

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

 RODNEY CLASS,)
) Petitioner,)
) v.) No. 16-424
 UNITED STATES OF AMERICA,)
) Respondent.)

Pages: 1 through 66

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10 Washington, D.C.

11 Wednesday, October 4, 2017

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:00 a.m.

16

17 APPEARANCES:

18 JESSICA R. AMUNSON, Washington, D.C.; on behalf
19 of the Petitioner.

20 ERIC J. FEIGIN, Assistant to the Solicitor General,
21 Department of Justice; on behalf of the
22 Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 16-424, Class v. United States.

Ms. Amunson.

ORAL ARGUMENT OF JESSICA R. AMUNSON
ON BEHALF OF THE PETITIONER

MS. AMUNSON: Mr. Chief Justice, and may it please the Court:

A defendant comes to the plea bargaining table with certain rights in hand, including the statutory right to appeal a conviction.

The government concedes that in his written plea agreement, Petitioner did not waive his right to appeal his conviction, to challenge the constitutionality of the statute to which he pled guilty.

The question here is whether that right is nonetheless forfeited solely by operation of the plea itself. But as Judge Friendly summarized this Court's Blackledge-Menna doctrine, a defendant who

1 pleads guilty can challenge the -- challenge
2 his conviction on any constitutional ground
3 that, if asserted before trial, would forever
4 preclude the State from obtaining a valid
5 conviction against him.

6 Petitioner's claim here is that the
7 Second Amendment and Due Process Clause
8 preclude the government from ever obtaining a
9 valid conviction against him. It thus falls
10 well within the scope of the Blackledge-Menna
11 doctrine.

12 The government's main contention is
13 that Petitioner was required to preserve his
14 claim through a conditional plea, but as the
15 drafters of Rule 11(a)(2) noted in the advisory
16 notes to that -- to that rule, the -- the
17 Supreme Court has held that certain kinds of
18 constitutional objections may be raised after a
19 plea of guilty, Rule 11(a)(2) has no
20 application to such situations and should not
21 be interpreted as either broadening or
22 narrowing the Blackledge-Menna except -- the
23 Blackledge-Menna doctrine or as establishing
24 procedures for its application.

25 CHIEF JUSTICE ROBERTS: I should know

1 this, but I don't. The -- in the situation in
2 Blackledge, et al., can the government specify
3 that those claims are waived; in other words,
4 spell it out: You are waiving any double
5 jeopardy claim too.

6 MS. AMUNSON: Yes, Your Honor. Both
7 the double jeopardy and prosecutorial
8 vindictiveness claim are waiveable. And so our
9 contention here is not that these claims cannot
10 be waived. Our contention here is that they
11 were not explicitly waived in the plea
12 agreement and they were not otherwise forfeited
13 by operation of the plea itself.

14 And I think it's useful to take a step
15 back and look at the categories of rights that
16 are at stake when a defendant pleads guilty.

17 So first are the defendant's trial
18 rights. The defendant who's pleading guilty is
19 affirmatively waiving those rights. By saying
20 that they're not going to trial, they're
21 affirmatively waiving the protections -- the --
22 the -- the very right to a trial and those
23 trial rights themselves.

24 The second class of rights that are at
25 stake are those procedural and evidentiary

1 rights that would go to the reliability of the
2 defendant's conviction; so, for example, Fourth
3 Amendment rights against search and seizure or
4 Fifth Amendment rights against
5 self-incrimination.

6 And the Court has held in Tollet and
7 in the Brady trilogy that those rights need not
8 be affirmatively waived but are effectively
9 foreclosed by the plea of guilty because, once
10 a defendant pleads guilty, we're no longer
11 worried, for example, about whether the
12 evidence against him was properly obtained.

13 But the third category of rights,
14 which are the rights at stake here, are those
15 which -- where the defendant is saying that the
16 government cannot obtain a valid conviction
17 against me regardless of the procedures that
18 are used, regardless of the evidence that is
19 amassed.

20 JUSTICE ALITO: Another situation in
21 which we ask whether the -- a defendant is
22 asserting the right not to be tried is in
23 determining whether there's a right to a -- an
24 interlocutory appeal. So would you say that if
25 a right is one that can be protected through an

1 interlocutory appeal, it would fall within this
2 doctrine?

3 MS. AMUNSON: It would seem -- so the
4 double jeopardy right is --

5 JUSTICE ALITO: That's one that can be
6 appealed in -- in an interlocutory appeal.

7 MS. AMUNSON: Can be appealed. But --
8 but we think that the category is broader than
9 that because, for example, the prosecutorial
10 vindictiveness claim is not something that can
11 be appealed through interlocutory appeal.

12 JUSTICE ALITO: How about a speech or
13 debate clause claim? That's -- that permits an
14 interlocutory appeal. So, if a member of
15 Congress is charged with a crime and pleads
16 guilty, that member of Congress may then argue
17 on appeal that the prosecution was blocked by
18 the speech or debate clause.

19 MS. AMUNSON: If -- if the speech or
20 debate clause would forever preclude the
21 government from obtaining a -- a conviction
22 against him, yes. If -- if it would not
23 require that defendant to otherwise contradict
24 the admissions that he makes in pleading
25 guilty, so that's the other important

1 limitation on this right. And then the --

2 JUSTICE GINSBURG: But wouldn't that
3 be the same for statute of limitations? And I
4 think that statute of limitations has been
5 considered to come within 11(a). If you don't
6 -- if you don't raise it, you can't raise it
7 later, even though you're saying the statute of
8 limitations ran before I was charged with this
9 crime; so I shouldn't be subjected to -- to
10 prosecution.

