No. 23-618

In the Supreme Court of the United States

DELANO MARCO MEDINA,
Petitioner,

v.

COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is consistent with due process for a court to convict a criminal defendant without finding that the defendant is guilty.

RELATED PROCEEDINGS

Colorado Supreme Court:

Medina v. People, No. 21SC765 (Sept. 11, 2023)

Colorado Court of Appeals:

People v. Medina, No. 19CA1196 (Sept. 23, 2021)

Lake County (Colo.) District Court:

People v. Medina, No. 13CR52 (May 2, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Delano Marco Medina respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is published at 535 P.3d 82 (Colo. 2023). The opinion of the Colorado Court of Appeals is published at 501 P.3d 834 (Colo. Ct. App. 2021).

JURISDICTION

The Colorado Supreme Court entered its judgment on September 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Is it consistent with due process for a court to convict a defendant without finding that the defendant is guilty? A question so fundamental ought to have been settled long ago, but it is the subject of one of our oldest and largest lower court conflicts. This case provides a rare opportunity to resolve the question.

The conflict is pervasive because the issue arises so often. In an "*Alford* plea"—so named because the Court permitted it in *North Carolina v. Alford*, 400

U.S. 25 (1970)—the defendant pleads guilty while asserting innocence of the charged crime. *Alford* pleas are very common. They account for approximately six percent of state criminal cases. Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* 8, table 17 (Nov. 2000); Allison D. Redlich and Asil Ali Özdoğru, *Alford Pleas in the Age of Innocence*, 27 Behavioral Sciences and the Law 467, 476, table 1 (2009).

In an ordinary guilty plea, the defendant confesses in court, and that confession provides the primary evidence—often the only evidence—of the defendant's guilt. An *Alford* plea is a guilty plea, but without the confession. The defendant does not provide any evidence of guilt. Such evidence must come from some other source. But what if there is no other evidence of the defendant's guilt? Does the Due Process Clause allow the court nevertheless to enter a judgment of conviction, without finding that the defendant is, in fact, guilty?

There is an enormous and lopsided split on this question. Almost every jurisdiction has weighed in, and all but a few courts have held that due process requires a factual basis for an *Alford* plea—that is, that the court may not accept an *Alford* plea if there is no evidence that the defendant is guilty. On the smaller side of the split, a handful of courts have held that there is no such constitutional requirement. In these jurisdictions, now including Colorado due to the decision below, a court may accept an *Alford* plea—a guilty plea—even where there is no evidence of guilt.

Despite the magnitude of the split and the frequency with which it arises, the issue scarcely ever

arrives at this Court. *Alford* pleas are typically negotiated. Normally, neither side has any incentive to appeal. In this case, by contrast, the issue is squarely presented.

Few issues in criminal procedure are as basic as this. The Court should grant certiorari and reverse.

1. Petitioner Delano Medina was arrested in Lake County, Colorado, and charged with the offense of "menacing" after his wife called 911 and reported that he threatened her with a knife during an argument. App. 3a-4a. He already faced several unrelated charges in Lake County and one in Boulder County, including forgery, violating bond conditions, and traffic offenses. *Id.* at 4a. His bond was set extraordinarily high—more than $1 million, an amount far beyond his means—so he was sent to jail. *Id.* at 53a.

While Medina was in jail, his wife recanted the accusation that he threatened her with a knife. *Id.* at 6a n.2. Her accusation had been the only evidence that Medina committed the offense of menacing.

After a few months in jail, Medina nevertheless agreed to plead guilty to the menacing charge. *Id.* at 4a. In exchange, the state agreed to dismiss the remaining Lake County charges. *Id.* The agreement included a stipulated sentence of one year in prison, to be served after his sentence in Boulder County. *Id.* In the agreement, Medina purported to waive the establishment of a factual basis for the menacing charge. *Id.*

At the plea hearing, Medina, through counsel, explained that he was not guilty of menacing. *Id.* Counsel informed the court that Medina consented to the plea agreement "even though in his heart of

hearts he does not believe he's guilty of that." *Id.* at 5a. The court acknowledged that Medina would be entering an "*Alford* plea"—a guilty plea in which he insisted on his innocence. *Id.* The court noted that Medina had "waived the factual basis" for the plea, so the court accepted the plea without determining whether there was any evidence that Medina was guilty of menacing. *Id.* at 5a. With the dismissal of most of the charges, Medina's bond was drastically reduced, which enabled him to be released from custody. *Id.* at 6a.

After failing to appear at his first sentencing hearing, Medina moved to withdraw his guilty plea. *Id.* He told the court: "I stand before you an innocent man charged with menacing." Tr. Mar. 19, 2015, p. 5. He explained that he had misunderstood the nature of an *Alford* plea, which he thought he could revoke once he secured evidence of his innocence. *Id.* at 2-3. The court denied the motion and imposed the one-year sentence. App. 6a.

Nearly three years later, Medina filed a motion for postconviction relief in which he asserted that his conviction violated the Due Process Clause, because there was no factual basis for his *Alford* plea. *Id.* at 6a. The postconviction court held a hearing, at which Medina testified that he accepted the agreement, despite his innocence of menacing, because he was guilty of some of the other charges, and because he hoped that by getting out of jail, he would be able to obtain proof that he had not threatened his wife with a knife. *Id.* at 7a. "I knew that the menacing case was false," he explained. "The other cases I was guilty of." *Id.* at 49a.

