NO. 23-618

In the
Supreme Court of the United States

DELANO MARCO MEDINA,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP J. WEISER
Attorney General

SHANNON W. STEVENSON
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Shannon.Stevenson@coag.gov
(720) 508-6000

JILLIAN J. PRICE
Deputy Attorney General

GRANT R. FEVURLY
Senior Assistant Attorney General

WILLIAM G. KOZELISKI
Senior Assistant Attorney General

ALLISON S. BLOCK
Assistant Attorney General Fellow

Counsel for Respondent

QUESTION PRESENTED

Petitioner faced a multitude of charges, including ten felonies. To take advantage of a favorable plea offer, Petitioner chose to plead guilty to a single felony in exchange for a stipulated short prison sentence and dismissal of all the other charges. Although he maintained his factual innocence of the charge to which he pleaded guilty, Petitioner admitted his guilt to some of the dismissed charges. He also waived the establishment of a factual basis pursuant to state law to ensure the negotiated plea disposition was accepted by the district court.

The question presented is as follows:

Does the Due Process Clause of the Fourteenth Amendment preclude a criminal defendant from making an otherwise voluntary, knowing, and intelligent decision to plead guilty to a crime to which he maintains innocence, and from waiving establishment of a factual basis, so that he may take advantage of a favorable plea bargain that ensures the dismissal of other charges to which he has admitted guilt?

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STATEMENT OF THE CASE

Initial Plea and Sentencing. In August 2013, Petitioner held a knife to his wife's throat during an argument, telling her, "You're not going to tell me what to do. I'm the man." Pet. App. 26a, 52a-53a. After Petitioner left, his wife called 911 to report the incident. Pet. App. 26a; CF, pp 5-6. Officers located and arrested Petitioner, who had a knife inside his pants pocket. Pet. App. 26a; CF, p 5. Petitioner was charged with one count of felony menacing (committed with the use of a real or simulated weapon) for this incident. Pet. App. 4a, 26a.

At the time, Petitioner also faced prosecution in five other cases in the same county that encompassed: ten felony counts ranging from identity theft to forgery, eleven misdemeanor counts, a misdemeanor traffic offense, a traffic infraction, and a habitual criminal sentence enhancer. Pet. App. 4a, 26a.

Petitioner pleaded guilty to the menacing charge with a stipulated one-year prison sentence in exchange for the dismissal of the charges in the five other cases. Pet. App. 26a. Petitioner acknowledged that "there [was] a factual basis for [his] guilty plea," and that he was "waiv[ing] establishment of a factual basis for the charge." Pet. App. 4a. Petitioner was advised of the elements of menacing, various rights he was giving up by pleading guilty, and the possible sentencing range. CF, pp 31-35.

Before the plea colloquy, Petitioner's attorney ("plea counsel"), told the court that Petitioner "steadfastly maintains that the menacing would not be a provable case," but also acknowledged that Petitioner

"does not have a defense" to the "other cases, in particular a bond violation." Pet. App. 4a. Accordingly, plea counsel represented that Petitioner "was choosing to plead guilty to felony menacing, 'even though in his heart of hearts he does not believe he's guilty of that,' so [Petitioner] could 'take advantage of the plea bargain.'" Pet. App. 4a-5a. Plea counsel also stated that Petitioner "would be waiving proof of a factual basis." Pet. App. 5a.

The district court acknowledged that Petitioner was "kind of doing an *Alford*[1] plea." Pet. App. 5a; TR 1/9/14, p 6. It asked Petitioner if he had read and understood everything in the plea agreement and Petitioner said he had. Pet. App. 5a. It warned Petitioner that he would be "giving up some serious rights" by pleading guilty, which it then described in turn, and Petitioner said that he understood. Pet. App. 5a, 44a-45a. Noting that Petitioner was "not admitting that you did that, except that you're saying 'I'm willing to plead guilty,'" the court explained the elements of felony menacing and asked Petitioner whether he understood that the prosecution would have to "prove each of those things by proof beyond a reasonable doubt" at trial, which Petitioner acknowledged. Pet. App. 5a, 45a-46a. Finally, the district court advised Petitioner that once he pleaded guilty, his decision was "final" and that he could not come back at another time and "change [his] mind"; again, Petitioner stated he understood. Pet. App. 5a, 46a.

The district court then asked Petitioner how he chose to plead, and he pleaded guilty. Pet. App. 5a.

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

The court found that Petitioner "waived the factual basis" and that his plea was "freely, voluntarily, knowingly, and intelligently given," and accepted the plea agreement. Pet. App. 5a.

The court set the matter over for sentencing, but Petitioner "posted bond and absconded for almost a year until he was apprehended." Pet. App. 5a-6a, 26a.

