ninth Circuit held that the plea agreement's appeal waiver precluded his factual-basis challenge.

Rule 11(b)(3) of the Federal Rules of Criminal Procedure requires a district court to confirm the sufficiency of the factual basis for a plea agreement before accepting a guilty plea—furthering the due process requirement that a plea be truly voluntary. *McCarthy v. United States*, 394 U.S. 459, 466-67 (1969).

The federal courts of appeals conflict over their obligation to confirm the sufficiency of a guilty plea's factual basis when a plea agreement includes an appeal waiver. The First, Second, Fourth, Fifth, and Eleventh Circuits hold that they cannot refuse to consider factual-basis challenges even when the agreement includes an appeal waiver, whereas the Ninth Circuit below, as well as the Tenth and D.C. Circuits, hold that an appeal waiver allows them to refuse to consider such arguments.

The Question Presented is:

Whether the federal courts of appeals can refuse to consider a challenge to the sufficiency of the factual basis for a guilty plea when the plea agreement includes an appeal waiver.

PARTIES TO THE PROCEEDINGS

Petitioner Faisal Ashraf, pursuant to a plea agreement with the United States that included an appeal waiver, was convicted under the Computer Fraud and Abuse Act of three misdemeanor counts of intentionally accessing a computer without or in excess of authorization with the intent to obtain information. *See* 18 U.S.C. § 1030(a)(2). Petitioner was the defendant in the district court and the appellant in the Ninth Circuit. The United States was the plaintiff in the district court and the appellee in the Ninth Circuit.

RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

- *United States v. Ashraf*, No. 18-50071

United States District Court for the Central District of California:

- *United States v. Ashraf,* No. 8:13-CR-0088-DOC

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION, STATUTES, AND RULES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

This case presents an important question that divides the federal courts of appeals and creates disparate due process rights for tens of thousands of criminal defendants each year: whether courts of appeals can refuse to consider a challenge to the sufficiency of the factual basis for a guilty plea when the plea agreement includes an appeal waiver. Uniformity on this issue is vital to protect all defendants' core constitutional rights, given the ubiquity of plea agreements, which "are central to the administration of the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

Federal Rule of Criminal Procedure 11(b)(3)'s requirement that a district court find a sufficient factual basis before accepting a guilty plea helps ensure the voluntariness of an individual's relinquishment of important constitutional protections, including "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." *McCarthy v. United States*, 394 U.S. 459, 466 (1969); FED. R. CRIM. P. 11(b)(3). It impacts an individual's fair notice of "the true nature of the charge" and potential for criminal punishment by the government—"the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618 (1988) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

Moreover, demanding courts' rigorous and consistent enforcement of Rule 11(b)(3)'s factual-basis

prerequisite serves an important separation-of-powers function. It helps ensure that individuals who plead guilty do so in connection with a crime created by Congress, not one improvised by the government—even if with a court's and defendant's agreement. *See id.* at 620-21. "For under our federal system, it is only Congress, and not the courts, which can make conduct criminal." *Id.* (first citing *United States v. Lanier*, 520 U.S. 259, 267-68 n.6 (1997); and then citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812)).

Although the Ninth Circuit below recognized that Rule 11(b)(3) was created to protect defendants from unknowingly entering into a plea, Pet. App. 2a, it refused to review petitioner's factual-basis challenge to his conviction—even though this Court had issued controlling authority concerning petitioner's crime of conviction after petitioner entered into his plea and while his direct appeal was pending. Specifically, the Ninth Circuit held that an appeal waiver in petitioner's plea agreement precluded him from arguing that, in light of this Court's intervening decision in *Van Buren v. United States*, 141 S. Ct. 1648 (2021), the facts he admitted in the plea agreement did not constitute a crime under the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030(a)(2). Like the Tenth and D.C. Circuits, the Ninth Circuit has determined that it has no obligation to confirm the sufficiency of a plea agreement's factual basis when challenged by a defendant like petitioner whose agreement includes an appeal waiver. *See infra* Part I.A.

In contrast, the First, Second, Fourth, Fifth, and Eleventh Circuits require consideration of a defendant's factual-basis challenge—even when there was an appeal waiver in the plea agreement. *See infra* Part I.B. Although these circuits vary slightly in their articulated rationales for confirming the sufficiency of admitted facts in a plea agreement when challenged on appeal, their overriding concern is one of voluntariness—the constitutional requirement this Court highlighted in *McCarthy* as support for enforcing courts' Rule 11 obligations. *See* 394 U.S. at 466.

The circuit split on the question presented means that the enforceability of constitutionally invalid plea agreements will vary depending on where the prosecution arises: A defendant who can establish the absence of a factual basis for a guilty plea will always be given an opportunity to make that showing on appeal in some circuits but not in others. *Compare infra* Part I.A *with infra* Part I.B. Given that 90% of federal criminal cases are resolved through guilty pleas—nearly all of which include appeal waivers, *see infra* pp. 24-25—this Court should grant the petition to ensure uniformity in the plea-bargaining process, which "*is* the criminal justice system." *Frye*, 566 U.S. at 144 (emphasis in original) (internal quotation marks omitted).

