No. 23-6250

IN THE

Supreme Court of the United States

MATTHEW C. SPAETH,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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This Court should grant this petition to review the Tenth Circuit's novel and erroneous interpretation of *Tollett v. Henderson*, 411 U.S. 258 (1973). The Tenth Circuit held below that *Tollett* precludes the government and the defendant from conditioning a guilty plea on the defendant's right to collaterally attack the conviction on grounds other than ineffective assistance of counsel that renders the plea invalid. Pet. App. 11a. That interpretation of *Tollett* is not only wrong and unprecedented, but it is also inconsistent with this Court's precedents on plea bargaining. Pet. 13-18. Even more importantly, the Tenth Circuit's decision severely restricts the ability of parties to plea bargain in federal criminal cases, raises ethical implications with current plea-bargaining practices, and sharply hampers federal courts' ability to correct pre-plea constitutional violations on collateral review. Pet. 34-40. It also effectively makes it impossible to remedy the widespread pattern of surreptitious prosecutorial misconduct that occurred in the District of Kansas. Pet. 6-10, 38-39.

The government does not dispute our interpretation of *Tollett*. BIO 14. Nor does the government take issue with the importance of the question presented or the seriousness of the prosecutorial misconduct that occurred in this case and the untold number of other cases in the District of Kansas. *See* BIO 14-15.[1] Rather, the government summarily claims that we've misread the Tenth Circuit's decision below, that Mr. Spaeth's plea agreement was not conditioned on the right to bring a

[1] *See Ayala-Garcia et al. v. United States*, Supreme Court Case No. 23-6621 (a pending joint petition on behalf of 32 other petitioners raising analogous Sixth Amendment prosecutorial misconduct claims).

prosecutorial misconduct claim based on pre-plea misconduct, and that our position that the Tenth Circuit's decision is unprecedented and inconsistent with this Court's precedent is "question-begging." BIO 14-15. The government also claims that this is a poor vehicle because "of the fact-specific issue of how to construe the language in [Mr. Spaeth's] plea agreement," and because of the Tenth Circuit's recent en banc grant in *United States v. Hohn*, 91 F.4th 1060 (10th Cir. 2024) (en banc). BIO 18-19. As explained below, none of these arguments are persuasive. Nor do they undermine the critical need for review here.

This Court should also grant this petition to review the Tenth Circuit's unsupported, unwarranted, and erroneous extension of *Tollett* to preclude collateral attacks to sentences based on pre-plea constitutional violations. Pet. 24-34. *Tollett* had nothing to do with sentencing challenges, its reasoning does not extend to such challenges, and neither this Court nor any other court of appeals has extended *Tollett* to the sentencing context. Pet. 24-34. It is also critically important that this Court review this question because the Tenth Circuit's decision trivializes the outsized role sentencing plays in the federal criminal justice system and seriously hampers courts' ability to correct constitutional violations that, although committed prior to the guilty plea, still impact the sentencing stage. Pet. 37-39.

The government disagrees that *Tollett* is limited to plea challenges, erroneously states that our sentencing challenge is dependent on a challenge to the plea, and suggests that other courts of appeals agree with the Tenth Circuit's extension of *Tollett* to the sentencing context. BIO 16-18. The government also suggests that

review in this case is "complicate[d]" because Mr. Spaeth entered into a Rule 11(c)(1)(C) agreement and received the agreed-upon sentence. BIO 18-19. As explained below, none of these arguments are persuasive. Review is necessary.

I. Review Is Necessary To Resolve Whether Tollett Limits Plea Bargaining In Federal Courts.

A. The Tenth Circuit erred, and it is critically important to the federal criminal justice system that this Court correct the error.

The Tenth Circuit held below that *Tollett* precludes the government and the defendant from conditioning a guilty plea on the defendant's right to collaterally attack the conviction on grounds other than ineffective assistance of counsel that renders the plea invalid. Pet. App. 11a. The government does not dispute that, if the Tenth Circuit so held, that holding would be incorrect. Rather, the government claims that this is not what the Tenth Circuit held below. BIO 14. According to the government, the Tenth Circuit "simply rejected [Mr. Spaeth's] argument that the carve-out in his appeal waiver dispensed with the *Tollett* rule." BIO 14.