Once Petitioner reappeared, he was represented by a new attorney ("sentencing counsel"), who made an oral motion to withdraw the plea based on new evidence – jail phone calls – that would purportedly show Petitioner did not actually use a knife during the menacing incident.[2] Pet. App. 6a, 27a. The district court denied Petitioner's request to withdraw his plea, noting "there's no evidence before me that [Petitioner's] plea was not freely, voluntarily, knowingly and intelligently done," and sentenced him in accordance with the plea agreement. Pet. App. 6a, 27a.

Postconviction Proceedings. Almost three years later, Petitioner filed a motion for postconviction relief, arguing, in part, that his conviction violated the Due Process Clause because "there was no factual basis for the plea." Pet. App. 6a, 55a-56a.

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[2] The State disagrees with Petitioner's assertion that this evidence constituted a recantation on the part of his wife. Indeed, the jail phone calls including these purported statements were never provided to the district court despite the court indicating Petitioner could pursue this claim through a written motion if there was "actual prove [sic] of that." Pet. App. 50a, 55a; TR 3/19/15, pp 17-20. And, in any event, it is undisputed that Petitioner was aware of these phone calls, to the extent they actually occurred, *before* he pleaded guilty. Pet. App. 6a.

At an evidentiary hearing on the motion, plea counsel testified that Petitioner waived the factual basis for menacing because "he may have been guilty of some of the other charges" – even if he may not have believed he was guilty of menacing – and "wanted to take the plea agreement, and that's the way it was offered by the District Attorney." *See* Pet. App. 7a, 27a-28a; TR 4/12/19, p 75:4-15. Plea counsel also explained it was Petitioner's choice to plead guilty, and that entering into the plea agreement resulted in the dismissal of his other pending cases and reduced his bond. Pet. App. 7a, 28a; TR 4/12/19, pp 75:16-24, 78-79.

Petitioner testified that he was innocent of the menacing charge but acknowledged "[t]he other cases I was guilty of." Pet. App. 7a; TR 4/12/19, pp 89-90. Petitioner conceded that part of the reason he entered the plea was so he "could take the benefit of getting [his] other cases dismissed," and testified that he had experience in the criminal justice system prior to these cases and was "aware of the process" of entering pleas. TR 4/12/19, pp 104-05. He admitted that he waived a factual basis in this case "because that's what [plea counsel] wanted me to do," and noted the judge "wouldn't accept [the plea] if I said I'm innocent, I'm not guilty and didn't waive factual basis," so he "went along with what was going on." TR 4/12/19, pp 106-07. Petitioner conceded that pleading guilty to menacing "was my choice" and that "[n]obody forced me." Pet. App. 7a.

The postconviction court denied Petitioner's motion. Pet. App. 7a. It found that Petitioner "waived a factual basis for the purpose of availing himself of the plea bargain in the case and entered an *Alford* plea."

Pet. App. 54a, 65a. The court found it "[p]articularly persuasive" that Petitioner pleaded guilty "knowing he would obtain the benefits of an 'incredibly favorable' plea bargain, including the dismissal of five other cases and a stipulated one-year sentence." Pet. App. 7a, 64a. The court also found that the "[r]ecord as a whole does provide a sufficient basis upon which to determine that there was a strong factual basis for the offense," and specifically pointed to the warrantless arrest affidavit and complaint in reaching this conclusion. Pet. App. 63a-65a. Accordingly, the postconviction court found that there was "no violation of [Petitioner's] due process rights with regard to the voluntariness of the plea" as he entered his "plea to a charge to which he claimed innocence with the full knowledge of the rights he had and the implications of such a plea," and there was a "factual basis for the plea sufficient to meet the *Alford* requirements." Pet. App. 64a-65a.

Proceedings on Appeal. Petitioner appealed, arguing, in part, that "due process requires that an *Alford* plea be supported by strong evidence in the record, a requirement that is not waivable." *People v. Medina*, 2021 COA 124, ¶ 14 ("*Medina I*"); Pet. App. 28. A division of the Colorado Court of Appeals, after observing that federal and state courts were split on the issue, agreed that "the strong factual basis from *Alford* is required as part of constitutional due process," but disagreed that this requirement was a "separate element – or separate constitutional due process right – from a court's requirement generally to determine whether a defendant knowingly, voluntarily, and intelligently entered a plea agreement." *Medina I*, ¶¶

25-37, 48; Pet. App. 33a-38a, 42a-43a. Because Colorado's procedural rules – namely Crim. P. 11(b)(6) – allow defendants to waive the factual-basis finding when entering a plea agreement, the division concluded that such a waiver – if validly made – does not "render[] an *Alford* plea involuntary as a matter of law" or violate a defendant's due process rights. *Medina I*, ¶¶ 4, 14, 18, 48; Pet. App. 25a, 28a-30a, 42a-43a. Applying those principles, the division found that Petitioner waived a factual-basis finding and "voluntarily, knowingly, and intelligently entered into his plea agreement," and affirmed the order of the post-conviction court. *Medina I*, ¶ 65; Pet. App. 51a.