OPINIONS BELOW

The Ninth Circuit's unreported opinion is available at No. 18-50071, 2023 WL 2570401, at *1 (9th Cir. Mar. 20, 2023). Pet. App. 1a. The district court did not issue an opinion on petitioner's plea agreement but made findings that are included at Pet. App. 9a-13a.

JURISDICTION

The court of appeals entered its opinion and judgment on March 20, 2023, Pet. App. 1a, and denied petitioner's timely filed petition for rehearing and suggestion of rehearing en banc on July 6, 2023, Pet. App. 7a. On September 21, 2023, Justice Kagan granted petitioner's application to extend the time to file his petition until December 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V.

Federal Rule of Criminal Procedure 11 provides in relevant part:

> (b) Considering and Accepting a Guilty or Nolo Contendere Plea.
>
> . . . .
>
> (3) *Determining the Factual Basis for a Plea*. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

FED. R. CRIM. P. 11(b)(3).

The Computer Fraud and Abuse Act provides in relevant part:

> (a) Whoever—
>
> . . . .
>
> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—
>
> . . . .
>
> (C) information from any protected computer;
>
> . . . .
>
> shall be punished as provided in subsection (c) of this section.
>
> . . . .
>
> (c) The punishment for an offense under subsection (a) or (b) of this section is—
>
> . . . .

> (2)
>
> (A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph[.]

18 U.S.C. § 1030(a)(2)(C), (c)(2).

STATEMENT

I. FACTUAL BACKGROUND

Hewlett Packard offered an "HP Volume Big Deal Rebate Program" that gave discounts to certain high-volume purchasers who were obtaining HP products for internal use by specified end-users. Pet. App. 21a-22a. These customers received login credentials to access an online portal through which they could make the purchases. Pet. App. 21a-22a. It was a condition of the Big Deal program that the purchases not be for resale. Pet. App. 21a-22a.

Petitioner's brother, who was his business partner, obtained login credentials from HP. *See* Pet. App. 22a. At his brother's request, petitioner used the login credentials to access the portal and purchase HP products. Pet. App. 22a-23a. These purchases were ultimately for resale, not internal use. Pet. App. 22a-23a.

II. PROCEDURAL BACKGROUND

After the U.S. Attorney filed criminal charges in connection with petitioner's purchases through the HP portal, petitioner eventually entered into a plea agreement in connection with the government's Third Superseding Information. Pet. App. 10a, 15a. He pleaded guilty to three misdemeanor counts of "intentionally accessing a computer, without authorization and in excess of authorization, with intent to obtain information," in violation of 18 U.S.C. § 1030(a)(2)(C) and § 1030(c)(2)(A) of the CFAA. Pet. App. 15a. The plea agreement contained a "Waiver of Appeal of Conviction" provision, which stated: "[W]ith the exception of an appeal based on a claim that defendant's guilty pleas were involuntary, by pleading guilty defendant is waiving and giving up any right to appeal defendant's convictions on the offenses to which defendant is pleading guilty." Pet. App. 28a.[1]

A separate provision of the agreement called "Defendant's Obligations" included language about a Ninth Circuit case involving a different provision of the CFAA (§ 1030(a)(4)) than the provision under which petitioner entered guilty pleas (§ 1030(a)(2)): "Defendant understands potential arguments that

[1] Another provision provided for a "Limited Mutual Waiver of Appeal of Sentence," Pet. App. 28a, and petitioner raised arguments in the Ninth Circuit regarding the restitution order imposed in connection with his sentence, Pet. App. 4a. The government agreed that this waiver did not preclude petitioner's restitution arguments, *see id.*, but the court below affirmed on the merits, Pet. App. 6a, and petitioner does not reassert restitution arguments in this Court.

might be raised pursuant to *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc) and waives those arguments." Pet. App. 15a; *see also Nosal*, 676 F.3d at 856 (describing charges under § 1030(a)(4)).

At the plea hearing, the district judge called attention to the *Nosal* provision and asked the Assistant U.S. Attorney assigned to petitioner's case to "explain it" because "I haven't paid too much attention to that case." Pet. App. 10a-11a. The Assistant U.S. Attorney said, "We believe that this case is distinguishable from [*Nosal*] under the facts of the case." Pet. App. 12a. As described by her, *Nosal* "involved an employee of a company who then left the company and asked people who were still working there, his friends who had access to that information that they were properly granted by that company, to send him information to use for a competing company." Pet. App. 11a. She mistakenly said the Ninth Circuit concluded those actions were "not a violation of 1030(a)(2)," Pet. App. 12a, when *Nosal* actually involved § 1030(a)(4), *see* 676 F.3d at 856. The judge pronounced that the government attorney had explained *Nosal* "[b]etter than I can," and petitioner's counsel agreed: "Better than I could as well." Pet. App. 12a.

In accepting petitioner's guilty plea, the district judge found "that there's a knowing and intelligent waiver of your rights, that you understand the nature and consequences of your plea, that your plea is freely and voluntarily entered into, that there's a sufficient factual basis for this plea." Pet. App. 13a.

