No. 23-537

In The
Supreme Court of the United States

FAISAL ASHRAF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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

February 6, 2024

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

Page

INTRODUCTION

The government's brief in opposition is an exercise in misdirection. It dodges the genuine circuit split the petition raises by mischaracterizing the question presented (*compare* Resp. 14, *with* Pet. i), fails to cite—much less distinguish—this Court's two most on-point decisions (*Bousley v. United States*, 523 U.S. 614 (1998), and *McCarthy v. United States*, 394 U.S. 459 (1969)), and leaves unaddressed and thus unrefuted the critical separation-of-powers and due-process concerns that arise when courts accept guilty pleas that lack a factual basis for the crime of conviction.

The question presented, at its core, asks whether it is permissible for courts to look the other way when a defendant pleads guilty to a non-crime and the plea agreement includes an appeal waiver. Like the Ninth Circuit below, the government is comfortable allowing defendants to plead guilty based on noncriminal conduct so long as the defendant is aware of the "consequences" of the deficient plea. *See* Resp. 10-11; Pet. App. 3a. Similarly, the Tenth and D.C. Circuits may refuse to review a challenged and potentially noncriminal factual basis when a plea agreement includes an appeal waiver. *See* Pet. 14-16. This approach flies in the face of Rule 11(b)(3)'s factual-basis requirement, as well as the separation-of-powers tenet that "it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620-21. By contrast, the First, Second, Fourth, Fifth, and Eleventh Circuits require review of a challenged factual basis notwithstanding an appeal

waiver, recognizing that factual insufficiency renders the plea agreement, and any appeal waiver therein, unenforceable. *See* Pet. Part I.B; *infra* pp.4-5.

Because courts conflict as to this obligation, the enforceability of constitutionally deficient plea agreements will vary depending on where the prosecution arises: A defendant who can establish an insufficient factual basis is always given an opportunity to make that showing on appeal in some circuits but not in others. *Compare* Pet. Part I.A, *with* Pet. Part I.B; *see also infra* pp.3-6. And this conflict becomes all the more glaring when—as in petitioner's case—this Court issues an intervening decision after a defendant pleads guilty but while the appeal window remains open, impacting "the true nature of the charge" at issue. *See Bousley*, 523 U.S. at 618; *see infra* pp.7-9 (contrasting the Ninth and Second Circuits' conflicting factual-basis approaches regarding intervening authority). Given that 98% of federal convictions stem from guilty pleas—most of which include appeal waivers—*see* Pet. 24-25, this Court should grant the petition to ensure uniformity in the plea-bargaining process, which "*is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks and citation omitted).

ARGUMENT

I. THE GOVERNMENT DODGES THE GENUINE SPLIT PETITIONER PRESENTS: WHETHER A COURT OF APPEALS CAN REFUSE TO REVIEW A CHALLENGE TO THE FACTUAL BASIS UNDERLYING A PLEA AGREEMENT.

The government attacks a strawman question that petitioner did not present, arguing that "none of the courts of appeals adheres to a rule under which an appeal waiver invariably precludes a factual-basis challenge." Resp. 14. That is a proposition no one disputes. The circuits are split instead as to whether factual-basis review is *required*—not "invariably preclude[d]"—in the presence of an appeal waiver. *See* Pet. 11. Thus, the government's argument that the Ninth, Tenth, and D.C. Circuits *could* entertain a factual-basis challenge notwithstanding an appeal waiver misses the mark. The Ninth Circuit can choose to review factual-basis claims, *see* Pet. 13-14 n.3, but it also may refuse to do so, *see id.*; Pet. App. 3a. This is not an "intra-circuit conflict," Resp. 14, but a rule that squarely conflicts with the approaches of those circuits that *require* appellate review in the same circumstances. *See* Pet. Part I.B. Similarly, the Tenth and D.C. Circuit decisions discussed in the petition demonstrate that, in those circuits, as in the Ninth, the court may refuse to review factual-basis challenges. Pet. 14-16.[1]

---

[1] On November 15, 2023, the Tenth Circuit withdrew its original opinion in *United States v. Martin* (cited both in the

To the extent the government questions whether the First, Second, Fourth, Fifth, and Eleventh Circuits require review of factual-basis challenges—or would deviate from such a rule if faced with a "specific" waiver of a "precise argument" on appeal—the government has no support. *See* Resp. 15-16. It not only fails to identify a case in which any of these circuits enforced an appeal waiver to preclude a factual-basis challenge on appeal, but also cannot point to any language in any opinion that suggests the required-review rule might not apply to waivers that reference specific arguments. *See* Resp. 15-16.