The Colorado Supreme Court affirmed, "albeit on slightly different grounds." *Medina v. People*, 2023 CO 46, ¶ 3 ("*Medina II*"); Pet. App. 3a. It agreed that a defendant entering an *Alford* plea could waive proof of a factual basis "under the plain language of Crim. P. 11(b)(6)." *Medina II*, ¶¶ 3, 37-38; Pet. App. 3a, 19a-21a. However, it disagreed that a strong factual basis was constitutionally required for such a plea. *Medina II*, ¶¶ 3, 37 n.6; Pet. App. 3a, 19a. The supreme court recognized that "[o]ther appellate courts are split on this issue," and, after canvassing those cases, ultimately determined that a finding of "strong evidence of actual guilt" was not a "constitutional prerequisite" for an *Alford* plea. *Medina II*, ¶¶ 30-36; Pet. App. 16a-19a. Rather, the Constitution's standard "was and remains whether the plea represents a voluntary and intelligent choice." *Medina II*, ¶ 35 (quoting *Alford*, 400 U.S. at 31); Pet. App. 19a. And while inquiring into factual guilt is "one way that courts may assess whether an *Alford* plea is voluntary, knowing, and intelligent," it is "not the only way" to do so. *Medina II*,

¶ 36; Pet. App. 19a. Indeed, while *Alford* noted that evidence "of Alford's guilt 'provided a means by which the judge could test whether the plea was being intelligently entered,'" it did not "state that strong evidence of guilt *alone* can provide those means." *Medina II*, ¶ 36 (quoting *Alford*, 400 U.S. at 38); Pet. App. 19a. Accordingly, the supreme court held that a "defendant may enter an *Alford* plea while nonetheless waiving the establishment of a factual basis for the charge under Crim. P. 11(b)(6), provided that the plea is voluntary, knowing, and intelligent." *Medina II*, ¶ 40; Pet. App. 22a. As Petitioner's plea satisfied this standard, it was validly entered, and no error occurred. *See Medina II*, ¶¶ 41-43; Pet. App. 22a-23a.

SUMMARY OF THE ARGUMENT

This Court should deny certiorari because: (1) the case below was properly decided; (2) this case is an unsuitable vehicle for deciding the Question Presented; and (3) any outstanding circuit split does not warrant this Court's intervention.

The Colorado Supreme Court reached the correct decision. *Alford* explicitly states that the standard for assessing a guilty plea is whether it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant," 400 U.S. at 31. This Court has reaffirmed that standard multiple times since *Alford*. While the "strong factual basis" language in *Alford* supported the validity of the plea in that case, nowhere does *Alford* make it mandatory for all cases. Moreover, even if the Constitution required a factual basis for *Alford* pleas, Colorado's procedural rules properly allow a defendant to waive that

requirement, so long as that decision is knowing, voluntary, and intelligent.

Second, this case is a poor vehicle to decide whether a strong factual basis is required. As discussed, Petitioner waived the establishment of a factual basis at the plea hearing. The postconviction court also determined there was a factual basis for Petitioner's guilty plea. And unlike the circumstances in *Alford*, Petitioner pleaded guilty in exchange for the dismissal of other charges for which he or his counsel acknowledged his guilt.

Third, review is unwarranted because the Question Presented is not substantial and does not warrant the Court's attention. Indeed, the issue for which Petitioner seeks review rarely arises because, as occurred here, criminal defendants generally only accept plea agreements that are in their best interests. Nor is there evidence that States are abusing *Alford* pleas by entering criminal convictions against innocent individuals. Finally, Petitioner grossly overstates the actual variation in the approach of different courts to this issue. Thus, to the extent there is any such variation, there is no need for this Court to resolve it.

REASONS FOR DENYING THE PETITION

I. The Colorado Supreme Court reached the correct result.

This Court should decline review because the decision below does not run afoul of *Alford*. And even if a factual basis is otherwise required by *Alford*, Colorado's procedural rules properly allow a defendant to waive such requirement.

A. A strong factual basis is not a constitutional requirement of an *Alford* plea.

Petitioner argues that the "strong evidence of actual guilt" discussed in *Alford* is a nonwaivable constitutional prerequisite for all *Alford* pleas. Pet. 24-29. He is mistaken.

An *Alford* plea is "simply shorthand for a guilty plea accompanied by a protestation of innocence." *United States v. Mancinas-Flores*, 588 F.3d 677, 681 (9th Cir. 2009); *see also United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995) ("An *Alford*-type guilty plea is a guilty plea in all material respects."); *People v. Birdsong*, 958 P.2d 1124, 1127 (Colo. 1998) ("An *Alford* plea is a guilty plea.").