After petitioner's sentencing, the district court's final judgment, and petitioner's timely filed notice of appeal—but before petitioner filed his opening brief in the Ninth Circuit—this Court decided *Van Buren*,[2] which made clear that the CFAA "does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them." 141 S. Ct. at 1652. Pointing to *Van Buren*—which involved 18 U.S.C. § 1030(a)(2), the same section to which petitioner pleaded guilty—petitioner argued that his plea agreement lacked the sufficient factual basis required by Rule 11(b)(3) because, at most, it established what fell short of a § 1030(a)(2) violation in *Van Buren*: valid access with an improper motive. *See* Appellant's Opening Brief at 19-21, *United States v. Ashraf*, No. 18-50071 (9th Cir. Mar. 20, 2023), ECF No. 61. Specifically, he contended that the facts admitted in his plea agreement showed only that he purchased computers through the Big Deal program that were designated for a specific end-user's internal use but then resold them. *See id.* at 20. The plea did not contain facts showing that he accessed the portal without credentials or that he used the credentials provided by HP for anything other than purchasing computers. *See* Pet. App. 14a-35a.

---

[2] Petitioner's timely notice of appeal was filed on February 27, 2018, *see* Notice of Appeal at 1, *United States v. Ashraf*, 8:13-cr-00088 (C.D. Cal. Feb. 27, 2018), ECF No. 454; this Court decided *Van Buren* on June 3, 2021, 141 S. Ct. at 1648; and petitioner filed his opening brief in the Ninth Circuit on March 28, 2022, *see* Appellant's Opening Brief at 43, *United States v. Ashraf*, No. 18-50071 (9th Cir. Mar. 20, 2023), ECF No. 61.

The Ninth Circuit acknowledged petitioner's "argu[ment] that his factual-basis claim goes to knowledge and voluntariness because the factual-basis requirement is 'designed to protect a defendant who is in the position of pleading [guilty] . . . without realizing that his conduct does not actually fall within the charge.' *McCarthy v. United States*, 394 U.S. 459, 467 (1969)." Pet. App. 2a (alteration in original). But it disagreed that *Van Buren* informed whether the plea was knowing and voluntary or required the Ninth Circuit to reconfirm the sufficiency of the factual basis for petitioner's plea. Pet. App. 2a-3a.

Although the Ninth Circuit agreed that "Rule 11(b)(3) may have the purpose of protecting uninformed defendants," in its view "it does not follow that every Rule 11(b)(3) violation renders the plea unknowing or involuntary." Pet. App. 2a. Rather than considering the impact of *Van Buren*, the court pointed to the language in the plea agreement that "Ashraf waived any argument 'pursuant to *United States v. Nosal*,'" Pet. App. 3a—even though the government had affirmatively represented at the plea hearing that *Nosal* was "distinguishable," and the district judge and petitioner's trial counsel had all agreed with the government's employment-focused explanation of that case. *See* Pet. App. 11a-12a. The Ninth Circuit did not acknowledge that *Nosal* arose under a different section of the CFAA, whereas *Van Buren* interpreted the same section under which petitioner pleaded guilty. *See* Pet. App. 1a-6a. It did note that petitioner's appellate brief made no mention

of *Nosal*, relying instead solely on *Van Buren*. Pet. App. 3a. But the court below pointed to *Van Buren*'s reference to *Nosal* in a footnote, said *Van Buren* had "endorsed *Nosal*'s holding," and rejected petitioner's factual-basis-rooted voluntariness challenge, concluding that "Ashraf knew his admitted conduct was arguably noncriminal, and chose to waive the argument and to plead guilty." Pet. App. 3a.

REASONS TO GRANT THE PETITION

I. THE COURTS OF APPEALS CONFLICT AS TO WHETHER THEY CAN REFUSE TO REVIEW A CHALLENGE TO THE FACTUAL BASIS UNDERLYING A PLEA AGREEMENT THAT INCLUDES AN APPEAL WAIVER.

The decision below exacerbates a circuit split over the courts of appeals' obligation to confirm the factual basis of a plea agreement when challenged by a defendant whose agreement contains an appeal waiver. The Ninth, Tenth, and D.C. Circuits hold that they have no obligation to consider factual-basis challenges in these circumstances. By contrast, the First, Second, Fourth, Fifth, and Eleventh Circuits require consideration of factual-basis challenges even when a plea agreement includes an appeal waiver. Had petitioner's appeal arisen in one of those circuits instead of in the Ninth Circuit, the court of appeals would have had to entertain his argument that his plea agreement lacked a factual basis in light of *Van Buren*.

A. The Ninth, Tenth, And D.C. Circuits Hold That They Can Refuse To Review A Factual-Basis Challenge To A Plea Agreement That Includes An Appeal Waiver.

The Ninth, Tenth, and D.C. Circuits have determined that they have no obligation to confirm the sufficiency of a plea agreement's factual basis when challenged on appeal by a defendant whose agreement includes an appeal waiver. Even when the facts admitted in a plea agreement do not constitute a crime—contravening the factual-basis requirement for entering judgment on a plea agreement, FED. R. CRIM. P. 11(b)(3)—an appeal waiver in these circuits insulates that type of unlawful plea from mandatory appellate review.

