No. 25-936

In the Supreme Court of the United States

NADARIUS BARNES, PETITIONER,

v.

UNITED STATES

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

REPLY BRIEF FOR THE PETITIONER

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
TRIAL LAWYERS FOR JUSTICE
421 W. Water Street
Decorah, IA 52101
(866) 854-5529
Andrew@TL4J.com

NICOLE MASIELLO
LISA CORDARA
DANA KHABBAZ
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street,
New York, NY 10019
(212) 836-8000

KENESHA STARLING DUNCAN
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana St., Ste. 4000
Houston, TX 77002
(713) 576-2400

DANA KAGAN MCGINLEY
SPENCER J. FABER
CONNOR MORGAN
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

EDWARD K. FEHLIG, JR.
FEHLIG LAW FIRM, LLC
3002 S. Jefferson Ave., Ste. 207
St. Louis, MO 63118
(314) 359-5690

TABLE OF CONTENTS

Page

Reply Brief for the Petitioner 1
Argument..2
I. The Split Is Entrenched And Recurring..................2
II. The Question Presented Is Important 7
III. The Decision Below Is Wrong..................................8
IV. This Case Is An Ideal Vehicle 10
Conclusion..11

TABLE OF AUTHORITIES

Cases Page(s)

Blackledge v. Perry,
417 U.S. 21 (1974) 8, 9

In re Bonvillian Marine Serv., Inc.,
19 F.4th 787 (5th Cir. 2021) 3

Brady v. United States,
397 U.S. 742 (1970) 9, 10

Class v. United States,
583 U.S. 174 (2018) 4, 8, 9

Grzegorczyk v. United States,
997 F.3d 743 (7th Cir. 2021) 5

Jacobs v. Nat'l Drug Intel. Ctr.,
548 F.3d 375 (5th Cir. 2008) 3

Menna v. New York,
423 U.S. 61 (1975) 8, 9

Missouri v. Frye,
566 U.S. 134 (2012) 7

United Bhd. of Carpenters & Joiners of Am. v. United States,
330 U.S. 395 (1947) 9

United States v. Al Hedaithy,
392 F.3d 580 (3d Cir. 2004) 6

United States v. Aquart,
92 F.4th 77 (2d Cir. 2024) 5, 6

United States v. Bain,
925 F.3d 1172 (9th Cir. 2019) 4

United States v. Broce,
488 U.S. 563 (1989) 9, 10

United States v. Brown,
875 F.3d 1235 (9th Cir. 2017) 4

Cases—Continued Page(s)

United States v. Carrasco,
No. 23-50238, 2024 WL 64765
(5th Cir. Jan. 5, 2024) 3

United States v. Chavez-Diaz,
949 F.3d 1202 (9th Cir. 2020) 5

United States v. Cotton,
535 U.S. 625 (2002) 1, 2, 4, 9

United States v. Delgado-Garcia,
374 F.3d 1337 (D.C. Cir. 2004) 5

United States v. Fuller,
No. 25-10639, 2026 WL 33973
(11th Cir. Jan. 6, 2026) 4, 6

United States v. Jones,
75 F.4th 502 (5th Cir. 2023) 2, 3, 6

United States v. Nyandoro,
146 F.4th 448 (5th Cir. 2025) 3

United States v. Ortiz,
927 F.3d 868 (5th Cir. 2019) 3

United States v. Peter,
310 F.3d 709 (11th Cir. 2002) 4

United States v. Pittman,
125 F.4th 527 (4th Cir. 2025) 5, 6

United States v. Porter,
933 F.3d 226 (3d Cir. 2019) 6

United States v. Reasor,
418 F.3d 466 (5th Cir. 2005) 2

United States v. Rosa-Ortiz,
348 F.3d 33 (1st Cir. 2003) 6

United States v. Rubin,
743 F.3d 31 (2d Cir. 2014) 5

Cases—Continued Page(s)

