No. 23-720

In the Supreme Court of the United States

OMAR AHMED KHADR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
MATTHEW G. OLSEN
Assistant Attorney General
DANIELLE S. TARIN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's petition for review based on the waiver of appellate rights in his plea agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulation, and rules:

Statutes, regulation, and rules—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 67 F.4th 413. The opinion of the United States Court of Military Commission Review (Pet. App. 36a-58a) is reported at 568 F. Supp. 3d 1266.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2023. A petition for rehearing was denied on August 4, 2023 (Pet. App. 34a-35a). On October 13, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 1, 2024. The petition was filed on January 2, 2024 (a Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 10 U.S.C. 950g(e) and 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea before a military commission at the United States Naval Base Guantanamo Bay, Cuba, petitioner was convicted of murder in violation of the law of war, in violation of 10 U.S.C. 950t(15); attempted murder in violation of the law of war, in violation of 10 U.S.C. 950t(28); spying in violation of the law of war, in violation of 10 U.S.C. 950t(27); conspiracy to commit offenses triable by military commission, in violation of 10 U.S.C. 950t(29); and providing material support for terrorism, in violation of 10 U.S.C. 950t(25). Pet. App. 40a. Petitioner was sentenced to 40 years of confinement, which the convening authority reduced to eight years pursuant to petitioner's pretrial plea agreement. *Id.* at 6a, 41a. The United States Court of Military Commission Review (CMCR) dismissed petitioner's appellate challenge for lack of jurisdiction. *Id.* at 36a-58a. The D.C. Circuit dismissed petitioner's petition for review of the CMCR's decision based on petitioner's waiver of appellate rights in his plea agreement. *Id.* at 1a-33a.

1. On September 11, 2001, the al Qaeda terrorist organization attacked the United States, murdering nearly 3000 people. In response, Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

Later that year, the President issued a military order authorizing the trial by military commission of noncitizens for certain offenses. *Military Order of November 13, 2001: Detention, Treatment, and Trial of Cer-*

tain Non-Citizens in the War Against Terror § 4, 3 C.F.R. 918, 919-920 (2001 Comp.). This Court in *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), however, held that the presidentially authorized military-commission system contravened statutory restrictions in the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* See *Hamdan*, 548 U.S. at 613-635. In response, Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (10 U.S.C. 948a *et seq.* (2006)), which Congress later largely superseded with the Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, Tit. XVIII, 123 Stat. 2574 (10 U.S.C. 948a *et seq.*).

The MCA establishes a military commission system "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. 948b(a). Among other things, the MCA identifies offenses triable by military commission. 10 U.S.C. 950t. Those statutorily identified offenses include, for example, murder "in violation of the law of war," 10 U.S.C. 950t(15).

2. Petitioner "is a Canadian citizen and the son of Ahmad Khadr, a former senior member of al Qaeda." Pet. App. 4a. According to petitioner's counseled stipulation of fact (C.A. App. A73-A81) that accompanied his counseled pretrial plea agreement (*id.* at A59-A65), petitioner was living in Afghanistan around June 2002 when, at age 15, he himself obtained basic training from al Qaeda. *Id.* at A76-A77. Petitioner has admitted that he voluntarily "chose to conspire and agree with various members of al Qaeda to train and ultimately conduct operations to kill United States and coalition forces." *Id.* at A77. And "[a]fter [petitioner] successfully completed

his training, [he] considered himself to be an active member of al Qaeda." *Ibid.*

In July 2002, petitioner joined a terrorist cell in Afghanistan composed of terrorists associated with al Qaeda and the Libyan Islamic Fighting Group. C.A. App. A77; see *id.* at A78-A79. Petitioner actively participated in the cell's construction and deployment of improvised explosive devices (IEDs) to kill U.S. and coalition forces. *Id.* at A77 (noting video evidence of petitioner's activities). Petitioner has admitted that he "voluntarily chose to conspire and agree * * * to construct and plant IEDs in support of al Qaeda" and that he and others in the cell "targeted U.S. forces with the specific intent of killing * * * as many [Americans] as possible." *Id.* at A78.