Petitioner's case illustrates the Ninth Circuit's position and the preclusive effect of appeal waivers on even legal-sufficiency challenges to a plea's factual basis. *See* Pet. App. 2a-3a. The court below refused to review petitioner's factual-basis challenge despite this Court's intervening decision in *Van Buren*, 141 S. Ct. 1648, which issued after petitioner entered into his plea agreement and which, petitioner argued on appeal, established that the facts he admitted do not constitute a crime under the CFAA. Pet. App. 3a (dismissing petitioner's reliance on this Court's post-plea *Van Buren* decision due to the agreement's appeal waiver, stating that petitioner knew before *Van Buren* that "his admitted conduct was arguably noncriminal"); *Van Buren*, 141 S. Ct. at 1652 (holding that the CFAA

"does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them").

The court's refusal to confirm whether there was a sufficient factual basis for petitioner's plea illustrates the consequences of the Ninth Circuit's rule that factual-basis challenges are not the type of Rule 11 error that requires appellate review when a plea agreement includes an appeal waiver. *See United States v. Brizan*, 709 F.3d 864, 866 (9th Cir. 2013) (confirming, while noting limited Rule 11 error exceptions to appeal waivers, that "[n]one of these exceptions applies here" and defendant's challenge to her plea's factual basis "cannot overcome the appeal waiver contained in her plea agreement"); *see also United States v. Gillespie-Shelton*, No. 20-50321, 2022 WL 822199, at *1 (9th Cir. Mar. 18, 2022) (refusing to consider defendant's challenge because her "plea agreement plainly waives the right to appeal her conviction based on an allegedly insufficient factual basis for her guilty plea"). Indeed, as petitioner's case further illustrates, the Ninth Circuit may refuse to confirm the sufficiency of the factual basis for a plea even when a post-plea decision from this Court intervenes while a timely appeal is pending. *See* Pet. App. 3a.[3]

---

[3] Of course, a court can always elect to review a plea's factual basis for a variety of reasons, such as when the government agrees to have the court rule on the merits of the factual-basis challenge before addressing the validity of the waiver—*see, e.g.*, *United States v. Montano*, No. 19-10220, 2022 WL 72353, at *2

Like the Ninth Circuit, the D.C. Circuit has determined that it is not required to review the factual basis for a guilty plea when challenged on appeal by a defendant whose plea agreement contains an appeal waiver. *See In re Sealed Case*, 40 F.4th 605, 608 (D.C. Cir. 2022). As Chief Judge Srinivasan's opinion in *In re Sealed Case* demonstrates, that court can decline to entertain such arguments even when a defendant argues that the facts admitted in the plea agreement fail to establish an element of the crime of conviction. *Id.* at 607-08 (refusing to consider defendant's argument that his admitted conduct fell outside the statute of conviction because his appeal waiver referenced that potential argument—a question of first impression in the D.C. Circuit). For

---

n.2 (9th Cir. Jan. 7, 2022), *cert. denied*, 143 S. Ct. 172 (2022)—or when the court opts to rule on the factual-basis challenge without deciding whether such an argument is even properly available on appeal. *See, e.g.*, *United States v. Kazzaz*, 592 F. App'x 553, 555 (9th Cir. 2014) ("assuming without deciding" that appellant's factual-basis argument was properly before the court); *United States v. Rodriguez-Cruz*, 44 F. App'x 814, 815 (9th Cir. 2002) (same approach). In a 2019 trio of unpublished decisions, Ninth Circuit panels elected to consider arguments by appellants who claimed that an insufficient factual basis is the type of Rule 11 error that creates an exception to appeal waivers' enforceability. *See United States v. Peeters*, 776 F. App'x 948, 949 (9th Cir. 2019); *United States v. Rupak*, 772 F. App'x 591, 592-93 (9th Cir. 2019); *United States v. Remoket*, 753 F. App'x 457, 458-59 (9th Cir. 2019). But the Ninth Circuit's earlier published precedent squarely rejects that position. *See Brizan*, 709 F.3d at 866. And subsequent opinions, including the opinion in petitioner's case, make clear that the Ninth Circuit can and does refuse to review factual-basis challenges to plea agreements containing appeal waivers. *See* Pet. App. 1a-3a; *Gillespie-Shelton*, 2022 WL 822199, at *1.

the D.C. Circuit, ensuring the existence of a legally sufficient factual basis for the plea, as required by Rule 11(b)(3), does not drive the outcome; instead, the question is whether "the defendant is aware of and understands the risks involved," *id.* at 608 (quoting *United States v. Guillen*, 561 F.3d 527, 529-30 (D.C. Cir. 2009))—even when the risk is a conviction for conduct that is not a crime, *see id.* at 608-09.