The absence of any such case is unsurprising because the reasoning in the First, Second, Fourth, Fifth, and Eleventh Circuits makes clear that an insufficient factual basis invalidates a plea agreement—and any appeal waiver therein. *See* Pet. Part I.B. As the Fourth Circuit has explained, a factual-basis challenge "goes to the heart of whether the guilty plea, including the waiver of appeal, is enforceable." *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018) (quoting *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1285 (11th Cir. 2015)); *see also*, *e.g.*, *United States v. Ramos-Mejía*, 721 F.3d 12, 14 (1st Cir. 2013); *United States v. Balde*, 943 F.3d 73, 93-95 (2d Cir. 2019). And the Fifth Circuit has stated that,

---

petition and the brief in opposition) and issued a new one. *See* No. 23-3045 (10th Cir. Nov. 15, 2023) (per curiam). The court still rejects other circuits' mandatory review as "not the law in this circuit" and enforces the appeal waiver; but it focuses on Martin's scope-of-waiver arguments—not whether factual-basis insufficiency rendered the plea involuntary. *Id.* slip op. at 6-7.

even with a "valid" appeal waiver, "[i]f the factual basis is not sufficient as to any count, the conviction should be vacated." *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008).

Moreover, the government's attempted "general" versus "specific" waiver explanation for circuits' conflicting rules is undermined by its contradictory characterizations of virtually identical appeal-waiver provisions in different cases. The government dismisses the D.C. Circuit's ruling in *In re Sealed Case* as a court enforcing "not just a general appeal waiver but also a specific provision stating that the defendant '"waive[d] any argument that . . . his admitted conduct does not fall within the scope of the statute" to "which he is pleading guilty."'" Resp. 14 (alteration in original) (quoting *In re Sealed Case*, 40 F.4th 605, 607 (D.C. Cir. 2022) (quoting plea agreement)). But the government flips its position when faced with the Eleventh Circuit's refusal to enforce indistinguishable waiver language in *United States v. Jean*—brushing aside the provision as "not identify[ing] a particular factual-sufficiency argument." Resp. 16 n.5; *Jean*, 838 F. App'x 370, 371 (11th Cir. 2020) (per curiam) (quoting the waiver as covering "any claim that . . . the admitted conduct does not fall within the scope of the statute of conviction" (alteration in original)). The government cannot have it both ways. Regardless, its inconsistent labels make no difference: Whether characterized as "general" or "specific," the same language yielded directly conflicting results. In the D.C. Circuit, this waiver was enough to block the

defendant's factual-basis challenge on appeal; in the Eleventh Circuit, it was not.[2]

II. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO RESOLVE IMPORTANT SEPARATION-OF-POWERS AND DUE-PROCESS CONCERNS OVER GUILTY PLEAS FOR NONCRIMINAL CONDUCT.

The government not only mischaracterizes the split that petitioner presents, but also leaves unaddressed the critical separation-of-powers and due-process concerns that arise when courts accept guilty pleas that lack a factual basis for the crime of conviction. Echoing the Ninth Circuit below, the government doubles down on the notion that guilty pleas for noncriminal conduct are neither constitutionally suspect nor even worth reviewing when a defendant challenges the factual basis on appeal, so long as the plea agreement includes an

---

[2] The government also claims "there is no indication that the waiver provision" in *United States v. Mendoza* "specifically referred to" an argument that the defendant's conduct did not fall within the scope of the statute. Resp. 16 n.5. But the Fifth Circuit itself spelled out that the plea agreement 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." *United States v. Mendoza*, 842 F. App'x 903, 905 (5th Cir. 2021) (per curiam). That is hardly "no indication" that the agreement included such a provision. And the Fifth Circuit determined that the waiver—notwithstanding language specifying the precise argument the defendant wished to raise on appeal—"does not bar our review of the adequacy of the factual basis for Mendoza's guilty plea." *Id.*

appeal waiver. *See* Resp. 11; Pet. App. 3a. That position flies in the face of Rule 11(b)(3)'s factual-basis requirement, which not only helps ensure that defendants have "real notice of the true nature of the charge," *Bousley*, 523 U.S. at 618 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)), but also performs 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 prosecutors, even if with a court's and defendant's acquiescence. *See id.* at 620-21.