11 MS. AMUNSON: Yes, Your Honor. I
12 think it's -- it's hard to conceive of a
13 statute of limitations situation that would not
14 require the defendant to -- to contradict the
15 admissions, the factual admissions, that he
16 makes in pleading guilty. So we think those
17 would likely be encompassed within the Tollett
18 and Brady line of cases that are effectively
19 foreclosed by the -- by the plea of guilty.

20 JUSTICE GINSBURG: What about the
21 unconstitutional composition of a grand jury?

22 MS. AMUNSON: That is -- that is
23 exactly the Tollett case, Your Honor, where the
24 Court held that that was, in fact, foreclosed
25 by -- by the guilty plea. So -- so what --

1 that category of rights are the category of
2 procedural and evidentiary protections that a
3 defendant would otherwise be entitled to if he
4 went to trial but, in fact, are foreclosed once
5 the defendant pleads guilty.

6 And this -- the Blackledge-Menna
7 category is an entirely separate category,
8 where the defendant is saying, regardless of
9 the procedures that are used, regardless of the
10 evidence that is amassed, I cannot be validly
11 convicted of this crime.

12 CHIEF JUSTICE ROBERTS: But what
13 about --

14 JUSTICE SOTOMAYOR: So there is a
15 limit to your -- your definition of what this
16 doctrine would hold. You're saying if it's not
17 -- if the -- if the constitutional violation is
18 not clear on the face of the admission?

19 MS. AMUNSON: That's right, Your
20 Honor. If -- if the constitutional violation
21 is not clear on the face of the record at the
22 time of pleading guilty, and that's the
23 formulation that this Court used in Justice
24 Kennedy's opinion for the Court in Broce, where
25 the Court said that this category of rights is

1 where -- the formulation Broce uses is where
2 the court has no power to impose -- to enter
3 the conviction or impose the sentence --

4 JUSTICE SOTOMAYOR: All right. Let --
5 let --

6 MS. AMUNSON: -- on the face of the
7 record.

8 JUSTICE SOTOMAYOR: Let's -- let's go
9 to the standard charge, which would be the
10 crime was committed on 1991, a substantive
11 crime and continuing conspiracy crime.
12 Defendant pleads guilty and says, yes, I did
13 the substantive crime in '91 and I participated
14 in the conspiracy. And that's all he or she
15 says.

16 Why would not this be subject to the
17 Blackledge line of cases, the Menna-Blackledge
18 line of cases? Or would it be?

19 MS. AMUNSON: Would the -- I'm sorry,
20 Your Honor. So would the defendant then be
21 saying that that was unconstitutional on
22 appeal?

23 JUSTICE SOTOMAYOR: Yes. Well, that
24 -- that there -- a statute of limitations has
25 run.

1 MS. AMUNSON: Oh. So because, Your
2 Honor, I think that the -- the defendant would
3 have, in making the plea, had to admit certain
4 facts that would be -- that the defendant would
5 then have to be contradicting on appeal.

6 And so we're accepting the limitation
7 that it has to be on the record at the time of
8 pleading guilty. The defendant would be coming
9 back and saying, no, actually, those are not
10 the facts and, in fact, I -- there was a
11 continuing conspiracy and --

12 JUSTICE SOTOMAYOR: Or there wasn't a
13 continuing conspiracy, but how about the
14 substantive crime, the charge is in -- is in
15 2017, but on -- the indictment was in 2017, but
16 the charge, the substantive charge was 1991
17 with a five-year statute of limitations.

18 MS. AMUNSON: So if --

19 JUSTICE SOTOMAYOR: Could that
20 defendant come back and say, yes, I did that
21 crime then?

22 MS. AMUNSON: So, Your Honor, I think
23 that is conceivable that that could fall within
24 the Blackledge-Menna line of cases, but the
25 Blackledge-Menna line of cases has generally

1 been held to be constitutional limitations on
2 the -- on the ability of the Court to secure
3 conviction.

4 Blackledge and Menna themselves were
5 both about constitutional limitations.

6 And, of course, the Court need not
7 decide the outer bounds of the doctrine here
8 because all that we are arguing for is the
9 constitutionality of the statute of conviction,
10 which we think falls well within the Blackledge
11 -Menna doctrine.

12 CHIEF JUSTICE ROBERTS: What --

13 JUSTICE SOTOMAYOR: So, the state your
14 rule and its limitations again. One, it has to
15 be clear on the face of the complaint.

16 MS. AMUNSON: Right.

17 JUSTICE SOTOMAYOR: The constitutional
18 --

19 MS. AMUNSON: A constitutional and
20 that it goes to the very power of the
21 government to ever obtain a valid conviction
22 against the defendant, or the other formulation
23 that Judge Friendly used is a plea of guilty
24 operates as a forfeiture of all defenses,
25 except those that once raised cannot be cured.

1 CHIEF JUSTICE ROBERTS: What about,
2 where does sufficiency of an indictment fall
3 under that approach? You have a crime. The
4 elements are 1, 2, 3, and 4, but 4 is left out.
5 The -- the defendant pleads guilty to the crime
6 and, you know, through the colloquy admits to
7 1, 2, and 3 but 4 -- doesn't admit to 4 because
8 it was left out.