In *Alford*, the defendant was indicted for first-degree murder – a capital offense in North Carolina – but pleaded guilty to a lesser offense, despite his protestations of innocence, to avoid the death penalty. 400 U.S. at 27-29. Prior to accepting the plea, the trial court heard a summary presentation of the state's case, which suggested that Alford had committed the murder. *Id.* at 28. The trial court accepted the plea and sentenced him to prison. *Id.* at 29.

Alford later challenged his conviction, arguing that his plea was invalid because he maintained his innocence. *See id.* at 31. This Court held that Alford's choice to plead guilty while maintaining his innocence was constitutionally permissible. *Id.* at 38-39. As this Court made clear, the standard for assessing the validity of a guilty plea "*was and remains* whether the plea represents a voluntary and intelligent choice

among the alternative courses of action open to the defendant."[3] *Alford*, 400 U.S. at 31 (emphasis added); *see Roddy v. Black*, 516 F.2d 1380, 1385 (6th Cir. 1975) ("*Alford* held that there is no constitutional bar to accepting a guilty plea in the face of an assertion of innocence, so long as a defendant voluntarily, knowingly, and understandingly consents to be sentenced on a charge. . . . [T]here is no constitutional requirement that a trial judge inquire into the factual basis of a plea.").[4] And while evidence of a defendant's guilt can assist a court in its assessment of whether an *Alford* plea is voluntary, knowing, and intelligent as it provides "a means by which the judge [can] test whether the plea [is] being intelligently entered," *Alford*, 400 U.S. at 38, it is not the sole way to do so, *see Higgason v. Clark*, 984 F.2d 203, 208 (7th Cir. 1993) ("'Strong evidence of guilt' may suffice to sustain a conviction on an *Alford* plea . . . but it is not necessary to comply with the Constitution."); *Medina II*, ¶ 36.[5]

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[3] Notably, a court is not constitutionally required to accept an *Alford* plea – or even a standard guilty plea – "merely because a defendant wishes so to plead." *Alford*, 400 U.S. at 38 n.11. Such a right – as well as the procedural requirements for the acceptance of such a plea – derives instead from statute or court rule, not the constitution. *See id.* ("[T]he States may by statute or otherwise confer such a right.").

[4] This Court has reaffirmed that standard on multiple occasions in the years following *Alford*. *See, e.g.*, *Parke v. Raley*, 506 U.S. 20, 28-29 (1992); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

[5] Additionally, this Court did not explain in *Alford* just how "strong" the factual basis must be for an *Alford* plea, which militates against a finding that this Court, despite not further defining or expanding on this standard, nevertheless sought to establish a constitutional requirement. Indeed, even those courts

In so holding, this Court also stated that it could "not perceive any material difference" between Alford's plea and a plea of nolo contendere. *Id.* at 37. In both situations, "an express admission of guilt" was "not a constitutional requisite to the imposition of a criminal penalty," even though in Alford's case the "record before the judge contain[ed] strong evidence of guilt." *Id.* In both situations, the defendant concluded that entering the plea was in their best interests. *Id.* at 36-37; *see also id.* at 37 (no material difference between a nolo contendere plea and an *Alford* plea when a defendant "intelligently concludes that [their] interests require entry of a guilty plea" and they have "absolutely nothing to gain by a trial and much to gain by pleading").

Contrary to Petitioner's assertion, this Court's statement in *Alford* concerning "strong evidence of guilt" did not create a constitutional factual-basis requirement for guilty pleas with protestations of innocence. Pet. 25. *See Loftis v. Almager*, 704 F.3d 645, 650 (9th Cir. 2012) ("*Alford* did not explicitly hold that a factual basis was constitutionally necessary."). Rather, this language was necessarily tethered to, and a reflection of, the particular facts that were before the

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that have concluded such a factual-basis requirement exists disagree as to whether that basis differs in any respect from that required pursuant to Fed. R. Crim. P. 11 when a defendant enters a standard guilty plea, which further undercuts the status Petitioner affords it. *Compare White Hawk v. Solem*, 693 F.2d 825, 829 (8th Cir. 1982) (requiring a "strong factual basis") *with United States v. Morrow*, 914 F.2d 608, 612 (4th Cir. 1990) (noting it was "unwilling to place more requirements" on the Fed. R. Crim. P. 11 factual basis requirement "in the context of an *Alford* plea").