The government does not cite, much less distinguish, *Bousley* and offers no response to petitioner's separation-of-powers arguments. That silence is telling. And the government's rush to embrace the Ninth Circuit's tolerance of a noncriminal guilty plea is concerning—especially when, as here, an intervening decision from this Court construes the statute in question, raising serious doubts as to whether the facts admitted in a plea agreement satisfy all elements of the crime. *See* Pet. 28-29 (explaining why the Ninth Circuit asked the wrong question in focusing on petitioner's awareness of potential noncriminality instead of determining whether the facts he admitted stated a violation of § 1030(a)(2) under this Court's post-plea decision in *Van Buren v. United States*, 141 S. Ct. 1648, 1652 (2021)).

"It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express,*

Inc., 511 U.S. 298, 312 (1994). When this Court interprets a statute after a guilty plea and while a direct appeal is pending, that interpretation controls the sufficiency of the plea's factual basis. *See Bousley*, 523 U.S. at 619-21. That is because "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 511 U.S. at 312-13 & n.12. Accordingly, when "decisions of this Court hold[] that a substantive federal criminal statute does not reach certain conduct," a defendant who pleaded guilty uninformed by this Court's subsequent interpretation may "stand[] convicted of 'an act that the law does not make criminal.'" *See Bousley*, 523 U.S. at 620-21 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

As the Second Circuit recognized in *Balde* when faced with a factual-basis challenge relying on intervening authority from this Court, the validity of a plea—and necessarily any waiver therein—depends on this Court's post-plea interpretation of a statute's elements, not the state of the law when the plea was entered. *See* 943 F.3d at 94. The plea in *Balde* was "deficient," even if "through no fault of the district court," because this Court's post-plea interpretation "instructs us about what [the statute] has always meant." *Id.* (citing *Rivers*, 511 U.S. at 312-13).

That approach to factual-basis review in light of intervening authority is faithful to *Bousley*, as well as to separation-of-powers and Rule 11 requirements, *see* 523 U.S. at 619-21, whereas the government's and

Ninth Circuit's contrary approach to intervening authority is not. And even absent intervening authority from this Court, the same separation-of-powers concerns arise whenever the Ninth, Tenth, and D.C. Circuits enforce appeal waivers without first resolving a factual-basis challenge that would render the plea agreement deficient and any appeal waiver therein unenforceable. *See* Pet. 23-27.

The government points to no authority from this Court establishing that a plea agreement can waive the existence of a crime—with or without intervening law. The government cites two of this Court's decisions it says reject voluntariness challenges based on incomplete plea information, Resp. 11, but those cases did not involve factual-basis review or potentially *noncriminal* convictions. *See United States v. Ruiz*, 536 U.S. 622, 629 (2002) (holding that the Constitution does not require disclosure of impeachment evidence during plea bargaining); *Brady v. United States*, 397 U.S. 742, 757 (1970) (considering whether plea was coerced by threat of unconstitutional death penalty). Far from endorsing guilty pleas to non-crimes, this Court in *Ruiz* merely recognized "the Government's interest in securing those guilty pleas that are *factually justified.*" *See* 536 U.S. at 631 (emphasis added).[3]

---

[3] Ignoring *Bousley* and *McCarthy*, neither of which is cited much less discussed in the brief in opposition, the government suggests that a plea lacking a sufficient factual basis could be valid so long as a defendant is "fully aware of the direct consequences" of the plea. *See* Resp. 10 (quoting *Brady*, 397 U.S. at 755). But the requirement that a plea be "voluntary" and

Indeed, this Court has made clear that the government and courts lack constitutional authority to transform noncriminal conduct into a conviction that Congress has not authorized. *See Bousley*, 523 U.S. at 620-21; *cf.* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1049 (2006) (noting that the "unbridled discretion" wielded by the government in the plea-bargaining process precisely demonstrates the type of overreach "that the separation of powers is supposed to prevent").