United States v. Shortman,
No. 21-30198, 2022 WL 17500201
(9th Cir. Dec. 8, 2022) 5

United States v. St. Hubert,
909 F.3d 335 (11th Cir. 2018) 4

United States v. Turner,
94 F.4th 739 (8th Cir. 2024) 5, 6

Statutes and Rules

18 U.S.C. § 924(c) 3, 4

Fed. R. Crim. P. 11(b)(3) 10

Other Authorities

Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*,
55 Duke L. J. 209 (2005) 7

Petition for Certiorari, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (No. 15-290) 5

Petition for Certiorari, *United States v. Sanchez-Gomez*, 584 U.S. 381 (2018) (No. 17-312) 5

U.S. Brief, *Hunter v. United States*,
(No. 24-1063) (argued Mar. 3, 2026) 8

U.S. Brief in Opp., *Abouammo v. United States*,
(No. 25-5146) (argued Mar. 30, 2026) 7

U.S. Brief in Opp., *Ellingburg v. United States*,
607 U.S. 163 (2026) (No. 24-482) 7

U.S. Cert. Reply Brief, *Comm'r v. Est. of Jelke*,
555 U.S. 826 (2008) (No. 07-1582) 10

U.S. Cert. Reply Brief, *Match-E-BeNash-She-Wish Band v. Patchak*, 132 S. Ct. 2199 (2012)
(Nos. 11-246, 11-247) 10

U.S. Cert. Reply Brief, *United States v. Bean*,
537 U.S. 71 (2002) (No. 01-704) 10

In the Supreme Court of the United States

NADARIUS BARNES, PETITIONER,

v.

UNITED STATES

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

REPLY BRIEF FOR THE PETITIONER

The courts of appeals are openly divided over whether a guilty plea alone bars a defendant from arguing on appeal that the conduct he admitted is not a crime. The consequences are stark: Guilty pleas are central to the operation of the federal criminal system. The effect of a guilty plea on appeal rights shapes plea negotiations every day. If the plea itself extinguishes the most important of those rights, express appellate waivers are virtually worthless.

Unable to deny the conflict or minimize the stakes, the government focuses on the merits. It says *United States v. Cotton*, 535 U.S. 625 (2002), forecloses defendants from appealing guilty pleas because *Cotton* held that indictment defects are not jurisdictional and guilty pleas impliedly waive all nonjurisdictional defenses. But that argument rests on the mistaken premise that this Court has never adopted: that a guilty plea impliedly waives every nonjurisdictional claim. That claim is disproven by the Court's three cases recognizing that guilty pleas do not impliedly waive constitutional challenges.

The government's lone vehicle argument fails. It says review should be denied because petitioner will lose on remand. That is not a vehicle problem. Speculation about what might happen after the correct rule is applied is no reason to deny certiorari.

This case presents an entrenched conflict on an important and recurring question at the heart of federal criminal practice. The petition should be granted.

ARGUMENT

I. THE SPLIT IS ENTRENCHED AND RECURRING

The government does not deny the circuit conflict. It does not deny that multiple courts of appeals have recognized it. Pet. 17-18. It does not deny that leading treatises and law-review surveys catalogue it. Pet. 18-19. It does not deny that the government itself identified the conflict in its Tenth Circuit brief in this very case. Pet. 2 & n.1. Instead, the government says the conflict is "overstated" and unworthy of review. Opp. 10. It is neither.

A. The circuits on petitioner's side of the split are consistent and clear: a guilty plea admits facts; it does not impliedly waive the right to argue that those facts do not constitute a federal crime.