Court. *Alford* did not state that *only* strong evidence of factual guilt can render such a plea constitutionally permissible. *See Higgason*, 984 F.2d at 207 ("'If A then B' does not imply 'if not-A then not-B.'"); *United States v. Keiswetter*, 860 F.2d 990, 996 n.6 (10th Cir. 1988) ("*Keiswetter I*") (noting that "because the record in [*Alford*] revealed 'strong evidence' of the defendant's guilt, the plea of guilty was not constitutionally infirm," but that "[n]either *Alford*, nor any case subsequent to *Alford*, suggests that 'strong evidence' is the only constitutionally adequate standard for the acceptance of an *Alford* plea"), *modified as to remedy on reh'g by United States v. Keiswetter*, 866 F.2d 1301 (10th Cir. 1989) (en banc) ("*Keiswetter II*").[6]

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[6] Petitioner also states that the "only way" members of this Court have interpreted *Alford* since it was announced is that it established a constitutional factual basis requirement for *Alford* pleas. Pet. 26-27. He is incorrect. For instance, Chief Justice Rehnquist discussed *Alford* in his dissent in *Henderson v. Morgan*, 426 U.S. 637, 657-58 (1976) (Rehnquist, CJ, dissenting) – one of the cases cited by Petitioner – and does not even reference a factual basis, much less strong evidence, as integral to its holding. The Chief Justice noted that "we upheld the guilty plea [in *Alford*] because, as here, it was a tactically sound decision for the defendant to plead to second-degree murder in order to escape the greater penalties which might result from a first-degree murder conviction," and emphasized that the Court placed "great weight" on the fact that the defendant was represented by competent counsel. *Id.* at 658. Similarly, in *United States v. Vonn*, 535 U.S. 55, 69 n.8 (2002), Justice Souter, writing for eight of the nine justices, did not reference a factual-basis component at all when he described the theory of *Alford* as being "that a defendant may plead guilty while protesting innocence when he makes a conscious choice to plead simply to avoid the expenses or vicissitudes of trial." Finally, Petitioner cites as part of this argument

Petitioner also cites to a footnote in *Alford* observing 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," in support of his argument that this Court adopted a strong factual basis requirement. Pet. 26. But the plain language of this footnote rebuts Petitioner's argument as it did not state that such pleas "must not" or "cannot" be accepted. *Cf. Medina I*, ¶ 24 (observing that this footnote "did not mandate that an *Alford* plea may never be accepted if there was a waiver of a factual basis"); Pet. App. 32a-33a. Further, none of the cases this Court cited in the footnote held that a factual basis was a constitutional requirement. *See Griffin v. United States*, 405 F.2d 1378, 1380 (D.C. Cir. 1968); *Bruce v. United States*, 379 F.2d 113, 119 n.17 (D.C. Cir. 1967); *Commonwealth v. Cottrell*, 249 A.2d 294, 295 (Pa. 1969).

In sum, *Alford* did not alter the well-established standard for assessing the validity of a guilty plea – whether it was entered knowingly, voluntarily, and intelligently – and did not impose a constitutional factual-basis requirement for *Alford* pleas. Accordingly, the Colorado Supreme Court did not run afoul of *Alford* and this Court's review is unwarranted.

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to several non-plea cases for the proposition that "it is not consistent with due process to convict a defendant in the absence of evidence that the defendant is guilty." Pet. 27 (citing, in part, *Jackson v. Virginia*, 443 U.S. 307, 314 (1979)). But these cases are inapposite here given that a defendant who pleads guilty "waives constitutional rights that inhere in a criminal trial," *Florida v. Nixon*, 543 U.S. 175, 187 (2004), including the right "to be convicted by proof beyond all reasonable doubt," *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring).

B. A defendant in Colorado may, consistent with the Due Process Clause, waive any factual basis requirement.

Even if the Constitution requires a factual basis for an *Alford* plea, Colorado allows a criminal defendant to waive that factual basis in certain circumstances.

"The most basic rights of criminal defendants are . . . subject to waiver." *Peretz v. United States*, 501 U.S. 923, 936 (1991); *see also United States v. Clardy*, 877 F.3d 228, 229 (6th Cir. 2017) ("A defendant can waive 'any right, even a constitutional right,' in a plea agreement.") (citation omitted). Indeed, "a guilty plea waives important constitutional rights." *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987). As well, a defendant may waive statutorily created rights, which "logically flows" from the ability to waive constitutional rights. *United States v. Grimes*, 739 F.3d 125, 128 (3d Cir. 2014).

Even though entering a plea "frequently involves the making of difficult judgments," *McMann v. Richardson*, 397 U.S. 759, 769-70, 772 (1970), and involves an extensive waiver of the defendant's constitutional rights," it is constitutionally sound so long as it is knowing, voluntary, and intelligent, *see Nixon*, 543 U.S. at 187; *Parke*, 506 U.S. at 28-29; *People v. Schneider*, 25 P.3d 755, 759-60 (Colo. 2001).

Consistent with these principles, Colorado's Crim. P. 11(b)(6) provides that a defendant "may . . . waive the establishment of a factual basis for the particular charge to which he pleads" where the plea is entered as a result of a plea agreement and the court confirms that the defendant understands the basis for the

agreement. So long as a defendant waives the factual basis knowingly, voluntarily, and intelligently – which is what the language of Crim. P. 11(b)(6) seeks to ensure in any event – there is no constitutional impediment to doing so.