The postconviction court denied the motion. *Id.* at 52a-65a. The court acknowledged that "the transcript of the providency hearing [i.e., the plea hearing] is not ideal," *id.* at 64a, because the court that accepted the plea failed to find any evidence of Medina's guilt. The postconviction court nevertheless held that "the Record as a whole does provide a sufficient basis upon which to determine that there was a strong factual basis for the offense." *Id.* This was so, the court concluded, because "Defendant was well aware of the nature and benefit he was receiving from the plea bargain," and because "[h]is plea was knowing, and voluntary." *Id.*

2. The Colorado Court of Appeals affirmed. *Id.* at 24a-51a.

The Court of Appeals recognized that the federal courts of appeals are divided as to whether a court may accept an *Alford* plea without finding a factual basis for the plea—that is, without finding that the defendant is in fact guilty. *Id.* at 33a-35a. The court recognized that state supreme courts are likewise divided. *Id.* at 36a-38a. The court concluded that "the strong factual basis from *Alford* is required as part of constitutional due process." *Id.* at 42a. But the court determined that Medina had validly waived this requirement in his guilty plea. *Id.* at 43a-51a.

3. The Colorado Supreme Court affirmed. *Id.* at 2a-23a.

The Colorado Supreme Court recognized, as had the Court of Appeals, that "[o]ther appellate courts are split on this issue." *Id.* at 16a. On one side, the

court explained, the Sixth and Seventh Circuits hold that "the factual-basis requirement is not a requirement of the Constitution, but rather a requirement created by rules and statutes." *Id.* at 17a (internal quotation marks omitted). On the other side of the split, the court continued, were several other circuits which hold that "courts are constitutionally obligated to inquire into the factual basis of an *Alford* plea before accepting one." *Id.*

The state supreme court added that "[s]tate courts are similarly split." *Id.* at 18a. "Some have held that a factual-basis finding is constitutionally required for *Alford* pleas." *Id.* "But others treat the issue as a matter of state procedural law, not a federal constitutional requirement." *Id.*

The Colorado Supreme Court joined the courts that hold that the Constitution does not require a court to find a factual basis for an *Alford* plea. The court acknowledged that in *Alford* itself, "the Supreme Court noted that evidence of Alford's guilt 'provided a means by which the judge could test whether the plea was being intelligently entered.'" *Id.* at 19a (citing *Alford*, 400 U.S. at 38). The Colorado Supreme Court observed, however, that this "Court didn't state that strong evidence of guilt *alone* can provide those means." *Id.* So long as the plea is "voluntary, knowing, and intelligent," the Colorado Supreme Court concluded, a court may constitutionally accept it, even if the plea lacks a factual basis. *Id.* at 21a.

REASONS FOR GRANTING THE WRIT

This case ticks all the boxes for a grant of certiorari.

First, the lower courts are divided. They have been divided for thirty years. There is no chance they will reconcile without this Court's intervention.

Second, the decision below is wrong. It is contrary to due process to convict a defendant without finding that the defendant is guilty. This Court said as much in *Alford* and in other cases before and after. When the Due Process Clause was ratified it would have been unthinkable to convict a defendant without finding the defendant guilty. And there are good reasons that our legal system has always considered a finding of guilt a prerequisite for conviction, even where the defendant and the government would both prefer to dispense with it.

Third, this issue is important. It arises often. It affects a great many cases.

Finally, this case is an unusually good vehicle. The Court gets very few chances to address this issue. A comparable opportunity may not arrive for a long time.

I. The lower courts are divided over whether it is consistent with due process to convict a defendant without finding that the defendant is guilty.

In *Alford*, this Court held that "[i]n view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional er-

ror in accepting it." *Alford*, 400 U.S. at 38. The Court added that "various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea." *Id.* at 38 n.10.

Most federal courts of appeals and state supreme courts accordingly hold that the Constitution forbids a court from accepting an *Alford* plea without finding a factual basis for the plea—that is, without finding that the defendant is guilty. But a few courts disagree.

A. Most courts hold that it is inconsistent with due process to accept a guilty plea without evidence that the defendant is guilty.

In most jurisdictions, a defendant may not constitutionally enter an *Alford* plea unless the court finds that the defendant is, in fact, guilty.

First Circuit: *United States v. Williams*, 80 F. 4th 85, 98 (1st Cir. 2023) ("a strong factual basis for guilt is an essential part of an *Alford* plea") (internal quotation marks omitted).

Second Circuit: *United States ex rel. Dunn v. Casscles*, 494 F.2d 397, 400 (2d Cir. 1974) (granting a writ of habeas corpus because, in accepting an *Alford* plea, the state court "taking the plea did not assure himself that there was a factual basis for the plea" and "[t]he State did nothing to supply the missing elements by way even of an offer of what its proof would have been had the case gone to trial").

Third Circuit: *United States v. Mackins*, 218 F.3d 263, 268 (3d Cir. 2000) ("As *Alford* and the cases which followed in its wake made clear, however,

there must always exist some factual basis for a conclusion of guilt before a court can accept an *Alford* plea; indeed, a factual basis for such a conclusion is an essential part of an *Alford* plea.") (internal quotation marks omitted).