"[O]ne of [petitioner's] duties" in the terrorist cell "was to collect information on U.S. forces in order to determine where to plant IEDs to maximize the opportunity for death and destruction." C.A. App. A78. On at least one occasion, petitioner conducted a "spying mission" by blending in with civilians to obtain "actionable intelligence" about "U.S. troop movements near the airport in Khowst, Afghanistan." *Id.* at A78-A79. Petitioner collected information such as the "number and types of vehicles used by U.S. forces," the estimated distance between vehicles, military convoy speed, and time and direction of convoy movements "with the specific intent to learn the best locations to target U.S. forces with IEDs and to help al Qaeda in its attacks against U.S. forces." *Id.* at A79.

United States forces obtained information that suspected al Qaeda members who had been "conducting attacks against U.S. and coalition forces" were operating out of a compound in Ayub Kheil, Afghanistan. C.A.

App. A79. On July 27, 2002, U.S. forces were dispatched to investigate but, before they arrived, petitioner and the other cell members "received word that the Americans were coming to their location." *Ibid.* Rather than flee like the compound's owner, petitioner and the others stayed "in order to fight the Americans." *Ibid.*

When the U.S. forces arrived, they requested that the compound's occupants exit the compound so that the two sides could speak with one another. C.A. App. A79. The occupants refused. *Ibid.* Two members of the Afghan Military Forces accompanying the U.S. forces then "entered the main compound, raised their heads above a wall[,] and again asked for the occupants of the compound to come out and speak to the U.S. led forces." *Ibid.* Individuals within the compound opened fire, "instantly killing both Afghan soldiers." *Ibid.*

A four-hour firefight between U.S. forces and the al Qaeda cell ensued. C.A. App. A79. At several points during the firefight, including in breaks in the firing, "U.S. forces gave the occupants inside the compound multiple chances to surrender." *Ibid.* When "the women and children in the compound exited the compound," "U.S. forces escorted them to safety." *Ibid.* Petitioner and the remaining occupants, however, "made a pact that they would rather die fighting than be captured by U.S. forces." *Ibid.* Petitioner therefore "took up a fighting position within the compound" with an AK-47. *Ibid.* During the firefight, U.S. forces fired thousands of rounds of ammunition into the compound and requested close air support which, among other things, dropped two 500-pound bombs on the compound. *Id.* at A80.

When the U.S. forces concluded that the firefight was over, they initially believed that "all individuals in-

side the compound had been killed" and began clearing the compound. C.A. App. A80. As a U.S. Special Forces unit entered the compound, however, the soldiers "began taking direct fire from an AK-47." *Ibid.* They engaged the shooter, and killed him. *Ibid.*

Petitioner, who had likewise survived the battle, understood that "the firefight was over" and that "the soldiers entering the compound were looking for wounded or dead." C.A. App. A80. But upon hearing the soldiers approach, petitioner "positioned [himself] behind a crumbling wall" and then "armed and threw a Russian F-1 grenade in the vicinity of the talking soldiers" with "the specific intent of killing or injuring as many Americans as he could." *Ibid.*

The grenade landed near Sergeant First Class Christopher Speer, mortally wounding him. C.A. App. A80. Another special-forces soldier then engaged petitioner, shooting him twice. *Ibid.* Petitioner was taken into custody, treated for his injuries, and eventually "transferred to the Naval Base at Guantanamo Bay for detention." Pet. App. 4a.

3. In 2007, the convening authority for military commissions at Guantanamo Bay referred charges against petitioner to a military commission, namely, charges for Sgt. Speer's murder in violation of the law of war, attempted murder in violation of the law of war based on petitioner's IED activity, spying in violation of the law of war, conspiring to commit various offenses triable by military commission, and providing material support to terrorism. C.A. App. A10-A16; see Pet. App. 40a.

In 2008, a military judge denied petitioner's motions to dismiss the charges on ex post facto grounds, which were based on petitioner's contention that his 2002 offense conduct preceded Congress's 2006 codification of

the offenses. C.A. App. 28 (reasoning that codification of "the offense of murder in violation of the law of war" did not "create a new crime" because "the killing of a lawful combatant by an unlawful combatant," was already itself "a violation of the law of war"); *id.* at A19-A20, A31-A32, A36-A37, A42-A43 (similar rulings for remaining charges). Petitioner subsequently entered into a pretrial plea agreement (*id.* at A59-A65) with the convening authority.