1. Start with the Fifth Circuit. The government concedes that the Fifth Circuit has held—recently, after *Cotton*, and in a published decision—that a guilty plea does not bar a defendant from arguing on appeal that "the facts set forth in the record do not constitute a federal crime." *United States v. Jones*, 75 F.4th 502, 508 (5th Cir. 2023); *see* Opp. 13. The government tries to dismiss *Jones* as an outlier because it cited *United States v. Reasor*, 418 F.3d 466, 470 (5th Cir. 2005), which in turn cited earlier authority. Opp. 13. But that is not how circuit law works. *Jones* is binding Fifth Circuit law. Under the Fifth Circuit's "well-settled" rule of orderliness, one panel may

not disregard another panel's published decision absent intervening controlling authority from this Court, the en banc court, or Congress. *Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). That rule is "strict and rigidly applied." *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021). So whatever the government thinks about earlier Fifth Circuit decisions, *Jones* settled the issue in that circuit.

The Fifth Circuit continues to entertain factual-basis challenges to 18 U.S.C. § 924(c) convictions after guilty pleas. *See, e.g.*, *United States v. Carrasco*, No. 23-50238, 2024 WL 64765, at *1 (5th Cir. Jan. 5, 2024). As the Fifth Circuit recently explained *again*, it has "repeatedly held that 'even if there is an unconditional plea …, th[e] Court has the power to review if the factual basis for the plea fails to establish an element of the offense which the defendant pled guilty.'" *United States v. Nyandoro*, 146 F.4th 448, 458 (5th Cir. 2025) (quoting *United States v. Ortiz*, 927 F.3d 868, 873 (5th Cir. 2019)). The government cannot wish the Fifth Circuit out of the split by hypothesizing an internal disagreement the Fifth Circuit itself has not recognized. The rule in that circuit is clear: a guilty plea does not foreclose review where the defendant argues that the admitted facts do not establish a federal offense. This appeal would have been heard on the merits there.

2. The Eleventh Circuit is equally clear. The government told the Tenth Circuit that the Eleventh Circuit would have heard petitioner's claim on the merits. *See* Pet. 2 & n.1. It now tries to walk that concession back by saying the Eleventh Circuit has expressed "some doubt" about its own rule. Opp. 14. But this Court determines whether to grant certiorari based on conflicts in holdings, not reservations in dicta. The Eleventh Circuit's rule is clear: a guilty plea does not waive a claim that the indictment and admitted facts fail to state a

federal offense. *United States v. Peter*, 310 F.3d 709, 713-15 (11th Cir. 2002); *United States v. St. Hubert*, 909 F.3d 335, 341-44 (11th Cir. 2018). *St. Hubert* applied that rule to the exact kind of claim here—a post-plea challenge to a § 924(c) conviction on the ground that the predicate offense was not a crime of violence. The Eleventh Circuit continues to apply that rule today. Only months ago in *United States v. Fuller*, No. 25-10639, 2026 WL 33973 (11th Cir. Jan. 6, 2026), it reviewed de novo a post-plea § 924(c) crime-of-violence challenge because "a defendant does not waive such a challenge by pleading guilty." *Id.* at *1. Those are not the actions of a circuit moving away from *St. Hubert*. The government cannot erase the Eleventh Circuit from the split by pointing to reservations that have never displaced the circuit's binding rule.

3. Now consider the Ninth Circuit. The government admits that the Ninth Circuit has held that an unconditional guilty plea does not bar a defendant from arguing that the facts of his case fall outside the statute of conviction. Opp. 13. Its only answer is that the Ninth Circuit "did not cite, let alone distinguish *Cotton*." Opp. 13. But that is a merits argument dressed up as a split argument. The point at certiorari is not whether the Ninth Circuit is right; it is that defendants in the Ninth Circuit receive appellate review that defendants in the Tenth Circuit do not. The Ninth Circuit's rule is not some isolated relic. In *United States v. Brown*, the court held that a guilty plea did not bar review of whether the defendant's conduct was covered by the statute of conviction. 875 F.3d 1235, 1238-39 (9th Cir. 2017). Then in *United States v. Bain*, the court reversed after an open guilty plea because the admitted facts did not establish armed bank robbery. 925 F.3d 1172, 1177-79 (9th Cir. 2019). After *Class v. United States*, 583 U.S. 174 (2018), the Ninth Circuit again recognized that a guilty plea does not automatically bar claims challenging "the