9 Is that something that can be raised
10 on appeal or is that covered by his guilty
11 plea?

12 MS. AMUNSON: Well, I think because
13 the defendant is pleading to a substantive
14 crime, as this Court defined it in Broce, that
15 the defendant would not be able to raise that
16 on appeal because the defendant is saying, in
17 fact, I -- I did this substantive crime.

18 So I admit these elements of this
19 crime as defined by the -- by the legislature.
20 So the defendant would then be trying to come
21 back on appeal and contradict the admissions
22 that he made in pleading guilty.

23 And that would not be permissible
24 under the Tollett and Brady category of cases.

25 So the -- the Menna and Blackledge

1 line of cases is analytically distinct and it
2 follows in many ways the -- the line that this
3 Court has drawn in its retroactivity
4 jurisprudence of the line between substantive
5 and procedural rules.

6 JUSTICE KENNEDY: Just -- just to be
7 clear to your theory of the case. Suppose a
8 state passes a statute that a guilty plea
9 waives any later right to challenge the
10 constitutionality of the state statute, the
11 federal constitutionality of the state statute,
12 and the defendant is fully advised of this, and
13 he enters the plea. Later there's a serious
14 contention that the statute is constitutionally
15 invalid.

16 May the defendant challenge it on
17 direct appeal, under your view?

18 MS. AMUNSON: No, Your Honor.

19 JUSTICE KENNEDY: -- under your view?

20 MS. AMUNSON: We're not claiming that
21 this is a constitutional rule binding on the
22 states.

23 JUSTICE KENNEDY: That's what I want
24 to understand.

25 MS. AMUNSON: So that defendant I

1 think would have to go through 2255.

2 JUSTICE KENNEDY: So are we just
3 talking about the meaning of Rule 11? What --
4 what is is the basis of, the substantive basis
5 for your argument if it's not constitutional?

6 MS. AMUNSON: So, Your Honor, the
7 substantive basis --

8 JUSTICE KENNEDY: Just the best
9 interpretation of Rule 11?

10 MS. AMUNSON: Well, it's not only the
11 best interpretation of Rule 11. It's also that
12 we just have to take a step back for a moment
13 and look at what each party is coming to a plea
14 bargain with ex-ante.

15 So the defendant comes with certain
16 statutory rights, including a right to directly
17 appeal his conviction. And that right belongs
18 to him unless it is affirmatively waived or
19 somehow foreclosed.

20 And so here we know, the government
21 concedes, it is not affirmatively waived in his
22 written plea agreement. So we have to then
23 look to whether it is somehow foreclosed.

24 We look to Rule 11. Rule 11 says, no,
25 where you have a Blackledge-Menna claim you

1 don't have to preserve it by way of a
2 conditional plea. So the -- the government
3 does not dispute that there is an exception to
4 Rule 11 in the Blackledge-Menna doctrine. They
5 dispute only whether a constitutional challenge
6 to the statute of conviction falls within that
7 exception.

8 And I think their attempts to
9 distinguish Blackledge and Menna fall short
10 because they cannot explain Blackledge and
11 Menna themselves. They cannot explain the
12 Court's other relevant precedents. And they're
13 simply unworkable.

14 JUSTICE KENNEDY: Is the Court --

15 JUSTICE GINSBURG: What is your
16 position on what this Court said in the Broce
17 case? And I will quote the words: "A plea,
18 and conviction under it, comprehends all
19 factual and legal elements necessary to sustain
20 a binding final judgment."

21 MS. AMUNSON: Yes, Your Honor. I
22 think that that is correct.

23 But if the Court also reads through to
24 the end of that paragraph, the Court will see
25 there are exceptions where on the face of the

1 record the Court had no power to enter the
2 conviction or impose the sentence.

3 So, we agree that a defendant's plea
4 does, indeed, encompass the factual and legal
5 elements to sustain the conviction to say, yes,
6 I -- I committed this crime as defined by the
7 legislature.

8 But as the Court recognized in Broce,
9 which is -- which comes after the passage of
10 Rule 11, there are exceptions where on the face
11 of the record the Court had no power to enter
12 the conviction --

13 JUSTICE ALITO: This is --

14 JUSTICE KENNEDY: And the Court had no
15 power to enter the conviction here because?

16 MS. AMUNSON: The Petitioner's claim
17 is that the Second Amendment and the due
18 process clause preclude the Court from ever
19 obtaining a valid conviction against it.

20 JUSTICE KENNEDY: But you just said
21 that if a state had this law, it -- it would be
22 valid. I don't --

23 MS. AMUNSON: If --

24 JUSTICE KENNEDY: -- how can you say
25 there is no power to impose the -- the

1 conviction if there would be -- if the state
2 would have that power? I don't understand it.

3 MS. AMUNSON: I thought Your Honor's
4 hypothetical was that the state could pass a
5 law saying that a guilty plea forecloses a
6 later challenge.

7 JUSTICE KENNEDY: Yes.

8 MS. AMUNSON: So we are not contending
9 that this right is not waiveable. We're simply
10 saying it was not waived here --

11 JUSTICE KENNEDY: But you say --

12 MS. AMUNSON: -- and it, thus, falls
13 in the exception.

14 JUSTICE KENNEDY: -- you say that the
15 government has no power to impose the sentence.
16 Why is that, if there is no constitutional
17 prohibition against it?