There are sound policy reasons for allowing a defendant the option of waiving a factual basis in the circumstances presented here. Indeed, "[r]ights are most valuable when individuals have the choice not to invoke them"[:] "From the defendant's perspective, the way to maximize the value of a right is to give [them] the option to waive it, just in case (as is often the case) [they] can exchange it for something else that is even more valuable to [them]." *Alvarez v. City of Brownsville*, 904 F.3d 382, 400-01 (5th Cir. 2018) (Ho, J., concurring) (rejecting an argument that the court should treat a defendant's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), as a requirement that they cannot waive in a plea bargain).

This is especially so in the context of an *Alford* plea. Allowing a defendant to validly waive a factual basis for such a plea is consistent with the spirit of *Alford* and its recognition of the validity of a plea to a charge a defendant asserts they are innocent of but that is in their best interests to enter. Allowing waiver maximizes the defendant's options with respect to such a plea. *See id.* at 401 (Ho, J., concurring) (noting the perils of forcing "unwaivable 'rights' upon the accused" and observing that when "the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, *to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is*

to imprison a man in his privileges and call it the Constitution.") (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)) (emphasis in original).

Were the situation otherwise, a court could effectively "force a[] defense on a defendant in a criminal case" to their detriment – a concern *Alford* acknowledged, *see Alford*, 400 U.S. at 33 (citing *Tremblay v. Overholser*, 199 F.Supp. 569, 570 (D.D.C. 1961)) – by concluding, despite the defendant's knowing, voluntary, and intelligent choice to resolve the case, that the evidence is not deemed "strong" enough in the court's eyes to allow an *Alford* plea. But various safeguards exist in the criminal justice system to ensure that the charges a defendant faces are warranted. *See, e.g.*, U.S. Const. amend. V (right to indictment by grand jury); U.S. Const. amend. VI (right to counsel); Fed. R. Crim. P. 4 (probable cause standard for issuance of arrest warrant or summons); § 16-5-301, C.R.S. (2023) (providing for a preliminary hearing, for numerous crimes, "to determine whether probable cause exists"). And perhaps most importantly, the decision to plead guilty is the defendant's alone, *see New York v. Hill*, 528 U.S. 110, 114 (2000), and each defendant has their "own reasons for wanting to avoid trial," *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Medina II*, ¶ 39 ("While a defendant's choice to plead guilty may be influenced by the factual basis for the charge, it may equally be influenced by other considerations."); Pet. App. 21a. Allowing a defendant to waive a factual basis in order to facilitate an *Alford* plea that they have determined to be in their best interests – as Petitioner did here – does not violate due process.

In sum, any factual basis requirement arising from *Alford* is subject to waiver so long as that decision is made knowingly, voluntarily, and intelligently. As Colorado's procedural rules account for, and are consistent with, this standard, Petitioner's factual-basis waiver in this case was constitutionally permissible. Further review is therefore unnecessary.

II. This case is an unsuitable vehicle to address the Question Presented.

A. This case is a poor vehicle to address the Question Presented because Petitioner waived the establishment of a factual basis under state law.

This is the wrong case to address the Question Presented because it does not involve a straightforward application of the question.

This is not a case where Petitioner's guilty plea was accepted without any regard to a factual basis. To the contrary, just like the Federal Rules of Criminal Procedure, Colorado's procedural rules require a district court to determine whether a factual basis is present before accepting a guilty plea. Crim. P. 11(b)(6) ("The court shall not accept a plea of guilty or a plea of nolo contendere without first determining . . . [t]hat there is a factual basis for the plea."). However, as discussed, Colorado law has an exception to that requirement if a proposed guilty plea is being "entered as a result of a plea agreement." *Id.* If the court is satisfied that the defendant understands the basis for the agreement, then "the defendant may waive the establishment of a factual basis for the particular charge to which he pleads." *Id.*; *see also People v. Maestas*, 224

P.3d 405, 408 (Colo. App. 2009) ("[T]he defendant excuses the establishment of a factual basis for the specific charge after a full explanation of the basis for the plea agreement.").

That is what occurred here. The district court ensured that Petitioner understood the basis for the plea agreement. Specifically, he was pleading guilty to a single felony with a stipulated prison sentence to gain the dismissal of several cases in which he admitted his guilt. Consistent with Colorado law, after the court ensured that Petitioner understood the basis for the plea agreement, it allowed him to waive a factual basis for the plea.

Apart from the merits, these circumstances demonstrate how poor a vehicle this case is to address the Question Presented. While the Colorado Supreme Court held that a factual basis is not a constitutional prerequisite for a valid *Alford* plea, it further held that a criminal defendant may waive the establishment of a factual basis for the charge. *See Medina II*, ¶ 40 ("[W]e hold that a defendant may enter an *Alford* plea while nonetheless waiving the establishment of a factual basis for the charge . . . provided that the plea is voluntary, knowing, and intelligent."); Pet. App. 22a. That added circumstance makes this case a poor vehicle to address the Question Presented.