In that agreement, petitioner "agreed, among other things, to plead guilty to all five charges and to waive his appeal rights." Pet. App. 4a-5a; cf. R. Military Comm'n 705(c)(2)(E) (authorizing pretrial agreements that "waive appellate review"). More specifically, petitioner promised that, upon "[his] execution of [an appeal-waiver form]," he would waive his "rights to appeal [his] conviction, sentence, and/or detention * * * in any judicial forum," except for his rights to "bring a post-conviction claim if any sentence is imposed in excess of the statutory maximum sentence or in violation of the sentencing limitation provisions contained in [the plea] agreement." C.A. App. A60 ¶ 2.f. "In exchange, the convening authority agreed not to approve any sentence in excess of eight years' confinement and to support [petitioner's] request for a transfer to Canadian custody." Pet. App. 5a; see C.A. App. A64 ¶ 6.

The MCA establishes the CMCR as a military appellate court responsible for conducting appellate review in military-commission cases. 10 U.S.C. 950f. The MCA, however, does not authorize an accused to initiate appellate review in the CMCR. The MCA instead authorizes the CMCR to conduct appellate review only in "each case that is referred to the [CMCR] by the convening authority under [S]ection 950c of [Title 10] with

respect to any matter properly raised by the accused." 10 U.S.C. 950f(c). Section 950c, in turn, provides that—except as provided in Section 950c(b)—"the convening authority shall refer" to the CMCR "each case in which the final decision of a military commission under [the MCA] (as approved by the convening authority) includes a finding of guilty." 10 U.S.C. 950c(a). Section 950c(b)'s exception to that referral requirement applies where the accused "file[s] with the convening authority a statement expressly waiving the right of the accused to appellate review by the [CMCR]" "within 10 days after notice of the [convening authority's] action is served on the accused or on defense counsel." 10 U.S.C. 950c(b)(1) and (3).

Here, after signing the plea agreement, petitioner executed and filed an appeal-waiver form (C.A. App. A71-A72), in which he expressly waived (subject to the limited exceptions noted above) his right to appellate review by the CMCR as well as "to further review by the Court of Appeals for the District of Columbia Circuit, or by the Supreme Court." *Id.* at A71; see Pet. App. 5a-6a. The next day, the military commission sentenced petitioner to 40 years of confinement. Pet. App. 6a. "At the sentencing hearing, the military judge reviewed with [petitioner] the terms of his appeal waiver and confirmed in a colloquy that the waiver was both knowing and voluntary." *Ibid.* Consistent with petitioner's pretrial plea agreement, the convening authority then approved only eight years of the 40-year sentence imposed by the military commission. C.A. App. 82; see Pet. App. 6a. And in light of petitioner's express written waiver of his right to appellate review in the CMCR, which petitioner filed before the convening authority's action, C.A. App. A71; see *id.* at A60, the con-

vening authority did not refer petitioner's case to the CMCR for appellate review. Pet. App. 7a, 42a.

The CMCR therefore did not initiate appellate review. Instead, "[i]n September 2012, based in part on the convening authority's support, [petitioner] was transferred to Canada to serve the remainder of his sentence." Pet. App. 6a-7a. In 2015, "[t]he Queen's Bench of Alberta ordered Khadr released on bail" and, in 2019, the same Canadian court "determined * * * that his sentence had expired." *Id.* at 7a. Petitioner was subsequently released without conditions. *Ibid.*

4. In November 2013—2.5 years after the convening authority's action and more than a year after petitioner's transfer to Canada—petitioner attempted to initiate appellate review in the CMCR. Pet. App. 37a.[1] On October 21, 2021, after holding petitioner's request in abeyance for several years pending the D.C. Circuit's rulings in another military-commission case, *id.* at 7a, the CMCR dismissed petitioner's appellate action for lack of jurisdiction. *Id.* at 36a-58a.