Fourth Circuit: *United States v. King*, 673 F.3d 274, 282 (4th Cir. 2012) ("[T]here must be a factual basis for an *Alford* plea, and an *Alford* plea can only be accepted when the record contains strong evidence of actual guilt.") (internal quotation marks omitted); *United States v. Mastrapa*, 509 F.3d 652, 659 (4th Cir. 2007) ("We have repeated uniformly that the court must find a factual basis even for an *Alford* plea.").

Fifth Circuit: *Orman v. Cain*, 228 F.3d 616, 621 (5th Cir. 2000) (citing *Alford* for the proposition that "[w]here the defendant proclaims his innocence but pleads guilty anyway, due process is satisfied only if the state can demonstrate a factual basis for the plea") (internal quotation marks omitted); *Willett v. Georgia*, 608 F.2d 538, 540 (5th Cir. 1979) ("[W]hen a defendant pleads guilty while claiming his or her innocence, the court commits constitutional error in accepting the plea unless the plea is shown to have a factual basis.").

Eighth Circuit: *Winslow v. Smith*, 696 F.3d 716, 736 (8th Cir. 2012) (citing *Alford* for the proposition that "[w]here the defendant proclaims his innocence but pleads guilty anyway, due process is satisfied only if the state can demonstrate a factual basis for the plea") (internal quotation marks omitted); *Wilson v. Lawrence Cty.*, 154 F.3d 757, 758 n.1 (8th Cir. 1998) (citing *Alford* for the proposition that "[t]he court is obliged to find strong evidence of actual guilt before

accepting such a plea") (internal quotation marks omitted); *White Hawk v. Solem*, 693 F.2d 825, 829 (8th Cir. 1982) (citing *Alford* for the proposition that "[a]s long as there is in fact a strong factual basis supporting a guilty plea, it is valid even if the defendant protests his innocence").

Ninth Circuit: *United States v. Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995) (citing *Alford* for the proposition that "[i]f a defendant enters a guilty plea while continuing to assert his innocence, the district court may accept it if there is a strong factual basis") (internal quotation marks omitted).

Tenth Circuit: *United States v. Vidal*, 561 F.3d 1113, 1119 (10th Cir. 2009) (citing *Alford* for the proposition that "[i]n such a case, the court is under a special obligation to ensure that the record contains strong evidence of actual guilt"); *United States v. Keiswetter*, 860 F.2d 992, 995 (10th Cir. 1988) (remanding for reconsideration of *Alford* plea "because of the paucity in the record below of information about the factual basis for Mr. Keiswetter's guilty plea"), *modified as to remedy*, 866 F.2d 1301, 1302 (10th Cir. 1989) (en banc) (holding that that the proper remedy for an *Alford* plea without a factual basis is to vacate the plea).

Alabama: *Yamada v. State*, 426 So.2d 906, 908 (Ala. 1982) ("In [*Alford*], the United States Supreme Court held that a factual basis was required for the trial court to accept a guilty plea.").

Arizona: *State v. Draper*, 784 P.2d 259, 262 (Ariz. 1989) (citing *Alford* for the proposition that "[a]n *Alford* guilty plea is constitutionally permissible if the trial court finds substantial evidence of guilt").

Arkansas: *Wallace v. State*, 471 S.W.3d 192, 200 n.4 (Ark. 2015) (citing *Alford* for the proposition that "a court may accept a guilty plea from a defendant who maintains his innocence, provided the court finds an adequate factual basis for the plea of guilty"); *Davis v. State*, 235 S.W.3d 902, 903 n.1 (Ark. 2006) (citing *Alford* for the proposition that "a court may accept a guilty plea from a defendant who maintains his innocence, provided the court finds an adequate factual basis for the plea of guilty").

California: *In re Alvernaz*, 830 P.2d 747, 758 n.9 (Cal. 1992) (citing *Alford* for the proposition that "an accused's claim of innocence does not preclude entry of a guilty or nolo contendere plea where the court taking the plea ascertains a 'factual basis' therefor").

Delaware: *Robinson v. State*, 291 A.2d 279, 281 (Del. 1972) ("In [*Alford*], the Court specifically held that there is no constitutional bar to a guilty plea even if the defendant is unable or unwilling to admit his participation in the acts constituting the crime, if the plea is voluntarily, knowingly, and understandingly made, provided there is a factual basis for the plea.").

District of Columbia: *Mannan v. District of Columbia Bd. of Med.*, 558 A.2d 329, 336 (D.C. Ct. App. 1989) ("For a plea to be an *Alford* plea the record supporting the plea must show strong evidence of actual guilt for the plea to be accepted by the judge."); *Hawthorne v. United States*, 504 A.2d 580, 595 (D.C. Ct. App. 1986) (citing *Alford* for the proposition that "a defendant may claim innocence while entering a valid guilty plea when the evidence of guilt is strong").

Florida: *Florida Bar v. Levine*, 571 So.2d 420, 421 n.1 (Fla. 1990) ("An *Alford* plea is a plea containing a protestation of innocence when ... a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.") (internal quotation marks omitted).