The Tenth Circuit aligns with the Ninth and D.C. Circuits on the question presented. This past summer, the Tenth Circuit acknowledged the circuit split on this issue and expressly rejected other circuits' requirement that they consider factual-basis challenges to a plea notwithstanding an appeal waiver. *United States v. Martin*, No. 23-3045, 2023 WL 4858015, at *3 (10th Cir. July 31, 2023) (per curiam) (citing *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018) (collecting circuits' rules)); *see also infra* Part I.B (detailing the positions of the First, Second, Fourth, Fifth, and Eleventh Circuits on the contrary side of the split). The court dismissed those other approaches as "not the law" in the Tenth Circuit. *Martin*, 2023 WL 4858015, at *3; *see also United States v. Novosel*, 481 F.3d 1288, 1289, 1295 (10th Cir. 2007) (per curiam) (reaffirming that limited exceptions to appeal waivers do not include challenges to the factual basis of a plea (citing *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per

curiam)[4])). Instead, as the Tenth Circuit has explained, the inclusion of an appeal waiver in a plea agreement means a defendant can challenge the factual basis only in the district court, not on appeal. *United States v. Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001).

B. The First, Second, Fourth, Fifth, And Eleventh Circuits Hold That They Cannot Refuse To Review A Factual-Basis Challenge To A Plea Agreement That Includes An Appeal Waiver.

Whereas the Ninth, Tenth, and D.C. Circuits may refuse to entertain a factual-basis challenge by a defendant like petitioner whose plea agreement contains an appeal waiver, the First, Second, Fourth, Fifth, and Eleventh Circuits require consideration of such challenges. Had petitioner's case arisen in one of these circuits, his appeal waiver would not have prevented him from arguing that, in light of this Court's post-plea decision in *Van Buren*, the facts admitted in his agreement do not constitute a crime.

---

[4] *Hahn* held that appeal waivers "will be enforced if (1) 'the disputed appeal falls within the scope of the waiver of appellate rights;' (2) 'the defendant knowingly and voluntarily waived his appellate rights;' and (3) 'enforcing the waiver would [not] result in a miscarriage of justice.'" *Novosel*, 481 F.3d at 1289 (quoting *Hahn*, 359 F.3d at 1325 (alteration in *Novosel*)). No enforceability exception exists in the Tenth Circuit for a plea agreement's lack of sufficient factual basis. *See id.*; *see also Martin*, 2023 WL 485015, at *3.

Although the First, Second, Fourth, Fifth, and Eleventh Circuits vary slightly in their articulated rationales for reviewing the sufficiency of admitted facts in a plea agreement when challenged on appeal, their overriding concern consistently is one of voluntariness—the constitutional requirement this Court highlighted in *McCarthy* as support for enforcing courts' Rule 11 obligations. *See* 394 U.S. at 466 ("[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."). For example, in reaffirming its rule that "a valid waiver of appeal does not bar review of a claim that the factual basis for a guilty plea fails to establish the essential elements of the crime of conviction," the Fifth Circuit reasoned that allowing such an appeal despite a waiver "protect[s] a defendant who may plead guilty with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the definition of the charged crime." *United States v. Trejo*, 610 F.3d 308, 312-13 (5th Cir. 2010) (alteration in original) (quoting *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008)).

Indeed, because of such voluntariness implications, the Fifth Circuit has emphasized that its obligation to confirm a sufficient match between admitted facts and the crime of conviction is mandatory. *See Hildenbrand*, 527 F.3d at 474. And the Fifth Circuit remains unwavering in requiring consideration of factual-basis challenges notwithstanding an appeal

waiver in a plea agreement. *E.g.*, *United States v. Bates*, No. 22-40508, 2023 WL 4542313, at *1 (5th Cir. July 14, 2023) (per curiam) (reaffirming that factual-basis challenges are not precluded by appeal waivers); *id.* at *5-8 (Oldham, J., dubitante) (acknowledging, while questioning, the Fifth Circuit's longstanding practice); *United States v. Mendoza*, 842 F. App'x 903, 905 (5th Cir. 2021) (per curiam) (reviewing the factual basis of a defendant's plea even when the defendant "waived his trial and appellate rights, including the right to challenge his conviction on the ground that his conduct did not fall within the scope of the statutes under which he was convicted").

The Eleventh Circuit similarly draws on voluntariness concerns in holding that an appeal waiver in a plea agreement does not prevent a defendant from challenging the sufficiency of the plea's factual basis. *E.g.*, *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1284-85 (11th Cir. 2015); *see also, e.g.*, *United States v. Jean*, 838 F. App'x 370, 373 n.1 (11th Cir. 2020) (per curiam) (reaffirming *Puentes-Hurtado*'s rule in rejecting the government's argument that the appeal waiver in defendant's plea agreement barred an appellate challenge to the sufficiency of the plea's factual basis). As the Eleventh Circuit reasons, an appeal waiver is unenforceable if the plea agreement itself is unenforceable due to its being "involuntary or unintelligent"—a benchmark that factual-basis review informs. *Puentes-Hurtado*, 794 F.3d at 1284 (citing *Bousley*, 523 U.S. at 618).