government's power to criminalize [the defendant's] (admitted) conduct." *United States v. Chavez-Diaz*, 949 F.3d 1202, 1208 (9th Cir. 2020). In fact, that court recently *reversed a defendant's conviction* where the facts she admitted at her plea colloquy did not establish the elements of the offense. *United States v. Shortman*, No. 21-30198, 2022 WL 17500201, at *2 (9th Cir. Dec. 8, 2022). The government may think those cases are wrong. But they are the law in the Ninth Circuit. This case would have been heard on the merits there too.

B. The other side of the split is equally clear. No one disputes that the Tenth Circuit has now joined the Fourth and Seventh Circuits in taking the opposite approach from the Fifth, Ninth, and Eleventh Circuits. The decision below held that petitioner's guilty plea waived his right to argue that "the course of conduct confessed to in the plea is not in fact criminal." Pet. App. 7a; *see* Opp. 5. The court below expressly aligned itself with *Grzegorczyk v. United States*, 997 F.3d 743, 748 (7th Cir. 2021), and *United States v. Pittman*, 125 F.4th 527, 533 (4th Cir. 2025). Thus, at minimum, the courts of appeals are divided 3-3 on the question presented.[1] That is a mature and entrenched split, not an "overstated one." Opp. 10. The government itself has successfully urged review of far shallower splits.[2]

[1] The Second, Eighth, and D.C. Circuits appear to apply the same basic rule as the Fourth, Seventh, and Tenth, making the split more like 3-6. *See United States v. Rubin*, 743 F.3d 31, 40 (2d Cir. 2014); *United States v. Aquart*, 92 F.4th 77, 90 (2d Cir. 2024); *United States v. Turner*, 94 F.4th 739, 741-42 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 216 (2024); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1340-41 (D.C. Cir. 2004).

[2] *See, e.g.*, Pet. at 11, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (No. 15-290) (1-1 split); Pet. at 25, *United States v. Sanchez-Gomez*, 584 U.S. 381 (2018) (No. 17-312) (2-1 split).

C. The First and Third Circuits only underscore the need for review. The government devotes substantial energy to arguing that the law in those circuits is muddled and does not unambiguously support petitioner.[3] Opp. 11-12. But uncertainty in additional circuits is a reason to grant review, not deny it. The government does not dispute that *United States v. Rosa-Ortiz*, 348 F.3d 33 (1st Cir. 2003), and *United States v. Al Hedaithy*, 392 F.3d 580 (3d Cir. 2004), applied petitioner's rule. Nor does it identify any decision overruling them. Instead, the government points to later decisions that it says point the other way. Opp. 11-12. But even if the law in the First and Third Circuits is uncertain, that means that the Court's review would do more than resolve a square split; it would also dispel the confusion the government identifies in two additional circuits.

D. The upshot is simple: this is a real split with real consequences. It is not a dispute over labels or jurisdictional terminology. It determines whether a defendant receives merits review at all. The conflict is not stale. It has sharpened in recent years: *Jones* was decided in 2023; *Aquart* and *Turner* in 2024; *Pittman* and *Barnes* in 2025; and *Fuller* in 2026. Those decisions are not artifacts of pre-*Cotton* doctrine. They reflect active disagreement over the legal effect of a guilty plea.

---

[3] As to the Third Circuit, the government's invocation of *United States v. Porter*, 933 F.3d 226 (3d Cir. 2019), Opp. 12-13, is hard to square with what *Porter* actually held. There, the Third Circuit reaffirmed that "a claim need not attack subject matter jurisdiction to survive an unconditional guilty plea." *Porter*, 933 F.3d at 229. That is a direct rejection of the very rule the government and the decision below suggest. *Porter* "join[ed]" the First and Ninth Circuits, both on petitioner's side. *Id.*; *see* Pet. 14. The government's lead Third Circuit authority is not just unhelpful to the government; it is squarely against it.