Georgia: *McGuyton v. State*, 782 S.E.2d 21, 23-24 (Ga. 2016) (citing *Alford* for the proposition that "all that is required in order to meet constitutional muster is for the trial court to find that the record contains strong evidence of actual guilt").

Hawaii: *State v. Smith*, 606 P.2d 86, 89 (Haw. 1980) (citing *Alford* for the proposition that "only after satisfying itself that there is a strong factual basis for the plea, ought the trial court to accept the plea").

Idaho: *Schoger v. State*, 226 P.3d 1269, 1275 (Idaho 2010) (citing *Alford* for the proposition that "[a]s long as there is a strong factual basis for the plea, and the defendant understands the charges against him, a voluntary plea of guilty may be accepted by the court despite a continuing claim by the defendant that he is innocent"); *Sparrow v. State*, 625 P.2d 414, 415 (Idaho 1981) (same).

Iowa: *State v. Chapman*, 944 N.W.2d 864, 872 (Iowa 2020) (stating that in an *Alford* plea, the "district court may not accept a guilty plea without first determining that the plea has a factual basis"); *Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 24 (Iowa 2012) (stating that an *Alford* plea "requires the district court to find a factual basis before accepting the plea"); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (stating that in an *Alford* plea,

"[t]he district court may not accept a guilty plea without first determining that the plea has a factual basis"); *Farley v. Glanton*, 280 N.W.2d 411, 416 (Iowa 1979) ("The Supreme Court in *Alford* was quite explicit in requiring that a factual basis for a guilty plea be established, particularly where the accused denied his guilt.").

Maine: *Oken v. State*, 716 A.2d 1007, 1008 n.1 (Me. 1998) ("In *Alford,* the Court held that a court may constitutionally accept a guilty plea from a defendant who affirmatively protests his innocence when the defendant intelligently concludes that the plea is in his interests and the record contains strong evidence of actual guilt.").

Maryland: *Smith v. State*, 296 A.3d 1032, 1045 (Md. 2023) ("This Court has often indicated that an *Alford* plea requires a factual basis for a finding of guilt (*i.e.*, a proffer or an agreed statement of facts).").

Massachusetts: *Commonwealth v. DelVerde*, 496 N.E.2d 1357, 1363 (Mass. 1986) ("Under *Alford,* a defendant who professes innocence may nevertheless plead guilty and voluntarily, knowingly and understandingly consent to the imposition of a prison sentence, if the State can demonstrate a strong factual basis for the plea.") (internal quotation marks omitted); *Commonwealth v. Ellsworth*, 146 N.E.3d 1121, 1124 n.1 (Mass. 2020) (same).

Michigan: *People v. Booth*, 324 N.W.2d 741, 748 (Mich. 1982) ("[A]s in *Alford,* we would require from some appropriate source strong evidence of actual guilt.").

Minnesota: *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015) (citing *Alford* for the proposition that "[b]ecause an *Alford* plea does not rely on an admission of guilt, the record must contain strong evidence of actual guilt") (internal quotation marks omitted); *State v. Theis*, 742 N.W.2d 643, 648-49 (Minn. 2007) (citing *Alford* for the proposition that "careful scrutiny of the factual basis for the plea is necessary within the context of an *Alford* plea because of the inherent conflict in pleading guilty while maintaining innocence. An *Alford* plea is not supported by the defendant's admission of guilt, and is actually contradicted by his claim of innocence; precedent therefore requires a strong factual basis for an *Alford* plea."); *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) ("[I]t is absolutely crucial that when an *Alford*-type plea is offered the trial court should not cavalierly accept the plea but should assume its responsibility to determine whether the plea is voluntarily, knowingly, and understandingly made, and whether there is a sufficient factual basis to support it.").

Mississippi: *Lott v. State*, 597 So.2d 627, 628 (Miss. 1992) ("[A] factual basis is an essential part of the constitutionally valid and enforceable decision to plead guilty" under *Alford*.) (internal quotation marks omitted).

Montana: *State v. Welling*, 647 P.2d 852, 855 (Mont. 1982) (referring to "the principle announced in *Alford*, that a court may accept a guilty plea if satisfied that there was strong evidence of guilt, even though the defendant, while offering to plead, denies that he was in fact guilty").

Nebraska: *State v. Beach*, 319 N.W.2d 754, 757 (Neb. 1982) (citing *Alford* for the proposition that "a plea of guilty, voluntarily and intelligently made, might be accepted even though the defendant professes his innocence, provided there is a factual basis for a finding of guilty"); *State v. Leisy*, 295 N.W.2d 715, 718 (Neb. 1980) (same).

Nevada: *Lyons v. State*, 775 P.2d 219, 223 (Nev. 1989) ("In *Alford,* the Court held that a plea containing a protestation of innocence was constitutionally acceptable when 'a defendant intelligently concludes that his interests require entry of a guilty plea *and the record before the judge contains strong evidence of actual guilt.*'").

New Jersey: *State v. Urbina*, 115 A.3d 261, 272 (N.J. 2015) (describing the holding of *Alford*, "which allows an individual accused of a crime to 'voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime,' so long as there is a 'strong factual basis for the plea'").