18 MS. AMUNSON: So I think the -- the
19 use of the word "power" and "jurisdiction" have
20 been somewhat, construed somewhat more broadly
21 than they might otherwise be thought of, Your
22 Honor.

23 The Defendant's claim is simply that
24 --

25 JUSTICE KENNEDY: Well, you are --

1 excuse me. Excuse me for interrupting. But --
2 but you're saying that in the federal system
3 there's no power to do this. I don't
4 understand --

5 MS. AMUNSON: We're saying that --

6 JUSTICE KENNEDY: -- why your argument
7 is that limited. And, if it's not so limited,
8 I see problems with it.

9 MS. AMUNSON: So, Your Honor, we're
10 saying that in the federal system, the federal
11 system has recognized this exception to -- it
12 is essentially a federal forfeiture rule, what
13 does a guilty plea actually do?

14 And here what the Court has said is
15 that a guilty plea does -- you don't need to
16 affirmatively waive everything.

17 JUDGE KENNEDY: But -- but that's --

18 MS. AMUNSON: That's the Brady and
19 Tollett line of cases.

20 JUSTICE KENNEDY: But that's circular.
21 That's circular. You are saying there is no
22 power to enter into it because that's the
23 federal rule. But what's the substance? How
24 do you determine whether there's no power?

25 MS. AMUNSON: Well, if I can just go

1 back again to Judge Friendly's formulation.
2 It's where the -- the claim is that the state
3 would be precluded from obtaining a valid
4 conviction against him.

5 So where the constitutional --
6 JUSTICE BREYER: But you were saying
7 there is power. I mean, I'm confused. I heard
8 you say, of course the federal government has
9 the power to insist that you no longer can
10 raise your constitutional claim. All they have
11 to do is write into the plea agreement I
12 forfeit my right to bring a constitutional
13 claim.

14 And I assume, henceforth, after this
15 when it somehow got away they will write that
16 into every claim, and into every agreement, and
17 then the person will not be able to bring his
18 constitutional claim but, rather, your point is
19 that here they didn't write those words.

20 MS. AMUNSON: That --

21 JUDGE BREYER: All they wrote were the
22 words, I plead guilty. So the question is, do
23 those words have the same effect as if they had
24 exercised their undoubted power to stop the
25 individual from raising the claim by writing it

1 out specifically. Is that right?

2 MS. AMUNSON: That's correct, Your
3 Honor. That's correct. And, Your Honor --

4 JUSTICE ALITO: Is the question -- I'm
5 sorry.

6 Is the question what does the
7 defendant implicitly concede by pleading
8 guilty?

9 MS. AMUNSON: That's the question,
10 Your Honor, yes.

11 JUSTICE ALITO: And so you can
12 understand Blackledge and Menna to say the
13 defendant does not implicitly concede that my
14 conviction is not barred by double jeopardy,
15 for example, but you could understand the plea
16 to implicitly concede I'm guilty of the offense
17 for which I'm charged. And that would include
18 facts and law as set out in -- in the case we
19 were discussing.

20 Now, if that is the proper
21 understanding of Blackledge and Menna, where
22 does your case stand?

23 MS. AMUNSON: Because if the defendant
24 is saying I am guilty of the offense as
25 charged, but the Constitution precludes my

1 conviction because of the double jeopardy
2 clause, because of the due process clause, or
3 because of, here, the Second Amendment and the
4 due process clause, that is the category of
5 Blackledge and Menna claims.

6 So the -- it is where, on the face of
7 the record, the court had, as the formulation
8 is in Broce, no power to enter the conviction
9 or impose the sentence. But the easier way to
10 think of it might also be the formulation that
11 Judge Friendly used of things that are not
12 curable. So --

13 JUSTICE KENNEDY: No power only
14 because it was not expressly waived?

15 MS. AMUNSON: That's correct, Your
16 Honor.

17 JUSTICE KENNEDY: That's the only
18 reason?

19 MS. AMUNSON: Right.

20 JUSTICE KENNEDY: So all we're talking
21 about is what -- how Rule 11 is properly
22 interpreted and how this plea agreement is
23 properly interpreted?

24 MS. AMUNSON: Right. We're
25 essentially talking about a federal forfeiture

1 rule that where -- and here, as I've said, the
2 government concedes that the plea agreement
3 does not explicitly waive the defendant's right
4 to appeal his conviction and challenge the
5 constitutionality of the sentence.

6 So the only question is whether by
7 operation of the plea itself, something is
8 waived. And Blackledge and Menna answer that
9 question and say, no, that there is a category
10 of cases that are not waived by -- a category
11 of claims that are not waived by --

12 JUSTICE ALITO: But the no power
13 formulation doesn't seem to be very helpful for
14 the reasons that -- pointed out by -- by
15 Justice Kennedy's question, because if it can
16 be waived, then there's power to do it.

17 MS. AMUNSON: Right. So I think --

18 JUSTICE ALITO: So it has to be
19 reformulated, I think, in another way.

20 MS. AMUNSON: So where -- where the --
21 the -- whereas the formulation in Judge
22 Friendly's opinion, where it would forever
23 preclude the State from obtaining a valid
24 conviction against him, and that would be
25 double jeopardy clause --

1 JUSTICE ALITO: Well, it doesn't
2 forever preclude him if it's waiveable.

3 MS. AMUNSON: Well, where the claim is
4 that if I -- where the claim -- this is
5 basically what is reserved. So the Brady and
6 Tollett line of cases say you don't have to
7 affirmatively waive everything. You can
8 actually implicitly concede some things, and
9 those are your procedural and evidentiary
10 objections like Fourth Amendment or Fifth
11 Amendment.