The government's reading of the Tenth Circuit's decision is plainly incorrect. When discussing the "carve-out provision," the Tenth Circuit asked "what effect, if any," it had "on the rule of *Tollett*," concluding, "the short answer is none." Pet. App. 10a. Rather, "Spaeth's § 2255 claim [was] unaffected by the presence or absence of the [] appeal waiver." *Id.* "That is, the government **could not** (and did not) **waive application of the *Tollett* standard**." *Id.* (emphasis added). *See also* Pet. App. 11a ("[t]he appeal waiver **cannot** and does not **relax the legal standard in … *Tollett***"). "That standard leaves habeas petitioners with one avenue to pursue pre-plea

constitutional violations—ineffective assistance of counsel that causes their pleas to be involuntary and unknowing." Pet. App. 11a. "Both the government and defendants are bound by this rule of law. The appeal waiver **could not** and does not **waive the *Tollett* standard** . . . ." Pet. App. 11a (emphasis added).

The government's reading of the Tenth Circuit's decision is not only plainly incorrect, it also conflicts with the government's position below. Consistent with its position in the district court (and the district court's decision that it was defending), *see* Pet. App 3a-4a, the government argued (successfully) in the Tenth Circuit that "the carve-out provision does not waive application of *Tollett*." Gov't Br. 30. According to the government below, "that a defendant who challenges his conviction by guilty plea must show that his plea was involuntary [under *Tollett*] is unrelated to any collateral-attack waiver in the defendant's plea agreement." Gov't Br. 30; *see also id.* at 31 ("the government's agreement" within an appeal waiver "does not silently displace the independent legal standards that control not-waived collateral challenges").

It is disingenuous for the government now to claim that the Tenth Circuit's decision means something other than what it plainly holds and what the government itself asked the Tenth Circuit to hold below. Indeed, now that the government has abandoned its position below, it is even more critical for this Court to grant this petition. This Court should not allow the government to advance an erroneous argument below, convince the lower courts to adopt that erroneous argument, then come to this Court and avoid further review by abandoning the erroneous argument

and advancing an unsupported and plainly incorrect reading of the lower court's opinion. At a minimum, if this Court does not grant this petition outright, it should grant, vacate, and remand in light of the government's decision to abandon its erroneous but successful argument below. *See*, *e.g.*, *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 171-175 (1996) (discussing this Court's practice of granting, vacating, and remanding based on a concession or changed position by the Solicitor General and other parties).

The government attempts to avoid the significant problems with the Tenth Circuit's interpretation of *Tollett* a second way: by claiming that this petition is a poor vehicle for review because the Tenth Circuit further held that Mr. Spaeth did not condition his plea on the ability to raise a pre-plea prosecutorial misconduct claim. BIO 14-15. As we have explained, however, the solution to this supposed problem is not to deny certiorari, but to grant certiorari on this sufficiently connected question as well. Pet. 18-24. After all, this Court "often grant[s] certiorari on attendant questions that are not independently 'certworthy,' but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration." *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 620 (2015) (Scalia, J., concurring in part and dissenting in part).

Such review is particularly appropriate here not only because of the serious consequences that flow from the Tenth Circuit's erroneous interpretation of *Tollett*, but also because the Tenth Circuit's interpretation of the plea agreement conflicts with blackletter law and the agreement's plain terms. Pet. 19-24. The government

does not seriously dispute this point. Its only response is to parrot the Tenth Circuit's claim that our reading of the plea agreement would render the word "subsequent" superfluous. BIO 15. We have explained that this is untrue, however, and that our reading differentiates between "prior" claims (i.e., claims raised prior to the plea agreement) and "subsequent" claims (i.e., claims raised for the first time in a § 2255 motion). Pet. 21. The government has not even attempted to refute that point. BIO 15. Nor could it. Our reading of the plea agreement does not render anything superfluous within the agreement, and the Tenth Circuit's erroneous conclusion to the contrary is a further reason to grant certiorari, not a reason to deny certiorari. Pet. 19-24.