New Mexico: *State v. Hodge*, 882 P.2d 1, 3 n.1 (N.M. 1994) ("In *Alford*, the United States Supreme Court held that courts do not violate due process when they accept guilty pleas from defendants who continue to protest their innocence, ... so long as the court is satisfied that there is a factual basis for the plea independent of the defendant's statements.").

New York: *People v. Hill*, 946 N.E.2d 169, 171 (N.Y. 2011) (stating that *Alford* pleas "are allowed only when, as in *Alford* itself, they are the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual

guilt") (brackets and internal quotation marks omitted); *Silmon v Travis*, 741 N.E.2d 501, 503 (N.Y. 2000) (same).

North Carolina: *State v. Rowsey*, 472 S.E.2d 903, 909 n.1 (N.C. 1996) ("In [*Alford*], the Court held that a defendant may enter a guilty plea containing a protestation of innocence when the defendant intelligently concludes that a guilty plea is in his best interest and the record contains strong evidence of actual guilt.").

North Dakota: *Kooser v. State*, 816 N.W.2d 802, 805 (N.D. 2012) ("In [*Alford*], the United States Supreme Court held an individual may enter a voluntary guilty plea without admitting guilt when the 'defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.'").

Oklahoma: *Bush v. State*, 280 P.3d 337, 345 (Okla. Ct. Crim. App. 2012) (citing *Alford* for the proposition that "[t]he factual basis of the plea must be sufficient so that the trial court can test whether the plea is being entered intelligently").

Pennsylvania: *Commonwealth v. Pasture*, 107 A.3d 21, 23 n.1 (Pa. 2014) (citing *Alford* for the proposition that "[w]hen a criminal defendant is unable or unwilling to admit to participating in acts constituting a crime, but the record contains strong evidence of guilt, the defendant may conclude that a guilty plea is in his or her best interests").

Rhode Island: *Azevedo v. State*, 945 A.2d 335, 339 (R.I. 2008) (stating that before an *Alford* plea may be accepted, "[t]he trial justice must be satisfied

that there is a factual basis for the plea"); *Armenakes v. State*, 821 A.2d 239, 242 (R.I. 2003) ("The so-called *Alford* plea is a procedure approved by the Supreme Court of the United States under which a person charged with a criminal offense may plead guilty even though he maintains his innocence as long as the state presents a factual basis for such plea through evidence other than the defendant's own admission.") (internal quotation marks omitted); *State v. Fontaine*, 559 A.2d 622, 624 (R.I. 1989) (same).

South Carolina: *State v. Herndon*, 742 S.E.2d 375, 380 (S.C. 2013) ("The *Alford* court reasoned that so long as a factual basis exists for a plea, the Constitution does not bar sentencing a defendant who makes a calculated choice to accept a beneficial plea arrangement rather than face overwhelming evidence of guilt.") (internal quotation marks omitted); *Zurcher v. Bilton*, 666 S.E.2d 224, 227 (S.C. 2008) (same).

South Dakota: *State v. Nachtigall*, 741 N.W.2d 216, 219 (S.D. 2007) (citing *Alford* for the proposition that "in cases where defendants proclaim their innocence while at the same time pleading guilty, the factual basis to support such pleas must be strong" (internal quotation marks omitted).

Tennessee: *State v. Albright*, 564 S.W.3d 809, 818 n.5 (Tenn. 2018) (citing *Alford* for the proposition that "because 'best interest'/*Alford* pleas are guilty pleas even though the defendant is protesting his innocence, a factual basis must be established on the record at the plea hearing before the trial court may accept the plea"); *Howell v. State*, 185 S.W.3d 319, 334 (Tenn. 2006) (citing *Alford* for the proposi-

tion that "[e]ven in circumstances in which a defendant enters a plea to avoid facing the death penalty but continues to maintain his innocence, the plea is valid as long as the record contains adequate evidence of guilt").

Utah: *State v. Ott*, 247 P.3d 344, 347 n.2 (Utah 2010) (citing *Alford* for the proposition that an *Alford* plea is permissible "when a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt") (internal quotation marks omitted).

Washington: *In re Cross*, 309 P.3d 1186, 1190 (Wash. 2013) (citing *Alford* for the proposition that that when a court decides whether to accept an *Alford* plea, "the question is whether the plea is a voluntary and intelligent choice among the alternative courses of action open to the defendant and whether there is a factual basis for the plea") (internal quotation marks omitted).

West Virginia: *State v. Seenes*, 572 S.E.2d 876, 877 n.1 (W. Va. 2002) (citing *Alford* for the proposition that "a court does not violate due process by accepting a guilty plea from a defendant who continues to protest innocence provided the court is satisfied a factual basis for the plea exists independent of the defendant's statements").

Wisconsin: *State v. Nash*, 951 N.W.2d 404, 417-18 (Wis. 2020) (before accepting an *Alford* plea, "[w]e require that the record reflect a strong proof of guilt not to convince the defendant of his or her guilt; rather, it is constitutionally required to ensure that the defendant is knowingly, intelligently, and voluntarily entering a plea that will result in a judgment of

conviction, despite the defendant's claims of innocence"); *State v. Smith*, 549 N.W.2d 232, 235 (Wis. 1996) ("The requirement of a higher level of proof in *Alford* pleas is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence."); *State v. Garcia*, 532 N.W.2d 111, 116-17 (Wis. 1995) (holding that "an *Alford* plea is entered in a constitutionally acceptable manner" only where "where an adequate record of the 'strong proof of guilt' behind the *Alford* plea has been made").