12 But you can still reserve after a plea
13 of guilty, a class of claims that would go to
14 whether the Constitution would bar your
15 conviction.

16 JUSTICE KAGAN: Ms. Amunson, would you
17 tell me if your theory is different than or the
18 same as the following theory? One way to look
19 at this is just to say that a plea substitutes
20 for a trial and a verdict at that trial. So
21 the line that we should be drawing is any issue
22 that would have been decided at trial is
23 foreclosed, unless there is -- you know, unless
24 there has been an explicit statement in the
25 plea agreement, and any other is not

1 foreclosed.

2 Is -- is -- is that the right line or
3 are you drawing a different line? And, if so,
4 why?

5 MS. AMUNSON: I -- I think that's
6 generally the line, Your Honor. I would stress
7 that also what -- a defendant might at trial
8 also raise a motion to dismiss their indictment
9 on constitutional grounds and lose that motion
10 and then try to renew that motion on appeal.
11 And that's essentially what defendant here is
12 also doing.

13 The defendant, just like the defendant
14 in Menna, just like the defendant in this
15 Court's decision in Haynes, moved to dismiss
16 his indictment on constitutional grounds, lost
17 that motion, and then pled guilty and is now
18 trying to renew his constitutional challenge on
19 appeal.

20 JUSTICE ALITO: And I don't understand
21 that -- your answer to that. At trial, a
22 conviction after trial permits -- if a
23 defendant's conviction after -- after a
24 trial -- convicted after a trial, the defendant
25 can -- can raise on appeal any issue that was

1 preserved.

2 MS. AMUNSON: That's right, Your
3 Honor, but I took Justice Kagan's question to
4 be is this about the sort of procedural and
5 evidentiary rules that you would have had to
6 overcome at trial, a motion to suppress, a -- a
7 contention that your confession was coerced.
8 Things like that that would be decided at trial
9 when the evidence is coming in against you,
10 those are foreclosed.

11 But things that are sort of beyond
12 what would be decided at trial are independent
13 of any kind of procedural or -- or evidentiary
14 ruling that might be made at trial are still
15 preserved.

16 JUSTICE ALITO: So you're saying --
17 you're saying this rule is congruent with the
18 plain error rule?

19 MS. AMUNSON: I think -- well, Your
20 Honor, we're not contending that there's --
21 that you don't have to preserve this issue. So
22 the -- the defendant here, as I said, just like
23 in Menna and in Haynes, actually preserved his
24 constitutional objections by raising a motion
25 to dismiss his --

1 JUSTICE KAGAN: If he hadn't, there
2 would be a different result?

3 MS. AMUNSON: If he hadn't, I think
4 there would be plain error on -- on appeal.
5 So --

6 JUSTICE KENNEDY: What about a -- a
7 question of statutory interpretation? Suppose
8 the defendant, after a guilty plea says, you
9 know, this statute cannot be interpreted to
10 cover my conduct.

11 MS. AMUNSON: Right. So, Your Honor,
12 I will just say, in the lower courts, this
13 doctrine has largely been limited to
14 constitutional challenge to statutes. There
15 are, however, Your Honor --

16 JUSTICE KENNEDY: Under -- under your
17 view, why should there be a difference?

18 MS. AMUNSON: Right.

19 JUSTICE KENNEDY: If there is no power
20 to impose a conviction because the statute,
21 properly interpreted, doesn't cover my conduct.

22 MS. AMUNSON: There are examples, Your
23 Honor, in --

24 JUSTICE KENNEDY: What is the rule
25 that you propose us to -- that you would

1 propose for us to adopt in that case?

2 MS. AMUNSON: So I think that that
3 could be encompassed within the
4 Blackledge-Menna doctrine. However, as I
5 indicated earlier to Justice Sotomayor, you may
6 well also say that the Blackledge-Menna
7 doctrine is about constitutional bars on the --
8 the conviction.

9 And in the -- the situation that Your
10 Honor is raising, the constitutional bar is one
11 step removed. So in the Blackledge and Menna
12 cases and in the case that we have here, the
13 defendant is saying: A constitutional
14 provision prohibits my conviction. There, the
15 defendant is -- it's one step removed where the
16 defendant is saying: I've been convicted of
17 something. It's not that they're saying that
18 Congress could not make it a crime, but that
19 Congress has not made it a crime.

20 So, in our situation, we're saying
21 Congress cannot actually criminalize this
22 behavior. It -- it is, as the formulation this
23 Court uses in its retroactivity jurisprudence,
24 beyond the criminal lawmaking authority's power
25 to proscribe.

1 JUSTICE GORSUCH: I guess I'm a little
2 confused by that reply. Why would it be that
3 you would implicitly waive statutory but not
4 constitutional claims by your guilty plea?

5 You said we could go either way, but I
6 think the premise underlying your response to
7 Justice Kagan was a guilty plea waives a trial.
8 It doesn't necessarily waive other legal claims
9 that might exist outside of trial. And this
10 might be one, that the statute should be
11 interpreted differently.