The CMCR concluded that 10 U.S.C. 950f(c) is a "jurisdictional statute" that grants the CMCR authority to conduct appellate review in a military-commission case only if the convening authority has referred the case to it under 10 U.S.C. 950c. Pet. App. 39a-40a, 43a-54a. The court observed, however, that it possessed authority to compel such a referral by writ of mandamus to correct a convening authority's erroneous refusal to do so. *Id.* at 55a-56a.

Noting that petitioner had never requested that the convening authority refer his case to the CMCR, Pet. App. 42a, the CMCR returned the matter to the conven-

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[1] The filings in petitioner's relevant CMCR case (No. 13-005) are available at https://www.mc.mil/Cases/CMCR-Cases.

ing authority with instructions that on remand, petitioner "may ask the convening authority to refer his case," *id.* at 57a. The CMCR stated that it would entertain a future mandamus petition if petitioner were to show that (a) he "acted diligently on remand" in filing a "request seeking a referral" and (b) the convening authority denied the request. *Ibid.*

On November 8, 2021, petitioner petitioned the D.C. Circuit for review of the CMCR's decision. C.A. Pet. for Review. Two days later, petitioner requested that the convening authority refer the case to the CMCR for review. C.A. App. A135. The government took the position that the convening authority "should refer [petitioner's] case to the [CMCR]." *Id.* at A137. But on December 3, 2021, the convening authority denied petitioner's request. *Id.* at A132-A133.

5. Rather than petition the CMCR for mandamus to compel the referral of his case for appellate review (as the CMCR had contemplated), petitioner pursued only his petition for review in the D.C. Circuit. The D.C. Circuit dismissed petitioner's petition for review. Pet. App. 1a-33a.

a. The government argued, among other things, that the D.C. Circuit lacked jurisdiction to review the CMCR's jurisdictional dismissal under 10 U.S.C. 950g. That provision grants the D.C. Circuit "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR])." 10 U.S.C. 950g(a). Section 950g further provides that the D.C. Circuit "may act * * * only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the

[CMCR]." 10 U.S.C. 950g(d). And here, the government observed that the CMCR's decision did not "affirm[] or set aside" a military commission judgment. Pet. App. 10a (citation omitted).

The court of appeals explained, however, that it need not resolve that jurisdictional issue because it found petitioner's case "fatally infirm" on the separate, "nonmerits threshold" question of "waiver." Pet. App. 10a-11a. Specifically, the court of appeals dismissed the petition for review based on petitioner's "broad" and "unambiguous[] waive[r]" of his right to seek review in the D.C. Circuit. *Id.* at 2a, 12a-13a; see *id.* at 10a n.1 (distinguishing waiver of right to review in the CMCR from waiver of further review in the D.C. Circuit). The court determined that petitioner's waiver was knowing and voluntary. *Id.* at 23a-24a. And it rejected petitioner's arguments that his waiver is unenforceable or that review of certain of petitioner's contentions can never be waived. *Id.* at 13a-24a.

In particular, the court of appeals rejected petitioner's contention that, under *Class* v. *United States*, 583 U.S. 174 (2018), a defendant can never waive a potential appellate claim that the statute of conviction (here, the MCA) is unconstitutional. Pet. App. 15a-17a. The court explained that "*Class* held only that a plea of guilty *on its own*" will "'not necessarily waive challenges to the constitutionality of [such a] statute.'" *Id.* at 15a (citation omitted). And it observed "[petitioner] expressly waived the right to appeal his convictions, sentence and detention" and "[n]othing in *Class*" prevents "a defendant from *expressly* waiving his right to challenge the statute of conviction on appeal." *Id.* at 16a-17a.

The court of appeals also rejected petitioner's contention that his guilty plea was not knowingly made, which was premised on the theory that the military judge had erroneously "ruled against him on the merits of his legal claims" and thereby "misinformed him about the nature and constitutionality of the charges against him." Pet. App. 23a-24a. The court explained that petitioner could not "challenge [his] plea based on an alleged error of law that was raised, rejected[,] and then waived pursuant to the plea" where petitioner was "aware that the military judge had rejected his theories" yet "nonetheless chose to plead guilty and expressly waive his right to appeal those erroneous (in his view) rulings." *Ibid.*

b. Judge Randolph filed a concurrence that explained his view of when a court may resolve a case that presents jurisdictional questions on threshold nonjurisdictional grounds. Pet. App. 25a-27a. And Judge Wilkins filed a dissenting opinion in which he took the view that the petition for review should have been dismissed on jurisdictional grounds. *Id.* at 28a-33a.