Agreeing with the Eleventh Circuit, the Fourth Circuit requires consideration of factual-basis challenges notwithstanding an appeal waiver because such arguments "go[] to the heart of whether the guilty plea, including the waiver of appeal, is enforceable." *McCoy*, 895 F.3d at 364 (internal quotation marks omitted) (quoting *Puentes-Hurtado*, 794 F.3d at 1285). As the Fourth Circuit elaborates, "[b]y arguing that his plea lacks a factual basis, a defendant raises the possibility that his decision to plead guilty is the product of coercion or misunderstanding. In other words, that the plea is not the result of a knowing and voluntary decision." *Id.* (citation omitted) (observing that "[t]his 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" (first citing *Puentes-Hurtado*, 794 F.3d at 1285; then citing *Hildenbrand*, 527 F.3d at 474; and then citing *United States v. Adams*, 448 F.3d 492, 497, 502 (2d Cir. 2006))).

Similarly, in the First Circuit, an appeal waiver "poses no bar" to appellate courts' consideration of insufficient-factual-basis claims. *United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (citing *United States v. Torres-Vázquez*, 731 F.3d 41, 44-45 (1st Cir. 2013)). An appeal waiver "lacks force" as to an insufficient-factual-basis argument, which "challenges the validity of the plea itself." *United States v. Ramos-Mejía*, 721 F.3d 12, 14 (1st Cir. 2013) (explaining further that "if a plea is invalid, the plea agreement

(and, thus, the waiver provision contained within it) disintegrates"). Indeed, as Justice Souter, sitting by designation, reasoned, it is because challenges to factual-basis sufficiency under Rule 11(b)(3) "go to the validity of the plea [that] we do not find them barred by a waiver of appeal rights that was contained in the plea agreement." *United States v. Gonzalez-Negron*, 892 F.3d 485, 486 (1st Cir. 2018). The factual-basis "safeguard serves to ensure that the defendant's conduct actually corresponds to the charges lodged against him." *Ramos-Mejía*, 721 F.3d at 16 (internal quotation marks omitted).[5]

In addition to focusing on due process requirements that a plea be voluntary and intelligent, the Second Circuit emphasizes the importance of ensuring district courts' compliance with Rule 11's mandates in holding that an appeal waiver does not preclude a factual-basis challenge on appeal. *E.g.*, *Adams*, 448 F.3d at 497-98; *United States v. Lloyd*, 901 F.3d 111, 118 (2d Cir. 2018) ("An appeal waiver included in a plea agreement does not bar challenges to the process leading to the plea. Challenges that typically survive appeal waivers include those

[5] Because factual-basis sufficiency goes to the validity of the plea itself, such challenges bypass the circuit's otherwise applicable appeal-waiver-enforceability analysis used outside of the factual-basis context. *See, e.g.*, *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001) (stating, regarding appeal waivers, that the court "may refuse to honor [a] waiver" if "denying a right of appeal would work a miscarriage of justice," thereby requiring the court to sever the appeal waiver from the plea agreement).

asserting that the district court failed to comply with the important strictures of Rule 11, which governs entry of guilty pleas."). Despite a waiver relinquishing the right to appeal or otherwise attack a conviction or sentence, "a defendant retains the right to contend that there were errors in the proceedings that led to the acceptance of his plea of guilty," including an argument "that the district court failed to satisfy the requirement that there is a factual basis for the plea." *Adams*, 448 F.3d at 497 (internal quotation marks and citation omitted).

And the Second Circuit has reaffirmed its rule in the context of a factual-basis challenge rooted in intervening authority from this Court. *See United States v. Balde*, 943 F.3d 73, 94-95 (2d Cir. 2019) (citing, *inter alia*, *Lloyd*, 901 F.3d at 118, and *Adams*, 448 F.3d at 499). In *Balde*, the defendant pleaded guilty to possessing a firearm in violation of 18 U.S.C. § 922(g)(5)(A) but sought to vacate that plea after this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019). He argued that the factual basis in his plea agreement failed to address whether he *knew*—as required by *Rehaif*, 139 S. Ct. at 2194—that he was illegally or unlawfully present in the United States. *Balde*, 943 F.3d at 77-78, 80.

Even though the plea agreement contained an appeal waiver, the Second Circuit confirmed the defendant's ability to challenge his plea's factual basis on appeal, reached the merits of that argument, and vacated his conviction on insufficient-factual-basis grounds. *Id.* at 93-95, 98 ("[A]n appeal waiver included in a plea

agreement does not bar challenges to the process leading to the plea." (quoting *Lloyd*, 901 F.3d at 118)). The plea was now "deficient under Rule 11," even though it was "through no fault of the district court," which did not have the benefit of *Rehaif* when it accepted the plea. *Id.* at 94. As the Second Circuit further explained, "in interpreting the statute, *Rehaif* instructs us about what [the statute] has always meant," and "therefore, we must look to the law as clarified by the Supreme Court in *Rehaif*" to determine whether an insufficient-factual-basis violation of Rule 11 exists regarding the plea. *Id.* "Without being fully informed of the nature of the offense, and without an established factual basis for finding that one of its elements was satisfied, it is hard to imagine how a defendant's plea could be knowing and voluntary." *Id.* at 95 ("The interactions between the district court and the defendant that Rule 11 directs are a mandated part of the guilty plea procedure, because the drafters of Rule 11 clearly deemed that advising the defendant of the matters in the Rule was necessary for a guilty plea to be considered knowing and voluntary." (quoting *Lloyd*, 901 F.3d at 118)).