The government further states, in one sentence with no analysis, that our position that the Tenth Circuit's interpretation of *Tollett* conflicts with this Court's precedent on plea-bargaining is "question-begging" because it "presupposes that [our] interpretation of the plea agreement, the decision below, and *Tollett* itself is correct." BIO 15. But we can say the same thing about the government's claim that *Tollett* does not conflict with this Court's precedent. That position is also "question-begging" because it presupposes that the government's interpretation of the plea agreement, the decision below, and *Tollett* itself is correct. That's why certiorari is necessary here; to resolve the question presented. It should not surprise anyone that we've begged this Court to answer the question presented. Every petition for review does that.

Finally, the government claims that this petition is a poor vehicle because the Tenth Circuit recently granted hearing en banc in another case involving the pattern

of prosecutorial misconduct at issue here. BIO 19 (citing *Hohn*, 91 F.4th 1060). The government claims that the Tenth Circuit may "reverse the decision on which petitioner's Section 2255 motion is premised." BIO 19. But the en banc grant does not ask whether that decision – *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) – should be "reversed," but instead whether the Court should reconsider the structural-error aspect of that decision and whether nonprivileged communications can still be considered "confidential" for Sixth Amendment purposes under *Shillinger*. 91 F.4th at 1061. Those questions have nothing to do with the Tenth Circuit's erroneous interpretation of *Tollett* in the decision at issue here, and any en banc opinion in *Hohn* would not negate the need to resolve the wholly separate question presented in this petition. Moreover, even if the questions posed in *Hohn* become relevant in this case at some future point, the mere grant of en banc hearing offers no insight into what the Tenth Circuit might hold in its en banc decision (or even whether the Tenth Circuit will issue an en banc decision *see*, *e.g.*, *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (vacating en banc rehearing order without issuing an en banc opinion)).[2]

In the end, the government has not questioned or otherwise tried to justify the egregious pattern of prosecutorial misconduct at issue here or argued that the resolution of the question presented is not of exceptional importance. Rather, the

[2] If this Court believes that *Hohn* might have some relevance to the disposition of this petition, it could hold this petition pending *Hohn*'s en banc resolution. But there is no rational reason to deny this petition based solely on the en banc grant in *Hohn*, before this Court even knows how the en banc Tenth Circuit resolves *Hohn*. With that said, leaving in place the Tenth Circuit's erroneous interpretation of *Tollett* should not be an option under any circumstance.

government has made weak, conclusory, straw-man arguments that do nothing to justify the Tenth Circuit's unprecedented decision below or to undermine the critical need to resolve whether *Tollett* in fact severely limits plea bargaining in the federal courts. The question presented is of utmost importance, and this Court should grant this petition to resolve it.

B. The Tenth Circuit's Extension Of *Tollett* To Preclude Sentencing Claims Is Unsupported, Unwarranted, and Erroneous.

Tollett held that the defendant could not vacate his guilty plea based on a pre-plea constitutional violation. 411 U.S. at 259, 267-269. *Tollett* had nothing to do with an attempt to vacate a sentence, nor has this Court ever suggested that *Tollett* had anything to do with a challenge to the defendant's sentence. *See* Pet. 25-26. Nor would it make sense to extend *Tollett* to the sentencing context because a sentencing challenge is independent of a challenge to the defendant's guilt. *See* Pet. 27-30.

The government disagrees because *Tollett* involved a pre-plea constitutional violation. BIO 16-17. That's obviously true. But what is also obviously true is that *Tollett* held that the defendant could not attack the guilty plea itself (not the sentence) based on this pre-plea constitutional violation. 411 U.S. at 259, 267-269. The government does not, and could not, point to anything within *Tollett* that precludes a sentencing challenge because *Tollett* had nothing whatsoever to do with a challenge to the sentence.