If anything, the conflict is understated. The government focuses on reported appellate decisions, but the rule's most important consequences often occur before any appeal is filed. The fact that reported cases continue to arise despite those plea-bargaining pressures only confirms how many federal prosecutions this rule affects.

II. THE QUESTION PRESENTED IS IMPORTANT

This case raises an exceptionally important question, the resolution of which would affect significantly more criminal defendants than will any of this Court's recent criminal cases. While several of the petitions the Court granted this Term asked the Court to answer questions affecting only a few defendants,[4] this petition asks the Court to resolve a question affecting the mechanism that resolves nearly every criminal case. This case compares favorably to recent criminal grants both because the split is at least as deep and because the question recurs daily across the plea-based system on which modern federal criminal justice depends.

Most criminal defendants plead guilty, *see Missouri v. Frye*, 566 U.S. 134, 144 (2012), and most of these defendants enter into express appeal waivers as part of their plea agreements, *see* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L. J. 209, 212 (2005). But under the government's theory, *see* Opp. 6-7, these express waivers are basically worthless. The government argues that

---

[4] *E.g.*, U.S. Br. in Opp. at 12, *Ellingburg v. United States*, 607 U.S. 163 (2026) (No. 24-482) (explaining the question presented is "of diminishing significance" because "[t]he number of individuals potentially affected … [is] limited"); U.S. Br. in Opp. at 15, *Abouammo v. United States*, (No. 25-5146) (argued Mar. 30, 2026) (arguing that because the question presented pertained only to the "specific statute at issue," it is "unclear in what way or to what end this Court might fashion a new general venue rule").

defendants who unconditionally plead guilty impliedly surrender nearly all their appellate rights, with "only narrow exceptions"—which largely overlap with the grounds that render appeal waivers unenforceable. *Compare* Opp. 6, *with* U.S. Br. at 29-31, *Hunter v. United States*, (No. 24-1063) (argued Mar. 3, 2026) (agreeing that appeal waivers are unenforceable in certain limited circumstances).

Consequently, one wonders why the government represented to this Court in *Hunter* that appeal "waivers are a valuable bargaining chip for defendants in plea discussions," *id.* at 12-13, given its assertion that the government obtains the exact same benefit *regardless* of whether a defendant negotiates an appeal waiver or unconditionally pleads guilty. Opp. 6-7. Indeed, under the government's theory, the Court's decision in *Hunter* will be of remarkably little significance.

III. THE DECISION BELOW IS WRONG

The decision below rests on a premise this Court has never adopted: that an unconditional guilty plea impliedly waives every challenge to a conviction except those labeled "jurisdictional." That premise is wrong. A guilty plea admits facts, not the legal conclusion that those facts establish the charged crime.

This Court's cases reflect that distinction. *Class* held that a guilty plea, by itself, does not bar a defendant from challenging the constitutionality of his statute of conviction on direct appeal. 583 U.S. 174, 181-85 (2018). That holding rested on the same principle reflected in *Blackledge* and *Menna*: some claims survive a guilty plea because they do not contradict the defendant's factual

admissions, but instead challenge the government's authority to obtain a conviction on those admitted facts.[5]

That principle long predates *Class*. This Court recognized decades ago that guilty pleas may be reviewed "to determine whether a crime is stated by the indictment." *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 412 n.26 (1947). The government's premise cannot be right. If pleading guilty waived every nonjurisdictional challenge to conviction, *Class*, *Blackledge*, and *Menna* would all be wrong. Constitutional claims, after all, are not "jurisdictional" in *Cotton*'s sense.