12 MS. AMUNSON: So, Your Honor, of
13 course, the Court need not decide that today,
14 because --

15 JUSTICE GORSUCH: Okay, okay, but --
16 (Laughter.)

17 MS. AMUNSON: -- but we -- but we are
18 -- but -- but the Court could limit it
19 consistent with the Blackledge-Menna doctrine
20 to constitutional claims.

21 JUSTICE GORSUCH: How? How,
22 analytically, would that work?

23 MS. AMUNSON: Because the Constitution
24 is the primary bar on this -- on the --

25 JUSTICE GORSUCH: It's more important

1 than statutes.

2 MS. AMUNSON: -- lawmaking authority's
3 ability to proscribe criminal conduct.

4 If I may reserve the balance of my
5 time.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Counsel.

8 Mr. Feigin.

9 ORAL ARGUMENT OF ERIC J. FEIGIN
10 ON BEHALF OF THE RESPONDENT

11 MR. FEIGIN: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 Rule 11(a)(2) requires a defendant who
14 both wants to plead guilty and wants to
15 preserve a challenge to the statute underlying
16 the charge to enter a conditional plea --

17 JUSTICE SOTOMAYOR: I'm sorry, how can
18 11 -- how can the federal rules undo a
19 constitutional rule? Blackledge and Menna were
20 constitutional rules. So, can Rule 11(c) undo
21 those?

22 MR. FEIGIN: Let me say a couple
23 things about that, Your Honor. First of all, I
24 think Ms. Amunson just conceded that Blackledge
25 and Menna are not constitutional rules. And so

1 in -- the federal rules could override them.

2 Second, I think what the drafters of
3 the rule --

4 JUSTICE SOTOMAYOR: It's almost a
5 vicious circle because the rules say --

6 MR. FEIGIN: Well --

7 JUSTICE SOTOMAYOR: -- we're not
8 affecting that doctrine. So --

9 MR. FEIGIN: Well, Your Honor, I think
10 I can try to cut through the Gordian knot here
11 by looking at this through the lens of Rule
12 11(a)(2). We're not trying to interpret
13 Blackledge and Menna in a vacuum but it's --
14 but it's refracted through the lens of Rule
15 11(a)(2).

16 I think what the drafters of Rule
17 11(a)(2) did -- and this is clear in the
18 advisory notes -- is, to be quite honest, I
19 think they were a little confused by Blackledge
20 and Menna. They weren't quite sure what to
21 make of them. They respected what this Court
22 had done in those particular situations and
23 instructed that the rule should not be
24 interpreted to apply in the situations at issue
25 in those cases, which they described with some

1 specificity. But I don't think they viewed
2 Blackledge and Menna as the tip of an iceberg
3 for the kind of rule petitioner is proposing,
4 which would, in theory, allow every criminal
5 defendant in the system who pleads guilty --
6 and there are over 50,000 of them each year --
7 in theory, to raise a substantive challenge to
8 their conviction without having notified the
9 government or the court of their intent to do
10 so.

11 JUSTICE BREYER: Well, all you have to
12 do --

13 JUSTICE KAGAN: Mr. Feigin, it's
14 awfully hard to say that the floodgates are
15 opening when it's in the power of every U.S.
16 Attorney to just write this into the plea
17 agreement.

18 MR. FEIGIN: So, Your Honor, if the
19 Court were to say that in its opinion and make
20 that very clear, I think that would go a long
21 way towards resolving a lot of the problems the
22 Petitioner's rule would otherwise create.

23 But let me say a few things about
24 appeal waivers. Under current law, we have a
25 couple of difficulties with appeal waivers.

1 One is that some District Judges believe that
2 they have discretion not to accept a plea
3 agreement that includes an appeal waiver, and
4 so as a practical matter we can't get appeal
5 waivers in those districts.

6 Number 2 is that several courts of
7 appeals have created implicit exceptions to
8 appeal waivers and some of which -- some of
9 them apply when a defendant is challenging
10 substantively the statute under which he is
11 convicted. And so we can't get it enforced in
12 those -- in those circuits.

13 And even circuits that would otherwise
14 dismiss the appeal, nevertheless, require the
15 government to brief the issue on the merits.
16 So we don't get the benefit -- we don't
17 actually get the practical benefit of the
18 appeal waiver.

19 The other thing I'd say about the
20 appeal waiver --

21 JUSTICE SOTOMAYOR: Mr. Feigin, all
22 you are saying is how much power you have and
23 how much power to coerce you have.

24 The other side is simply saying if a
25 defendant wants to accept your power, let him

1 do so expressly. You can worry about what
2 courts are doing separately but that shouldn't
3 bind him or her to the whim of whether you will
4 let them plead guilty based on an appeal waiver
5 that is so broad that they can't challenge
6 anything that's a constitutional violation.

7 MR. FEIGIN: Well, I think the
8 considerations of what the default rules should
9 be are the considerations that the drafters of
10 Rule 11(a)(2) took into account in the policy
11 process that produced that rule.

12 And they produced a broad rule that
13 applies not only to claims like the ones we
14 have in this case but to all the kinds of
15 claims that a defendant might want to bring
16 after pleading guilty, Fourth Amendment claims,
17 Fifth Amendment claims.

18 They concluded that the proper way to
19 preserve those claims was to make clear to the
20 government and to the Court ahead of time that
21 that was going to be something that was
22 reserved in the defendant's plea.