Wyoming: *Maes v. State*, 114 P.3d 708, 714 (Wyo. 2005) ("Acceptance of an *Alford* plea, however, does require strong evidence of actual guilt to negate the claim of innocence and provide a means by which the trial court can test whether the plea was intelligently entered.").

In these jurisdictions, a court cannot accept an *Alford* plea (which is, again, a *guilty* plea) without finding that the defendant is guilty. In *Mastrapa*, for example, the Fourth Circuit vacated an *Alford* plea because, due to the absence of evidence of Mastrapa's guilt, "the district court could not have found a factual basis in the record for Mastrapa's guilty plea." *Mastrapa*, 509 F.3d at 660. In *Dunn*, the Second Circuit vacated an *Alford* plea for the same reason. *Dunn*, 494 F.2d at 400. "Here the judge taking the plea did not assure himself that there was a factual basis for the plea," the Second Circuit explained. *Id.* "The State did nothing to supply the missing elements by way even of an offer of what its proof would have been had the case gone to trial." *Id.*

Likewise, in *Theis*, the Minnesota Supreme Court held that the defendant should be allowed to with-

draw his *Alford* plea because the record was unclear as to whether he was guilty. *Theis*, 742 N.W. at 649-51. In *Schminkey*, the Iowa Supreme Court reached a similar result, where the record lacked sufficient evidence of the defendant's guilt. *Schminkey*, 597 N.W.2d at 790-92. *See also Keiswetter*, 866 F.2d at 1301-02 (en banc Tenth Circuit vacates *Alford* plea for lack of evidence of guilt).

In these cases, the courts explicitly rely on the Constitution as construed in *Alford*. The Federal Rules of Criminal Procedure also require a factual basis for guilty pleas, Fed. R. Crim. P. 11(b)(3), but these cases do not rest on the Federal Rules. Indeed, they could not. Most of them are state cases that rely exclusively on *Alford*. The federal cases nearly all review state convictions, either on habeas or as predicates for federal sentencing. They too rely exclusively on *Alford*. In all these jurisdictions, an *Alford* plea is unconstitutional if there is no evidence that the defendant is guilty.

B. A few courts allow guilty pleas where there is no evidence that the defendant is guilty.

The other side of the split is much smaller. It includes only four courts—the Sixth and Seventh Circuits, the Kansas Supreme Court, and now the Colorado Supreme Court. In these jurisdictions, a court may accept a guilty plea where there is no evidence that the defendant is guilty.

The originator of this minority position was a young law professor at the University of Chicago. In *Criminal Procedure as a Market System*, 12 J. Leg. Stud. 289 (1983), Frank Easterbrook sought to up-

end the conventional wisdom about plea bargaining. The criminal justice system is not a search for truth, Easterbrook argued. Rather, it is "a well-functioning market system" meant to efficiently "set the 'price' of crime." *Id.* at 289. The purpose of criminal procedure, he contended, is not to assess guilt or innocence. Instead, through plea negotiations between prosecutors and defendants, "[c]riminal procedure is a method of allocating scarce resources." *Id.* at 290. "Plea bargaining establishes the price for most crimes," Easterbrook explained. "It establishes price in the same way as bargaining in the market for goods and services." *Id.* at 308.

Easterbrook disagreed especially sharply with the conventional view that it is wrong to allow people to plead guilty if they are not in fact guilty. *Id.* at 316. The error in this view, he argued, is that it presumes that trials are better than plea bargains as a method of distinguishing the guilty from the innocent. Trial verdicts are "simply a way of suppressing uncertainty," Easterbrook insisted. *Id.* "Trials produce a verdict by rounding up to one (guilt) or down to zero (innocence) a probability that hovers in jurors' minds somewhere between 0.9999 and 0.51." *Id.* at 316-17. Plea bargains establish more accurate prices for crimes than trials do, he argued, because they "reflect the probabilities case by case; trials disguise probabilities in individual cases and reflect them only over large populations of cases." *Id.* at 317.

For this reason, Easterbrook found it "a puzzle" that a court should be required to find a defendant guilty before accepting an *Alford* plea. *Id.* at 320. "Why is it necessary for the court to satisfy itself, before taking the plea, that there is evidence of guilt?",

he wondered. *Id.* "Ordinarily contracts are enforced without regard to the reasons people may have entered into them." *Id.*

Two years after this article was published, Professor Easterbrook became Judge Easterbrook. And eight years after that, he had the opportunity to put theory into practice. In *Higgason v. Clark*, 984 F.2d 203 (7th Cir. 1993), Judge Easterbrook was joined on the panel by Judge Posner, who shared his confidence that the tools of economics should be used to evaluate traditional legal principles and to discard them when they are found wanting. *See, e.g.*, Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193 (1985).