The government tries to escape that problem by subtly shifting theories. It leads with its argument that petitioner's claim is barred because it is nonjurisdictional under *Cotton*. Opp. 8-9. But at other times, it invokes *Broce* and *Brady* for the different proposition that a guilty plea admits not only facts, but legal guilt regardless of the statute's actual scope. Opp. 6, 8-9.[6] The government even faults petitioner for "never citing *Broce* or *Brady* or attempting to square his theory with those decisions." Opp. 9.

As to *Cotton*, this Court has never adopted the position that pleading guilty waives all nonjurisdictional defenses. It would be bizarre to do so. What, exactly, a guilty plea impliedly waives turns on what the defendant knows. There is no reason to believe that a criminal defendant knows he is waiving his right to argue that the judge has misconstrued the statute under which he is charged.

---

[5] *Blackledge v. Perry*, 417 U.S. 21 (1974); *Menna v. New York*, 423 U.S. 61 (1975) (per curiam).

[6] *United States v. Broce*, 488 U.S. 563 (1989); *Brady v. United States*, 397 U.S. 742 (1970).

As to *Broce* and *Brady*, they do not establish the sweeping rule the government claims. They do not hold that a defendant's plea conclusively establishes the legal proposition that admitted conduct falls within a federal criminal statute. That legal conclusion belongs to the court, not the defendant. Rule 11 proves the point. A district court may not accept a guilty plea unless it determines that the admitted facts supply a factual basis for the offense. Fed. R. Crim. P. 11(b)(3). If a defendant's admission of "guilt" itself resolved the legal sufficiency of the charge, that inquiry would be unnecessary.

At bottom, nothing about pleading guilty impliedly waives the argument that the court has misconstrued the statute of conviction. Nothing in *Broce* or *Brady* authorizes courts of appeals to refuse to hear a preserved legal claim simply because the defendant pleaded guilty. A plea can admit conduct. It cannot make noncriminal conduct criminal.

IV. THIS CASE IS AN IDEAL VEHICLE

The government's vehicle objection (Opp. 14-15) is not a vehicle objection. It is a prediction about what would happen on remand. But it does not matter, at this stage, that the government believes petitioner may lose on the merits on remand. The government has elsewhere acknowledged that very principle—that "the existence of a potential alternative ground to defend the judgment is not a barrier to review." U.S. Cert. Reply Br. at 9, *Comm'r v. Est. of Jelke*, 555 U.S. 826 (2008) (No. 07-1582); *see also* U.S. Cert. Reply Br. at 10, *Match-E-BeNash-She-Wish Band v. Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247) ("The possibility that [respondent] might ultimately be able [to win on alternative grounds] … would not prevent the Court from addressing the questions presented in the petition."); *accord* U.S. Cert. Reply Br. at 3, *United States v. Bean*, 537 U.S. 71 (2002) (No. 01-704). The government cannot wield that

principle when it seeks review and abandon it when a defendant does.

* * * * *

This is the right case in which to resolve the question presented. The issue is important, recurring, and squarely presented. Petitioner preserved the issue; the Tenth Circuit decided it; and the answer controlled the judgment. With the circuits openly divided, this is an urgent issue for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NICOLE MASIELLO
LISA CORDARA
DANA KHABBAZ
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street,
New York, NY 10019
(212) 836-8000

KENESHA STARLING DUNCAN
ARNOLD & PORTER
KAYE SCHOLER LLP
700 Louisiana St., Ste. 4000
Houston, TX 77002
(713) 576-2400

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
TRIAL LAWYERS FOR JUSTICE
421 W. Water Street
Decorah, IA 52101
(866) 854-5529
Andrew@TL4J.com

DANA KAGAN MCGINLEY
SPENCER J. FABER
CONNOR MORGAN
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

EDWARD K. FEHLIG, JR.
FEHLIG LAW FIRM, LLC
3002 S. Jefferson Ave., Ste. 207
St. Louis, MO 63118
(314) 359-5690

MAY 2026