23 JUSTICE GINSBURG: And clear to the
24 defendant what he is giving up. And in this
25 case, in the plea colloquy, the Court informed

1 Mr. Class you can appeal a conviction after a
2 guilty plea, if you believe that your guilty
3 plea was somehow unlawful. And the defendant
4 expressed some uncertainty about what that
5 meant.

6 But isn't that exactly what this
7 defendant is doing? I believe that my guilty
8 plea was unlawful because the statute under
9 which I was charged is constitutionally flawed.
10 It cannot be a crime.

11 MR. FEIGIN: Well, Your Honor, a
12 factual response to that and then a legal
13 response.

14 The factual response is that if you
15 read the remainder of the sentence, which is on
16 Joint Appendix 63, the Court says if you
17 believed your plea was somehow unlawful or
18 involuntary or if there is some other
19 fundamental defect in these guilty plea
20 proceedings, I think it is properly understood
21 to go to the kinds of procedural claims that
22 everyone understands you can bring after a
23 guilty plea, such as that your plea was not
24 knowing and intelligent.

25 The Court again -- and this is on page

1 76 -- tells the defendant that the plea
2 agreement actually precludes him from
3 challenging his conviction on appeal, which
4 isn't correct, but if he thought he had wanted
5 to actually bring an appeal challenging his
6 conviction, he might have spoken up at that
7 point.

8 But the broader legal point is that
9 this Court has made clear any number of times
10 that a defendant need not be subjectively aware
11 of everything that he is giving up in a plea in
12 order for the plea to be a knowing and
13 intelligent waiver of those rights.

14 JUSTICE KENNEDY: Well, isn't the
15 broader --

16 JUSTICE GINSBURG: Let me ask you the
17 case --

18 JUSTICE KENNEDY: -- the broader legal
19 point also that this argument is not presented
20 in the question on which we granted certiorari?

21 MR. FEIGIN: That is also correct,
22 Your Honor. I was simply responding to Justice
23 Ginsburg's question. I want to make one last
24 point.

25 JUSTICE GINSBURG: Let me put a case

1 to you that seems to be strongly for the other
2 side. And it is Loving against Virginia.

3 There are two people who pled guilty
4 to violating Virginia's miscegenation statute,
5 pled guilty, didn't reserve anything out. Yet,
6 that plea did not block them from seeking to
7 vacate their convictions on the ground that the
8 statute under which they were convicted was
9 unconstitutional.

10 Is that just a slip that the Court
11 didn't notice that they had pled guilty and,
12 therefore, shouldn't be able to raise the
13 constitutional question?

14 MR. FEIGIN: So, Your Honor, that case
15 as the caption reflects came up at the state
16 courts. I think this Court has been quite
17 clear that states can craft their own
18 procedures in these circumstances. And clearly
19 no one raised it in Loving against Virginia.

20 And whatever state procedures they may
21 have had wouldn't -- apparently did not
22 preclude the claim.

23 JUSTICE GINSBURG: But this was a case
24 with this court, notwithstanding any state
25 procedures, and I don't think there was any

1 state procedure that says -- said that they --
2 that their plea reserved out this question.

3 It was this Court that said they could
4 raise the question of the unconstitutionality
5 of the statute under which they were convicted,
6 not a state court.

7 MR. FEIGIN: Well, Your Honor, I don't
8 believe this particular preclusion question was
9 directly addressed in the circumstances of
10 Loving. And let me explain what would happen
11 if that case came up to the federal system in
12 Rule -- under Rule 11(a)(2) today.

13 First of all, the Lovings could seek
14 to enter a conditional plea, and the government
15 frequently does agree to conditional pleas,
16 although different U.S. Attorney's Offices have
17 different policies.

18 If the government for some reason did
19 not agree to a conditional plea, the defendants
20 could seek to have some kind of stipulated
21 bench trial, and they agree to the facts, yes,
22 they're married to each other, and they would
23 preserve every single possible claim they could
24 bring after a trial.

25 JUSTICE SOTOMAYOR: In some

1 jurisdictions the Judges use that to deny an
2 acceptance of responsibility.

3 MR. FEIGIN: Well, Your Honor, that is
4 specifically addressed in the Sentencing
5 Guidelines and the commentary to 3E1.1.

6 And it says that a Judge may give the
7 acceptance of responsibility reduction to a
8 defendant who insists on a trial solely for the
9 purpose precisely of preserving a challenge to
10 the statute.

11 JUSTICE SOTOMAYOR: A may -- a "may"
12 doesn't "should." If may is discretionary,
13 because the sentencing reduction is
14 discretionary. And I know of many prosecutors'
15 offices who routinely tell Judges if a
16 defendant seeks to preserve an appeal right,
17 they have not accepted responsibility.

18 And many Judges, just like many Judges
19 won't accept the appeal waiver for that reason,
20 don't give the acceptance of responsibility.

21 MR. FEIGIN: Well, Your Honor, I think
22 the points that you are raising are the kinds
23 of things that are best considered through the
24 kind of process that produced Rule 11(a)(2).
25 And I think if we're going to decide that there

1 is going to be a particular exception to Rule
2 11(a)(2) --

3 JUSTICE KAGAN: So, Mr. Feigin, can I
4 go to your basic 11, Rule 11 argument? Because
5 what Rule 11 does, if you just look at the text
6 of Rule 11, it says here are the conditions in
7 which you can enter a conditional guilty plea,
8 you know, you have to get some consents, and
9 then you can enter a conditional guilty plea.