Moreover, as we've already explained, Pet. 26-30, that the constitutional violation preceded the plea says nothing at all about whether that violation affected the sentence. As Justice Rehnquist once explained, the *violation* functionally occurs at

sentencing, regardless when the underlying unconstitutional *conduct* occurred. *Blackledge v. Perry*, 417 U.S. 21, 37 (1974) (Rehnquist, J., dissenting). The government does not even attempt to dispute this point, but instead parrot's the Tenth Circuit's hyperbole that our position "would render [*Tollett*] meaningless." BIO 17 (quoting Pet. App. 47a). That is obviously untrue: *Tollett* is not rendered meaningless because it still precludes a challenge to the guilty plea (unless the parties condition the plea on the ability to challenge that plea in a postconviction motion, as happened here).

The government's position also conflicts with 28 U.S.C. § 2255's plain text. Pet. 33-34. The government disagrees, but it does so under a false premise: that our sentencing challenge is not "independent of [our] challenge to [Mr. Spaeth's] conviction by plea." BIO 17. Of course it is. As we've explained, defendants often challenge sentences without challenging pleas, and that is true regardless whether the basis for the challenge preceded or postdated the guilty plea. Pet. 27-30, 34. One need only consider guidelines calculations to understand this point. Courts calculate guidelines ranges based almost entirely on pre-plea conduct, yet a defendant who pleads guilty does not waive his ability to litigate guidelines increases (i.e., challenges to the sentence) that are based on pre-plea conduct. *See* Pet. 28-29; Fed. R. Crim. P. 32(f) (expressly permitting guidelines objections made by all defendants, including those who plead guilty).

The government states that other courts of appeals have also interpreted *Tollett* to preclude sentencing challenges based on pre-plea constitutional violations. BIO 17-

18 (citing published opinions from the Second, Fifth, and Ninth Circuits, and unpublished opinions from the First and Fourth Circuits). We have already addressed the unpublished opinions and the Fifth Circuit's opinion in *United States v. Smallwood*, 920 F.2d 1231 (5th Cir. 1991). Pet. 31-32. The Second Circuit's opinion in *United States v. Arango*, 966 F.2d 64 (2d Cir. 1992), is not materially different than those decisions. That case involved a defendant's failure to move to suppress drugs prior to a guilty plea, then a belated attempt to suppress the drugs at sentencing. *Id.* at 65. These decisions generally follow the view, not at issue here, that the judicially-created (as opposed to constitutionally required) exclusionary rule does not apply at federal sentencings. *See*, *e.g.*, *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir. 1992) (citing cases). But even then, if a defendant makes "a showing that officers obtained evidence expressly to enhance a sentence," courts may refuse to consider such evidence at sentencing (even when defendants plead guilty). *Id.* And the Ninth Circuit's decision in *United States v. Leming*, 532 F.2d 647, 648-649 (9th Cir. 1975), turned on the defendants' "plea bargaining" to be sentenced under the Youth Corrections Act. That the defendants bargained away their ability to challenge the juvenile sentences in *Leming* is irrelevant here (the Tenth Circuit did not hold below that Mr. Spaeth bargained away his sentencing challenge). The government's inapposite cases confirm that the Tenth Circuit's decision below is an outlier.

That leaves the government's final point that Mr. Spaeth entered into a Rule 11(c)(1)(C) agreement and received the sentence that he bargained for. BIO 19. According to the government, this makes this a poor vehicle for this Court to resolve

whether *Tollett* applies to sentencing challenges. But that conclusion doesn't follow. Whether *Tollett* applies to sentencing challenges does not turn on whether Mr. Spaeth entered into a particular type of sentencing agreement. The legal question is straightforward, and it can be answered in this case. If this Court disagrees and believes that this case is a poor vehicle to address this issue, then it should grant certiorari in *Morris v. United States*, No. 23-6230, a pending petition that raises this identical issue and that does not involve any type of sentencing agreement whatsoever. If this Court grants certiorari in *Morris*, it could hold this petition pending the disposition of the petition in *Morris*.

The pattern of prosecutorial misconduct at issue here and in other similar cases is truly extraordinary. And the Tenth Circuit's novel and erroneous interpretation of *Tollett* is sure to wreak havoc on the plea bargaining process and the ability of courts to hold the government accountable for surreptitious constitutional violations that are only unearthed after the government obtains a guilty plea from the defendant. The questions presented in this petition are exceptionally important. Review is necessary.

Respectfully submitted,

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