In explaining why he too would have denied appellate relief, Judge Wilkins observed that Section 950g grants the D.C. Circuit jurisdiction to review a final judgment rendered by a military commission "on a limited basis," requiring that the judgment first be either "'affirmed or set aside'" by the CMCR. Pet. App. 29a (citation omitted). And he found such jurisdiction lacking because petitioner sought "review of the CMCR's decision dismissing for lack of jurisdiction" and "remanding with instructions," which did not "'affirm[] or set[] aside'" a military commission judgment as "required to grant [the D.C. Circuit] jurisdiction under [Section] 950g(a)." *Id.* at 30a.

ARGUMENT

Petitioner contends (Pet. 9-13, 19-22) that the court of appeals erred in dismissing his petition for review based on his express waiver, on the theory that a "generic appeal waiver" cannot "bar[] a defendant from challenging a conviction based on conduct that the law d[id] not proscribe" when the conduct occurred, Pet. 21. Petitioner further contends (Pet. 13-19) that the courts of appeals are divided on that question. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be an unsuitable vehicle for review for several reasons: the military-commission context of this case involving a foreign belligerent detained outside of the United States is highly atypical; the D.C. Circuit lacks statutory jurisdiction to hear petitioner's case; and petitioner waited to seek review until after he had obtained all the benefits of his plea agreement and is now in Canada beyond the United States' power to confine him for his offenses. The petition should be denied.

1. The court of appeals correctly dismissed petitioner's petition for review because petitioner knowingly and voluntarily entered a plea agreement that expressly waived his "rights to appeal [his] conviction, sentence, and/or detention * * * in any judicial forum," C.A. App. A60, and then implemented that agreement by executing a form that specifically waived his right "to further review by the [D.C.] Circuit," *id.* at A71.

As the D.C. Circuit explained, petitioner's "broad" and "unambiguous[] waive[r]" of his right to appellate review in exchange for a generous reduction in his sentence and other benefits is enforceable because it was knowing and voluntary. Pet. App. 12a-13a, 23a-24a; see

id. at 17a. Particularly given that petitioner agreed to the waiver after the military judge had denied his challenges to the charges, he "cannot now have the merits of his waived claims reviewed in the court of appeals by arguing his waiver was invalid because those claims were wrongly decided [by the military judge]." *Id.* at 24a.

This Court has emphasized that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). Statutory rights are likewise subject to waiver unless Congress "affirmative[ly] indicat[es]" otherwise. *Ibid.* This Court has therefore repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as the waiver is knowing and voluntary. See, *e.g.*, *Ricketts* v. *Adamson*, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double-jeopardy defense); *Town of Newton* v. *Rumery*, 480 U.S. 386, 389, 398 (1987) (waiver of right to file constitutional tort action).

The language of an appeal waiver in a plea agreement is interpreted as a contract and will "preclude[] challenges that fall within its scope" if it is knowing and voluntary and thus enforceable. *Garza* v. *Idaho*, 139 S. Ct. 738, 744-745 (2019) (citation omitted). And here, petitioner expressly and broadly waived any right to appellate review by the D.C. Circuit (or any other appellate court) to challenge his "conviction, sentence, and/or detention," while expressly preserving as an "except[ion]" his right to seek review of a sentence exceeding "the statutory maximum" or that violates the "sentencing limitation[s]" in his plea agreement. C.A. App. A60, A71. That knowing and voluntary waiver extinguishes petitioner's right to challenge his conviction on

the ground that the statute of conviction was unconstitutional. Pet. App. 13a, 17a.

If petitioner were correct that a defendant could never waive the right to appeal on the ground that a statute of conviction is unconstitutional, that rule would not advance the interests of defendants generally. As the court of appeals observed, if a defendant's appeal waiver is not enforced, "the waiver would lose its value as a bargaining chip for the defendant," who would lose the ability to exchange it for concessions from the government. Pet. App. 17a.