The government's seeming comfort with convictions for noncriminal conduct also raises concerns about prosecutorial gamesmanship. For example, the government makes much of the reference in petitioner's plea agreement to a Ninth Circuit case, *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc), which involved a different CFAA subsection that the government told the district court was "distinguishable" after that court acknowledged it "ha[d]n't paid too much attention to that case."

"intelligent" demands more than awareness of consequences: A defendant must have "real notice of the true nature of the charge against him." *Bousley*, 523 U.S. at 618 (quoting *Smith*, 312 U.S. at 334); *see McCarthy*, 394 U.S. at 467. Even assuming a defendant could voluntarily plead guilty based on admitted conduct that satisfies neither Rule 11(b)(3) nor the bounds of criminality defined by Congress, it is difficult to imagine how that plea could be "intelligent." If constitutional guardrails require only a defendant's awareness of a plea's consequences—not admitted facts sufficient to satisfy the elements of a crime defined by statute—prosecutors and courts could too easily exercise powers reserved to Congress. *See infra* pp.10-12 (discussing gamesmanship concerns).

Pet. App. 10a-12a. In this Court, however, the government—with the benefit of *Van Buren*—contends that the formerly "distinguishable," Pet. App. 12a, *Nosal* applied equally to the different subsection under which petitioner pleaded guilty and should have alerted him to the potential noncriminality of his conduct. Resp. 11-13.[4]

Tellingly, the government does not argue that the factual basis in petitioner's plea agreement satisfies *Van Buren*. *See id.* It asserts only that circuit precedent it once pitched as "distinguishable" now warrants upholding petitioner's conviction even if his plea agreement lacks facts sufficient to state a crime. *Id.* But the criminality of admitted facts should not turn on "creative prosecutors," even if they find "receptive judges." *Dubin v. United States*, 143 S. Ct. 1557, 1574 (2023) (Gorsuch, J., concurring in the judgment) (discussing, in the vagueness context, the dangers of uncertainty over what a statute "does and does not criminalize"). Requiring courts of appeals to review a factual-basis challenge notwithstanding an appeal waiver helps ensure that the government

[4] During the plea colloquy, the government reminded the district court of a *Nosal* waiver in another case. Pet. App. 12a. If the government can use appeal waivers to insulate potential non-crimes from scrutiny and evade potentially adverse circuit precedent, the government would intrude dramatically on Congress's exclusive authority to define criminal offenses. Those waivers also would impede courts' ability to clarify the law—including this Court's ability to ensure that criminal statutes are applied uniformly across jurisdictions.

cannot obtain convictions beyond the bounds of criminal conduct Congress proscribed.

Petitioner's case is an ideal vehicle to resolve the question presented, which has important ramifications for thousands of plea agreements each year. *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, 98% of federal convictions stemmed from plea agreements). The relevant facts have been agreed to by all parties in petitioner's plea agreement,[5] and the Ninth Circuit's decision turned entirely on its failure to mandate factual-basis review when a plea agreement includes an appeal waiver. That approach, which is shared by the Tenth and D.C. Circuits but conflicts with the approaches of the First, Second, Fourth, Fifth, and Eleventh Circuits, directly implicates separation-of-powers and due-process concerns that warrant this Court's immediate review. The Court should grant the petition to resolve the split over factual-basis-review obligations notwithstanding a plea agreement's appeal waiver.

[5] The government's statement roams outside the facts admitted in the plea agreement, relying on untried charges and assertions from the probation office's post-plea presentence report. Resp. 2-3; *cf.* Pet. App. 21a-23a. But of course it is the plea's admitted facts that control the factual-basis inquiry and resolution of the question presented. *See* FED. R. CRIM. P. 11(b)(3).

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

February 6, 2024