In *Higgason*, in an opinion authored by Judge Easterbrook and joined by Judge Posner, the Seventh Circuit became the first court to hold that the Constitution permits a defendant to plead guilty without any evidence that the defendant is, in fact, guilty. All the Constitution requires, the court reasoned, is that a guilty plea be voluntary and intelligent. *Higgason*, 984 F.2d at 207-08. The defendant's guilt might be evidence that his guilty plea was voluntary, the court continued, but a finding of guilt itself is not a constitutional prerequisite. *Id.* at 207. "Judges must guard against the assumption that whatever is familiar is also essential," the court cautioned. *Id.* at 207-08. "Putting a factual basis for the plea on the record has become familiar as a result of statutes and rules, not as a result of constitutional compulsion." *Id.* at 208. The court thus concluded that the Constitution permits a defendant to plead guilty in the absence of any evidence that the defendant actually *is* guilty, so long as the plea is the

defendant's voluntary and intelligent choice. *Id.* The Seventh Circuit has adhered to this view ever since. *See, e.g., Torzala v. United States*, 545 F.3d 517, 524 (7th Cir. 2008).

Until our case, only two other courts—the Sixth Circuit and the Kansas Supreme Court—followed the Seventh Circuit's innovative approach. *See United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995) (citing *Higgason* for the proposition that "[t]he requirement that a sentencing court must satisfy itself that a sufficient factual basis supports the guilty plea is not a requirement of the Constitution, but rather a requirement created by rules and statutes"); *Eggers v. Warden*, 826 F.3d 873, 876 (6th Cir. 2016) (characterizing *Alford*'s "strong factual basis" requirement as merely a method of determining whether a guilty plea is voluntary); *State v. Edgar*, 127 P.3d 986, 996 (Kan. 2006) (citing *Higgason* for the proposition that the factual basis "requirement is not constitutionally imposed").

In the decision below, the Colorado Supreme Court became the fourth court to adopt Judge Easterbrook's view. The Colorado Supreme Court surveyed the two sides of the split and sided with the Seventh Circuit. "Among these competing views, we find the Seventh Circuit's approach most persuasive," the court explained. App. 18a. "Although a finding of strong evidence of actual guilt *can* show that an *Alford* plea comports with due process, it is not a constitutional prerequisite for every such plea." *Id.* at 18a-19a (citing *Higgason*, 984 F.2d at 208).

The federal courts of appeals and state supreme court are thus divided on the question presented. Most courts have concluded that the Constitution

forbids a defendant from pleading guilty if there is no evidence that he truly is guilty. But a few courts have held the opposite.

The conflict is at its most acute in states that are subject to two inconsistent constitutional doctrines, one rule in the state courts and a contrary rule in the federal courts. These states include Colorado and Kansas, which conflict with the Tenth Circuit; Michigan and Tennessee, which conflict with the Sixth Circuit; and Wisconsin, which conflicts with the Seventh Circuit. These conflicts can produce inconsistent outcomes whenever federal courts assess the constitutionality of state convictions, as often happens on habeas and under the federal statutes imposing lengthier sentences on defendants with prior state convictions.

Below, Colorado acknowledged this split. People's Answer Brief, Colo. Sup. Ct., at 20 ("many federal circuits and states are split on this issue"). So did the Colorado Supreme Court, app. 16a-18a, and the Colorado Court of Appeals, *id.* at 33a-38a.

The split has existed for thirty years, ever since the Seventh Circuit decided *Higgason*. It will continue to exist until this Court decides which side is right.

II. The decision below is wrong.

Certiorari is also warranted because the Colorado Supreme Court is mistaken. Before convicting a criminal defendant, a court must have evidence that the defendant is guilty.

This was the holding of *Alford* itself. Alford pleaded guilty to murder, despite insisting he was innocent of the murder, to avoid the possibility of receiv-

ing the death penalty. *Alford*, 400 U.S. at 28. The question before the Court was whether this was a constitutionally permissible plea. The Court noted that "[o]rdinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him." *Id.* at 32. The Court observed, however, that the defendant's *admission* of guilt is not necessarily a constitutional prerequisite to a conviction, because of the long tradition of accepting pleas of *nolo contendere*, or "no contest." *Id.* at 37.

The Court acknowledged that a plea of guilty differs from a plea of *nolo contendere*. *Id.* (The difference is that in a *nolo contendere* plea, the defendant takes no position as to his guilt or innocence. For this reason, a *nolo contendere* plea, unlike a guilty plea, cannot be used against the defendant in a subsequent civil proceeding. Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 176 (Westlaw ed.).) But the Court reasoned that there is no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea *and the record before the judge contains strong evidence of actual guilt.*" *Alford*, 400 U.S. at 37 (emphasis added). That is, the Court held that both kinds of pleas are constitutionally permissible despite the absence of a confession of guilt, but only where the record includes strong evidence that the defendant is, in fact, guilty.

This could not have been loose language, because the Court repeated this holding twice. First, the

Court stated: "*In view of the strong factual basis for the plea demonstrated by the State* and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." *Id.* at 38 (emphasis added). Second, the Court explained that "various state and federal court decisions properly caution that *pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea.*" *Id.* at 38 n.10 (emphasis added). The holding of *Alford* is crystal clear. Before a court may constitutionally accept an *Alford* plea, the court must be satisfied that the defendant is guilty. This is how all the lower courts interpreted *Alford* until the Seventh Circuit decided *Higgason*.