Had petitioner's appeal arisen in the Second Circuit—or in the First, Fourth, Fifth, or Eleventh Circuits that follow the same factual-basis rule—the appeal waiver in his plea agreement would not have precluded him from arguing that this Court's post-plea decision in *Van Buren* established the lack of a factual basis for his guilty plea for violating the CFAA. But in the Ninth Circuit below, as well as in the Tenth and

D.C. Circuits, an appeal waiver allows the courts of appeals to refuse to consider the sufficiency of a plea's factual basis—even when, as in petitioner's case, intervening authority from this Court that otherwise would control in a timely appeal directly impacts whether the facts admitted in the plea agreement actually support a crime. *See supra* Part I.A; *Bousley*, 523 U.S. at 619-21.

II. This Case Provides An Excellent Vehicle To Resolve An Important Question About Ubiquitous Plea-Agreement Practices That Affect Substantial Due Process Rights, Skew The Balance Of Power Between The Government And Individual Defendants, And Effectively Authorize Judicially Created Crimes.

This case presents an important question that divides the federal courts of appeals and affects the substantial rights of tens of thousands of criminal defendants each year. It impacts an individual's fair notice of "the true nature of the charge" and potential for criminal punishment by the government—"the first and most universally recognized requirement of due process." *Bousley*, 523 U.S. at 618 (quoting *Smith*, 312 U.S. at 334). It also informs the voluntariness of an individual's relinquishment of core constitutional rights, including "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." *McCarthy*, 394 U.S. at 466.

Moreover, demanding courts' rigorous and consistent enforcement of Rule 11(b)(3)'s factual-basis prerequisite for acceptance of a guilty plea—including when challenged on appeal by a defendant whose plea agreement includes an appeal waiver—serves an important separation-of-powers function. It helps ensure that individuals who plead guilty do so in connection with a crime created by Congress, not one improvised by the government—even if with a court's and defendant's agreement. *See Bousley*, 523 U.S. at 620-21. "For under our federal system, it is only Congress, and not the courts, which can make conduct criminal." *Id.* (first citing *Lanier*, 520 U.S. at 267-68 n.6; and then citing *Hudson*, 11 U.S. (7 Cranch) 32).

Plea agreements are ubiquitous in the federal criminal system. About 90% of federal criminal defendants plead guilty. *See Table D-4: U.S. District Courts: Criminal Statistical Tables for the Federal Judiciary*, U.S. COURTS (June 30, 2023), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2023/06/30 (reporting that between June 2022 and 2023, 89% of all federal criminal defendants pleaded guilty and 98% of all federal convictions rested on guilty pleas); *see also Frye*, 566 U.S. at 144 (declaring that plea bargaining "*is* the criminal justice system" (emphasis in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))). And a large majority of the plea agreements in those cases include some form of appeal waiver. Quin M. Sorenson, *Appeal Rights Waivers: A*

Constitutionally Dubious Bargain, FED. LAW., Oct./Nov. 2018, at 32, 33; *see also* U.S. Dep't of Just., Just. Manual § 9-16.330 (2020), https://www.justice.gov/jm/jm-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.330 (describing federal prosecutors' ability to "incorporate waivers of appeal rights and post-conviction rights into plea agreements" as "helpful in reducing the burden of appellate and collateral litigation").

But as described above, the effect of those appeal waivers currently varies between the circuits. *See supra* Part I. And it does so in ways that implicate core constitutional concerns for individuals, as well as for the separation of powers that preserves balance in our federal system of government. When some circuits but not others require confirmation of the sufficiency of a challenged factual basis, defendants effectively receive more constitutional protections in some circuits than in others. That disparity warrants this Court's immediate attention.

Appellate review of the possible lack of a factual basis for a guilty plea protects important constitutional rights because a guilty plea "is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" *Bousley*, 523 U.S. at 618 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). And "a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* at 618 (quoting *Smith*, 312 U.S. at 334). Indeed, "[p]erhaps the most basic of due process's customary protections is the demand of

fair notice." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). In furtherance of this constitutional concern, Rule 11(b)(3) imposes a prerequisite on a district court's acceptance of a guilty plea, requiring the court to determine that a factual basis exists for the plea. FED. R. CRIM. P. 11(b)(3). "Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect 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.'" *McCarthy*, 394 U.S. at 467 (quoting FED. R. CRIM. P. 11 advisory committee's note to 1966 amendment). Without the understanding of both, a plea cannot be truly voluntary. *See id*. And if a plea agreement is not voluntary and intelligent, it is not "constitutionally valid" and cannot be enforced. *See Bousley*, 523 U.S. at 618.