Indeed, in this very case, petitioner's "waiver was an especially effective bargaining chip." Pet. App. 17a. It enabled petitioner to obtain a reduction of his 40-year term of confinement to just eight years, secure a transfer "to Canadian custody" "on the convening authority's recommendation," and then obtain (from Canadian authorities) his early "release[] on bail after serving only a portion of his [eight-year] sentence" for the murder of a U.S. soldier and other serious law-of-war offenses. *Ibid.*

2. Petitioner contends (Pet. 9-13, 19-22) that a "generic appeal waiver" does not "bar[] a defendant from challenging a conviction based on conduct that the law d[id] not proscribe" when the conduct occurred, Pet. 21. But petitioner fails to show that a defendant cannot knowingly and voluntarily waive such a challenge in a broad appeal waiver, with express exceptions only for types of claims other than the one at issue, like petitioner's appeal waiver here.

Petitioner repeatedly invokes (Pet. 1, 8-9, 12-13, 20, 22) this Court's decision in *Class* v. *United States*, 583 U.S. 174 (2018). But as the court of appeals recognized (Pet. App. 15a-17a)—and as petitioner himself appears

likewise to recognize, see Pet. 12-13—*Class* concerns only the "general waiver of appellate rights *implicit* in a guilty plea." *Ibid.* (emphasis added). In *Class*, the defendant's challenge to the constitutionality of the statute of conviction did "not contradict the terms of * * * the written plea agreement" and did "not fall within any of the categories of claims that [the defendant's] plea agreement forbid[] him to raise on direct appeal." *Class*, 583 U.S. at 181. And the Court held that, in the absence of such an express waiver, the defendant's "guilty plea by itself" did not bar him from "challenging the constitutionality of the statute of conviction on direct appeal." *Id.* at 178; see *id.* at 176. But nothing in *Class* calls into question a defendant's ability to expressly waive his right to appeal his conviction—even on constitutional grounds—where the waiver is otherwise knowing and voluntary.

Petitioner's reliance (Pet. 11) on *Bousley* v. *United States*, 523 U.S. 614 (1998), is similarly misplaced. In *Bousley*, the Court concluded that a criminal defendant may challenge the validity of his guilty plea on the ground that it was not knowingly entered where the trial court affirmatively "misinformed him as to the elements" of the offense and where "the record reveal[ed] that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Id.* at 618-619. But petitioner's claim is not analogous. And even with respect to a claim that an offense's elements were misdescribed at the time a defendant pleaded guilty, this Court has made explicitly clear that such a claim is forfeited if not timely raised. See *Greer* v. *United States*, 593 U.S. 503, 506-507 (2021). It should follow that it can be knowingly and intelligently waived.

Here, moreover, the parties' litigation—and the military judge's adjudication—of petitioner's constitutional challenge underscores that petitioner knowingly waived in his plea agreement his right to appeal on that issue. Had petitioner wanted to preserve his rights to relitigate that issue, he could have proceeded without a plea agreement or sought to except it from his broad waiver of appellate rights. Instead, however, he elected to waive his right to appeal his conviction without preserving his ability to seek review on that issue in order to obtain an agreement that ultimately provided him a generous sentence reduction and other significant benefits from the convening authority.

Petitioner observes (Pet. 21) that, after he entered his plea agreement, the D.C. Circuit determined that the offense of providing material support for terrorism was a "new offense" created in 2006 because it was not an "international law-of-war offense" or sufficiently analogous to an offense historically "triable by military commission." *Al Bahlul* v. *United States*, 767 F.3d 1, 27, 29 (2014) (en banc) (*Bahlul I*); see *id.* at 27-30; see also *id.* at 18 (assuming without deciding that the government correctly conceded that the "Ex Post Facto Clause applies in cases involving aliens detained at Guantanamo") (emphasis omitted). But that change in the governing precedent affecting one of petitioner's charges (material support) does not render petitioner's earlier waiver of appellate review in his plea agreement non-knowing or non-voluntary.

A "voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady* v. *United States*, 397 U.S. 742, 757 (1970); see *United States* v.