B. The facts of this case do not implicate the Question Presented because the postconviction court found there was a factual basis for Petitioner's guilty plea.

This is also the wrong case to address the Question Presented because, following an evidentiary hearing, the postconviction court found there *was* a factual

basis to support Petitioner's plea. Thus, because any decision by this Court concerning the Question Presented would have no effect on the outcome of this case, this Court's review is unwarranted.

Following the evidentiary hearing, the postconviction court determined 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" to which Petitioner pleaded guilty. Pet. App. 64a. In doing so, the court relied on unremarkable federal case law that holds a trial court may rely on anything in the record to satisfy itself that a factual basis exists for the plea. *See Keiswetter I*, 860 F.2d at 996 ("Rule 11(f) permits the trial judge to find the factual basis for the plea '*in anything*' that appears in the record.") (emphasis in original).

Here, the postconviction court relied on the fact that: (1) Petitioner acknowledged there was a factual basis for his plea in the written plea advisement; (2) the court had thoroughly advised him of the elements of the offense to which he was pleading guilty; (3) Petitioner was entering into the agreement with the full knowledge and understanding that he was obtaining the benefit of a very favorable plea bargain; and (4) the record as a whole, including a warrantless arrest affidavit and complaint, provided sufficient evidence to form a factual basis for Petitioner's guilty plea. Given these circumstances, the postconviction court concluded there "was a factual basis for the plea sufficient to meet the *Alford* requirements." Pet. App. 63a-64a. As a result, even if this Court were to conclude that the Due Process Clause requires a trial judge to en-

sure that a factual basis underpins a criminal defendant's guilty plea, the postconviction court in this case has already concluded that standard was satisfied.

Finally, Petitioner incorrectly postures this case as presenting a traditional *Alford* scenario in which a criminal defendant wanted to plead guilty despite maintaining his innocence. It is not. As Petitioner admits, in this case he pleaded guilty to a crime that he did not believe he committed "in exchange for the prosecutor's promise not to prosecute him for crimes he *had* committed." Pet. 30 (emphasis in original). That is an entirely different circumstance than the one set forth in Petitioner's Question Presented. Thus, if this Court accepted this case, it would need to determine whether a defendant's admitted guilt on dismissed charges satisfies any purported factual basis due process requirement. Accordingly, this Court's review is unnecessary.

III. The Question Presented does not relate to a substantial issue, nor does the purported split among courts require this Court's intervention.

Review is unwarranted here because, contrary to Petitioner's suggestions, the issue in this case is not substantial. Petitioner argues that the State should not be permitted to offer criminal defendants the choice of pleading guilty to an offense even though there may be no factual basis for the conviction – a choice Petitioner himself thought was in his best interest. *Alford*, 400 U.S. at 38-39 ("Alford now argues in effect that the State should not have allowed him this choice but should have insisted on proving him

guilty of murder in the first degree.").[7] But there is an overarching constitutional concern of individual choice in criminal cases. *See McCoy v. Louisiana*, 584 U.S. 414, 421 (2018) ("[T]he right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law.") (cleaned up) (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)). Indeed, the decision to plead guilty is personal to a criminal defendant. *Hill*, 528 U.S. at 114. Thus, the

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[7] Some criminal defendants may plead guilty to a charge with no factual basis because the factual basis that underpins their actual conduct may lead to undesirable collateral consequences. *See* Eisha Jain, *Prosecuting Collateral Consequences*, 104 Geo. L.J. 1197, 1217 (2016) (discussing how prosecutors can structure plea agreements to avoid collateral consequences). As this Court has recognized, in some cases, collateral consequences will be a criminal defendant's primary concern from a conviction and, in turn, the deciding factor of whether to accept a plea offer from the prosecution. *See Lee v. United States*, 582 U.S. 357, 369 (2017) ("There is no question that deportation was the determinative issue in Lee's decision whether to accept the plea deal.") (internal quotations omitted); *see also People v. Joslin*, 415 P.3d 881, 884 (Colo. App. 2018) ("Defense counsel may nonetheless have a duty to advise a client of collateral consequences where defense counsel has reason to believe that the issue is highly significant to his or her client's decision to plead guilty."). It is unclear why the Due Process Clause would prohibit a criminal defendant from making such a choice. This is particularly true in Petitioner's case in which he admits he is guilty of the offenses in the other cases that were the subject of the plea agreement. Such a freely negotiated plea is far from a "cynical transaction," as Petitioner submits. Pet. 30. To the contrary, it is a freely negotiated disposition that both parties conclude is the best possible outcome under the circumstances. *See Bordenkircher*, 434 U.S. at 362 ("Properly administered, [plea bargains] can benefit all concerned.") (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977)).