It is also the only way that members of this Court have interpreted *Alford*. In *Henderson v. Morgan*, 426 U.S. 637 (1976), Justice White (the author of *Alford*), joined by Justices Stewart, Blackmun, and Powell, explained that in *Alford*, the Court "held that where a defendant intelligently concludes that his interests require entry of a guilty plea *and the record before the judge contains strong evidence of actual guilt* a plea may be accepted even if accompanied by protestations of innocence." *Id.* at 648 (White, J., concurring) (internal quotation marks omitted; emphasis added). Likewise, in *Garza v. Idaho*, 139 S. Ct. 738 (2019), Justice Thomas, joined by Justices Alito and Gorsuch, described *Alford* as "permitting courts to accept guilty pleas where defendants admit that *there is a factual basis for the plea*, but do not admit actual guilt." *Id.* at 750 n.1 (Thomas, J., dissenting) (emphasis added). By contrast, no member of the Court has embraced Judge

Easterbrook's view that *Alford* permits a court to accept a guilty plea where there is no evidence of the defendant's guilt.

This unanimity is hardly surprising. In cases decided before and after *Alford*, the Court has consistently held that it is not consistent with due process to convict a defendant in the absence of evidence that the defendant is guilty. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm."); *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) (holding that it is "a violation of due process to convict and punish a man without evidence of his guilt").

Indeed, until relatively recently it would have been unthinkable to convict a defendant without evidence of his guilt. In England, according to Blackstone, a defendant's "conviction may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country." 4 William Blackstone, *Commentaries on the Laws of England* 355 (Oxford, 1769). There was simply no way to obtain a guilty verdict in the absence of evidence that the defendant was guilty. The same was true in the 19th-century United States. *See, e.g.*, Francis Wharton, *A Treatise on the Criminal Law of the United States* 134 (Philadelphia, 1846) (describing the same two ways of obtaining

a conviction); Franklin Fiske Heard, *The Principles of Criminal Pleading* 308 (Boston, 1879) (same).

The *Alford* Court was thus correct in insisting that a guilty plea may not be constitutionally accepted without evidence that the defendant is guilty. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Under traditional practice, guilty pleas required evidence of guilt. No one appears to have thought otherwise until Professor Easterbrook published his article.

The traditional rule makes a great deal of sense when one looks beyond narrow considerations of efficiency.

To begin with, innocent defendants often plead guilty based on poor advice from overburdened appointed counsel. Stephanos Bibas, *The Machinery of Criminal Justice* 63 (2012). Allowing such pleas without evidence of guilt will only exacerbate this problem.

Second, the public has an interest in seeing that justice is done. The criminal justice system expresses "the conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). When defendants plead guilty who are not in fact guilty, the public cannot help but doubt the fairness and the accuracy of the criminal justice system.

Third, convicting the guilty provides vindication and closure to the victims of crime, but convicting the innocent on a guilty plea provides neither. Victims lose their day in court. They receive neither an admission of wrongdoing from the defendant nor

even an authoritative factual finding of guilt by the court.

Finally, punishing the defendant is not the only purpose of the criminal justice system. Another goal is to rehabilitate the defendant and reintegrate him into the community. Admitting one's own wrongdoing is typically the first step toward rehabilitation. *Alford* pleas already go part of the way toward undermining this goal, and *Alford* pleas without evidence of guilt would complete the undermining.

The traditional rule thus has much more than tradition to recommend it.

It would be no answer to argue, as Colorado did below, that even if the Constitution requires evidence of guilt before a defendant pleads guilty, the defendant may waive that requirement. A waivable requirement of guilt would be no requirement at all. These are negotiated pleas in which the defendant *wants* to plead guilty despite his innocence. The whole point of requiring evidence of guilt as a prerequisite for a guilty plea is that there are good reasons not to allow innocent people to plead guilty even when they want to. Such pleas are contrary to our constitutional tradition, which governs a system of criminal *justice*, not a financial market in which guilt and innocence are merely chips to be traded.

III. This is an important issue, and this case is a rare vehicle for resolving it.

This issue is important because it affects an enormous number of criminal defendants. The state courts resolve more than 18 million criminal cases each year. National Center for State Courts, *Timely Justice in Criminal Cases: What the Data Tells Us*

6.[1] Approximately six percent of them end in *Alford* pleas. *See supra* at 2. That's a lot of *Alford* pleas. Trial courts need to know whether they can accept these pleas where there is no evidence that the defendant committed the charged crime.

Because these pleas are negotiated, defendants rarely appeal, so this issue does not come to the Court very often. This case presents an unusual opportunity to resolve a fundamental question.

The answer to the question presented will determine the outcome of this case. Delano Medina was charged with menacing—that is, with threatening his wife with a knife. App. 3a-4a. There was no physical evidence. Medina denied the charge. The only evidence of his guilt was his wife's 911 call in which she made the accusation. By the time Medina entered his *Alford* plea, however, his wife had recanted the accusation, so there was no evidence left. *Id.* at 6a n.2.

The plea that followed was a thoroughly cynical transaction in which Medina agreed to plead guilty to a crime he hadn't committed, in exchange for the prosecutor's promise not to prosecute him for crimes he *had* committed. Until thirty years ago, this would have been a shocking outcome that no one would have defended as consistent with due process. It should not be viewed as consistent with due process today.

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[1] https://www.ncsc.org/__data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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