Ruiz, 536 U.S. 622, 630 (2002) (explaining that guilty plea will be valid notwithstanding "various forms of misapprehension under which a defendant might labor," including a failure to anticipate a subsequent "change in the law"). "[T]here always remains a chance the law could change in the defendant's favor," but a "defendant knowingly and voluntarily assumes that risk because he receives a presumably favorable deal under existing law." *United States* v. *Goodall*, 21 F.4th 555, 563-564 (9th Cir. 2021), cert. denied, 142 S. Ct. 2666 (2022).

To the extent that the government would forgo reliance on an appeal waiver where a defendant has been convicted of a non-crime, that does not entitle petitioner to relief in this Court. As five members of the Court thus recently explained in a statement accompanying the denial of certiorari, that "this Court has no appropriate legal basis to vacate" a judgment of a court of appeals that affirmed the denial of relief under 28 U.S.C. 2255 on appeal-waiver grounds, even where "new caselaw" provided grounds for an argument for relief. *Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2580 (2022) (statement of Kavanaugh, J., respecting the denial of certiorari); see *Grzegorczyk* v. *United States*, 997 F.3d 743, 745-746 (7th Cir. 2021) (concluding that appeal waiver in plea agreement waived the "challenge to the legal sufficiency of the [Section] 924(c) charge"), cert. denied, 142 S. Ct. 2580 (2022).[2]

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[2] Petitioner is moreover incorrect in suggesting (Pet. 21) that the D.C. Circuit articulated a standard in *Bahlul I* that "undercut[s] the legal foundation of [petitioner's] remaining charges." With respect to petitioner's conspiracy charge, the D.C. Circuit has rejected an ex-post-facto challenge to a conviction for conspiracy to commit war crimes based on pre-9/11 conduct, and petitioner's conspiracy conviction is materially similar. See *Al Bahlul* v. *United States*, 840

3. Petitioner errs in asserting (Pet. 13-17) that the court of appeals' decision conflicts with decisions from the Second, Third, and Fourth Circuits.

The Second Circuit in *United States* v. *Balde*, 943 F.3d 73 (2019), addressed an appeal waiver in the context of a claim that the district court violated Federal Rule of Criminal Procedure 11 by misdescribing the elements of the offense in accepting a defendant's guilty plea. *Id.* at 93. It is not clear, however, that the Second Circuit would disagree with the D.C. Circuit's dismissal of the petition for review of petitioner's military-commission conviction in the particularized circumstances here. In particular, nothing about petitioner's claim here—which was litigated before the military judge—suggests that his plea was not knowingly and intelligently entered, as the Second Circuit deemed Balde's plea to have been. See *id.* at 93-97.

The Third Circuit's decision in *United States* v. *Castro*, 704 F.3d 125 (2013), is similarly inapposite. The court there found a "miscarriage of justice" that it

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F.3d 757, 758 (2016) (en banc) (per curiam), cert. denied, 583 U.S. 928 (2017). The court upheld the conspiracy conviction by a six-to-three vote. *Ibid.* Four judges upheld the conviction by applying de novo review, *ibid.*; see *id.* at 759-774 (Kavanaugh, J., concurring); one did so under plain-error review without resolving the question de novo, *id.* at 758 (per curiam); see *id.* at 774-797 (Millett, J., concurring); and one concluded that international law effectively recognizes a non-inchoate conspiracy law-of-war offense based on the "reasonably foreseeable offenses committed by others in the [conspiracy]," *id.* at 801, 804 (Wilkins, J., concurring); see *id.* at 797-804. And petitioner identifies no sound basis for concluding that his convictions for murder "in violation of the law of war," 10 U.S.C. 950t(15), attempted murder in violation of the law of war, 10 U.S.C. 950t(28), and spying "in violation of the law of war," 10 U.S.C. 950t(27), were new offenses (rather than a codification of existing law-of-war offenses) when they were codified in 2006 and 2009.

viewed as a basis for disregarding an appeal waiver where the evidence was insufficient to prove the offense of conviction. *Id.* at 137, 139. Petitioner does not raise a similar claim, and it is additionally unclear that the Third Circuit's "miscarriage of justice" rationale would apply here, where petitioner was convicted of five offenses including murder; obtained substantial benefits from his plea agreement, including a significant sentence reduction from 40 to just eight years of confinement (which he served only in part before a Canadian court granted him bail); and identifies a defect in only a single count on which he was convicted. Cf. *McKeever* v. *Warden SCI-Graterford*, 486 F.3d 81, 86 (3d Cir.) (rejecting argument that a guilty plea based on "a multi-count plea agreement [is] *per se* invalid when a subsequent change in the law renders a defendant innocent of some, but not all, of the counts therein"), cert. denied, 552 U.S. 1019 (2007).