Indeed, it is precisely the link between Rule 11(b)(3)'s factual-basis requirement and the validity of the plea agreement—including any appeal waiver within it—that leads the First, Second, Fourth, Fifth, and Eleventh Circuits to require confirmation of a sufficient factual basis on appeal before allowing a waiver to preclude appellate review. *See supra* Part I.B. By contrast, the Ninth Circuit below, along with the Tenth and D.C. Circuits, enforces appeal waivers without first confirming that an underlying plea agreement has the requisite factual basis to make

that agreement and its appeal waiver "constitutionally valid" and enforceable. *See Bousley*, 523 U.S. at 618; *McCarthy*, 394 U.S. at 466-67; *see also supra* Part I.A. That departure from constitutional and Rule 11 requirements means that the enforceability of constitutionally invalid plea agreements will vary depending on the circuit in which the prosecution arises: A defendant who can establish the absence of a sufficient factual basis for a guilty plea will always be given an opportunity to make that showing in some circuits but not in others. *Compare supra* Part I.A, *with supra* Part I.B.

Determining whether a defendant may appeal the lack of a factual basis for his plea based on an intervening decision of this Court interpreting a statute has particularly important constitutional implications. As this Court explained in *Bousley*, "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct" mean that a defendant who has pleaded guilty in a lower court that applied a different interpretation of the statute may "stand[] convicted of 'an act that the law does not make criminal.'" 523 U.S. at 620-21 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). This result is not a change in law. It is an enforcement correction to align with the conduct Congress determined should be criminalized. "For under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Id.* (first citing *Lanier*, 520 U.S. at 267-68 n.6; and then citing *Hudson*, 11 U.S. (7 Cranch) 32); *cf. Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) ("[A]s the

crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged.").[6]

When this Court interprets a statute after a guilty plea and while a direct appeal is pending, the current interpretation controls the factual-basis inquiry. *See Bousley*, 523 U.S. at 619-21. To ensure that a guilty plea was accepted properly, meaning with a sufficient factual basis, FED. R. CRIM. P. 11(b)(3), a court of appeals should entertain a challenge to the factual basis for that plea in light of the correct scope of the conduct criminalized by the statute. *See Bousley*, 523 U.S. at 619-21; *see also Balde*, 943 F.3d at 94-95 (holding that defendant's plea, including an appeal waiver, was invalid as not knowing and voluntary because its factual basis was insufficient to establish knowledge of his immigration

---

[6] The Federal Rules of Criminal Procedure distinguish between a guilty plea, which cannot be accepted without a sufficient factual basis to establish commission of an actual crime, and a "nolo contendere" plea that is governed by a different provision with different requirements than the factual-basis requirement for a guilty plea. *Compare* FED. R. CRIM. P. 11(b)(3) (conditioning a district court's acceptance of a guilty plea on its finding a sufficient factual basis to establish guilt), *with id.* (a)(3) (conditioning a district court's acceptance of a nolo contendere plea on "consider[ation of] the parties' views and the public interest in the effective administration of justice"). As this Court has explained, there is no factual-basis "requirement for pleas of nolo contendere, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt." *See North Carolina v. Alford*, 400 U.S. 25, 36 n.8 (1970). By contrast, a guilty plea by definition is about guilt, and it can be accepted only with a factual basis sufficient to permit a determination of guilt. FED. R. CRIM. P. 11(b)(3).

status when using a firearm, as required by this Court's post-plea statutory interpretation in *Rehaif*, 139 S. Ct. at 2195).

This case is an ideal vehicle to determine whether courts can refuse to consider insufficient-factual-basis claims due to an appeal waiver in a plea agreement. The facts petitioner admitted are agreed to by all parties and set out in the plea agreement, *see* Pet. App. 21a-23a, so the question presented is cleanly teed up. And the Ninth Circuit's decision on this issue turned entirely on its practice of not requiring confirmation of the sufficiency of a guilty plea's factual basis when challenged on appeal by a defendant like petitioner who has a plea agreement with an appeal waiver. *See supra* pp. 12-13; Pet. App. 2a-3a. Moreover, as to the merits of petitioner's factual-basis challenge in light of his plea agreement, the Ninth Circuit asked the wrong question: Rather than focusing on petitioner's awareness that "his admitted conduct was arguably noncriminal"—due to a Ninth Circuit case that the government, the district judge, and petitioner's counsel agreed was "distinguishable" and that arose under a different CFAA section, *see* Pet. App. 3a, 11a-12a; *Nosal*, 676 F.3d at 856—the court below should have asked whether the facts petitioner admitted in his plea agreement were sufficient to establish a violation of § 1030(a)(2) under this Court's post-plea *Van Buren* decision interpreting the scope of conduct Congress criminalized in that section of the CFAA.

The question presented has important ramifications for thousands of plea agreements each year, as well as for the preservation of the constitutional guardrails that ensure a defendant's guilty plea is voluntary and intelligent, sufficiently admitting conduct that Congress has made criminal. Accordingly, this Court should grant the petition and resolve the circuit split over appellate courts' obligation to confirm the factual sufficiency of a guilty plea notwithstanding a plea agreement's appeal waiver.

CONCLUSION

The Court should grant the petition and reverse the judgment of the Ninth Circuit.

Respectfully submitted,

MARK G. PARENTI
PARENTI LAW PLLC
800 Town & Country Blvd.
Suite 500
Houston, TX 77024

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton St.
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

November 16, 2023