Constitution, and the applicable decisions of this Court interpreting it, embody a principle that trusts individuals to do what is right for them. *See Bordenkircher*, 434 U.S. at 363 ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."). This Court should decline review when Petitioner sets forth no evidence that States are abusing *Alford* pleas by entering criminal convictions against innocent individuals. Thus, Petitioner does little more than present a solution in search of a problem.

Finally, while the State agrees there is not total uniformity among federal and state courts on the required factual findings to support a plea, Petitioner mischaracterizes the nature and extent of the purported split and intervention by this Court is unnecessary.

Many jurisdictions interpret *Alford* to require a factual basis for *Alford* pleas. But jurisdictions that have done so are divided as to the source. Some construe *Alford* to demand a factual basis as a constitutional requirement. *See, e.g.*, *United States v. King*, 673 F.3d 274, 282 (4th Cir. 2012); *Orman v. Cain*, 228 F.3d 616, 621 (5th Cir. 2000). Others hold that the factual basis requirement is grounded only in rule or statute. *See, e.g.*, *Tunning*, 69 F.3d at 111 ("The 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."); *Higgason*, 984 F.2d at 208.

Similarly, Petitioner proffers several cases, the holdings of which he asserts demonstrate that *Alford*'s demand of a factual basis is grounded in the Constitution. Pet. 8-12. However, many of these cases do not mention a source for the factual basis requirement, are not *Alford* cases at all, or merely mention the definition of an *Alford* plea as dicta. *See, e.g.*, *United States v. Williams*, 80 F.4th 85, 98 (1st Cir. 2023) (an *Alford* plea is still a conviction because of the strong factual basis of guilt requirement, but no source mentioned); *Wilson v. Lawrence Cty.*, 154 F.3d 757, 758 n.1 (8th Cir. 1998) (challenge to a 42 U.S.C. § 1983 action with a peripheral footnote defining *Alford*, but no source of factual basis mentioned); *Winslow v. Smith*, 696 F.3d 716, 736 (8th Cir. 2012) (plaintiffs claimed a substantive due process violation for reckless investigation and false evidence used to force them into a guilty plea; they did not claim a constitutional violation for sufficiency of evidence); *United States v. Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995) (citing *Alford* as requiring factual basis but not discussing source); *Keiswetter II*, 866 F.2d at 1301-02 (discussing proper remedy for violation of Fed. R. Crim. P. 11); *Wallace v. State*, 471 S.W.3d 192, 200 n. 4 (Ark. 2015) (defendant was denied request to enter *Alford* plea post-conviction; footnote describes *Alford* as requiring factual basis, but does not mention source); *In re Alvernaz*, 830 P.2d 747, 758 n. 9 (Cal. 1992) (habeas petition denied because defendant did not establish that he would have accepted a plea bargain; footnote cites to *Alford* to require a factual basis, but does not mention source); *State v. Chapman*, 944 N.W.2d 864, 872 (Iowa 2020) (discussing the standard of proof required for

collateral consequences of an *Alford* plea, but not the source of the factual basis requirement).

Further, Petitioner argues that "all lower courts interpreted *Alford*" to constitutionally require a strong factual basis "until the Seventh Circuit decided *Higgason*." Pet. 26. This is incorrect. Nearly two decades before *Higgason* was decided, the Sixth Circuit held that *Alford*:

> requires us to reject [the] attack on the trial judge's failure to establish a factual basis for the plea. *Alford* held that there is no constitutional bar to accepting a guilty plea in the face of an assertion of innocence, so long as a defendant voluntarily, knowingly, and understandingly consents to be sentenced on a charge. This being the rule, there is no constitutional requirement that a trial judge inquire into the factual basis of a plea. The requirement that a federal trial judge inquire into the factual basis of a plea stems from [Fed. R. Crim. P. 11] rather than from the Constitution.

Roddy, 516 F.2d at 1385.

In sum, even though there is some variation among courts in their approach to this question, it is not nearly as stark or pervasive as Petitioner asserts. And despite the variation on this question for almost five decades, this Court has never intervened. Because there continues to be no indication that the system is failing to properly function with respect to *Alford*

pleas, there remains no need for this Court to now resolve this issue. *Cf. Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 65 (2d Cir. 2016) ("Although a circuit split on this issue has persisted for some time, the Supreme Court has expressly declined to resolve it."), *vacated and remanded sub nom. on other grounds by Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433 (2017).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

SHANNON W. STEVENSON
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Shannon.Stevenson
@coag.gov
(720) 508-6000

JILLIAN J. PRICE
Deputy Attorney General

GRANT R. FEVURLY
Senior Assistant Attorney
General

WILLIAM G. KOZELISKI
Senior Assistant Attorney
General

ALLISON S. BLOCK
Assistant Attorney
General Fellow

Counsel for Respondent

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