Finally, the only relevant published Fourth Circuit decision cited by petitioner is *United States* v. *McKinney*, 60 F.4th 188 (2023), in which that court took the view that it could refuse to enforce an appeal waiver if its enforcement "would result in a 'miscarriage of justice,'" which it deemed to include a case in which a defendant presented a cognizable claim of "'actual innocence.'" *Id.* at 192 (citation omitted). The court there was addressing a concededly invalid conviction under 18 U.S.C. 924(c), which carried a mandatory consecutive sentence in addition to the sentence for the other offense for which the defendant was convicted. See *id.* at 191-193. The decision thus would not compel the Fourth Circuit to similarly adopt a miscarriage of justice rationale to disregard the appeal waiver here, which comes in the context of a military-commission convic-

tion for multiple crimes, with overlapping sentences, all of which were reduced to an eight-year sentence under the plea agreement.

4. At all events, this case for multiple reasons would be an unsuitable vehicle to review the D.C. Circuit's appeal-waiver-based dismissal of petitioner's petition for review.

First, as an initial matter, the military-commission context of this case is highly atypical. The relevant statutory and plea-procedure rules that apply to military commissions are different from those that apply to federal criminal prosecutions. And this Court has never decided whether or how related constitutional rules that apply to domestic criminal prosecutions in the United States might apply to military commissions and foreign belligerents detained at Guantanamo Bay, Cuba. This case therefore would not be a suitable case for addressing petitioner's assertion of any circuit disagreement concerning federal criminal contexts.

Second, as Judge Wilkins explained, dismissal is independently required because the D.C. Circuit lacks statutory jurisdiction under 10 U.S.C. 950g to review the CMCR's decision. See Pet. App. 29a-30a. Section 950g vests the D.C. Circuit with jurisdiction to review a military commission's "final judgment" only as approved by the convening authority and "as affirmed or set aside" by the CMCR. 10 U.S.C. 950g(a). The D.C. Circuit therefore may act "*only* with respect to the [approved] findings and sentence * * * *as affirmed or set aside*" by the CMCR. 10 U.S.C. 950g(d) (emphases added). But the CMCR has neither "affirmed [n]or set aside" (*ibid.*) any portion of the military commission's judgment; it instead "dismiss[ed] [petitioner's] appeal for want of jurisdiction" and "remand[ed] this matter to

the convening authority with instructions" to consider a request to refer the case to the CMCR for appellate review. Pet. App. 56a-57a. That CMCR decision thus is not one over which the D.C. Circuit possesses appellate jurisdiction.

Finally, this Court should deny review as a prudential matter because petitioner waited 2.5 years to seek review of the military commission's judgment and more than a year after his transfer to Canada, see p. 9, *supra*. He has thereby ensured that he had already secured all the benefits of his plea agreement and cannot readily be reimprisoned if the government is denied a critical benefit that it sought from the plea-agreement bargain. Although petitioner is not technically a fugitive from justice, the principles animating the fugitive-disentitlement doctrine counsel against a discretionary grant of certiorari.

That doctrine recognizes that "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal" because, as here, there would "be no assurance that any judgment it issued would prove enforceable." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239-240 (1993). The Court has similarly determined that it is "clearly within [the Court's] discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment [the Court] may render." *Id.* at 240 (quoting *Smith* v. *United States*, 94 U.S. 97, 97 (1876)). Permitting petitioner to continue litigating this case in this Court from abroad with no guarantee that he could return to custody in the United States would not only result in an inequitable implementation of petitioner's plea agreement, it would allow petitioner to litigate

complicated and sensitive issues governing the proper administration of the military-commission system without any realistic prosect that he would return to military custody if the government prevails on those issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
MATTHEW G. OLSEN
Assistant Attorney General
DANIELLE S. TARIN
Attorney

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