10 It doesn't say what happens if you
11 don't do that. There is nothing in Rule 11
12 that says and the consequence of not entering a
13 conditional guilty plea is X, Y, Z.

14 So you have to look outside the rule
15 for the consequence of not entering a
16 conditional guilty plea. And it seems to me
17 that the place you look, the question you ask
18 is, well, what's the inherent effect of that
19 guilty plea?

20 So Rule 11 just tells you, you know,
21 go try to figure out what the inherent effect
22 of the guilty plea is, and what's covered by
23 it, and, on the other hand, what is not.

24 So I don't see how Rule 11 really is
25 the answer to this question. Rule 11 just sets

1 up the problem.

2 MR. FEIGIN: Well, I think everyone
3 agrees, Your Honor, and petitioner hasn't
4 contested there is a negative implication baked
5 into Rule 11.

6 I think the first place I would look
7 is the Advisory Committee notes which make
8 clear that the drafters of the rule enacted it
9 on the understanding that a traditional
10 unconditional plea of guilty operates as a
11 waiver of all non-jurisdictional claims. And
12 there is no dispute that this is a
13 non-jurisdictional claim.

14 CHIEF JUSTICE ROBERTS: Except for the
15 Blackledge-Menna doctrine. So, you know, it is
16 obvious the key word is doctrine. It suggests
17 to me that there is more covered by that than
18 just Blackledge and Menna.

19 MR. FEIGIN: I'm not sure that's
20 right, Your Honor. I think, first of all, the
21 drafters of the rule were quite well aware of
22 the issue that's before the Court here. And I
23 think it says something that they did not
24 actually identify it as one of the exceptions.

25 I think they looked at Blackledge and

1 Menna and sort of took them as they were and
2 didn't want to interfere with the work that
3 this Court was doing.

4 But I don't think there is any reason
5 to believe that they silently intended to
6 create another exception for the kinds of
7 claims at issue in this case.

8 JUSTICE BREYER: Well, there is --
9 there is a logic. I mean, it's logical.
10 Justice Kagan brought this out before. I will
11 assume with you that if the government wants to
12 make the defendant waive his constitutional
13 claims, you said they simply write into the
14 plea agreement.

15 And maybe there is some you can't, I
16 don't know of any you couldn't, but there might
17 be, then that's a different case. So I will
18 assume that maybe you could do that, and here
19 somehow you forgot to do it. In a lot of cases
20 you don't forget, but here you forgot. Okay.

21 So then we have to face the problem of
22 whether, by saying guilty, that's a waiver.
23 And I thought, having looked at Blackledge and
24 Menna, the rule is simply this: When you say
25 guilty, you have admitted you did what the

1 statute forbids. Okay?

2 So let's go look at the statute. See
3 what it forbids. And you admit you did it.
4 Now, that means you're waiving all the claims
5 that the evidence wasn't good enough, that they
6 should have excluded something under the Fifth
7 Amendment, that somebody shouldn't have
8 testified under the -- the Fourth Amendment,
9 under the Fifth. There are a whole lot of
10 things -- a jury trial. Naturally, you admit
11 you did what the statute forbids.

12 But what you haven't admitted is that
13 the statute, for example, is a valid statute.
14 You haven't admitted that. And another thing
15 you haven't admitted, you haven't admitted
16 vindictive prosecution because I did it, I did
17 it, but they're prosecuting me for a bad
18 reason, and they can't do that. Okay? That's
19 vindictive.

20 Two, you didn't admit double jeopardy.
21 I did it, I did it. Ha, ha, you still can't
22 prosecute me because you did once before. I
23 did it, I did it, but you cannot take away from
24 me the right to claim that the statute's
25 unconstitutional because my guilty plea has

1 nothing to do with that.

2 So, when we fall into that category,
3 the guilty plea by itself doesn't waive the
4 claim. Now, all we have to say here is, and,
5 moreover, where it's important, like
6 Constitution. But I don't know if you need the
7 last part.

8 MR. FEIGIN: Your Honor, let me be --
9 let me respond to that in a couple of ways.

10 First of all -- and this goes to
11 Justice Kagan's proposed rule that she advanced
12 to opposing counsel.

13 JUSTICE BREYER: Well, it doesn't
14 quite work, her rule, because the rule doesn't
15 take into account, which I hadn't thought of --
16 I thought it -- it doesn't take into account
17 failures in the indictment. And -- and a
18 failure in the indictment, you couldn't bring
19 up later because what you've admitted to is you
20 did what the statute forbids.

21 MR. FEIGIN: Well, Your Honor, it does
22 even more than that because, for example, it's
23 clear, under Tollett against Henderson, you
24 can't challenge the composition of the grand
25 jury, but if you went to trial, you would have

1 a right to challenge the composition of the
2 grand jury even following conviction. In fact,
3 the Court said in *Baskett v. Hillary*.

4 JUSTICE BREYER: It doesn't matter,
5 because when you say you did it, you are
6 admitting that you did what the statute forbids
7 and they can convict you for it. Okay? You're
8 admitting you did what the statute forbids, so
9 you can't -- you can't challenge the
10 composition of a grand jury; of course not.
11 You can't challenge any of the stuff that would
12 take away that you did the things that the
13 statute forbids.

14 MR. FEIGIN: Well, Your Honor, the
15 grand jury is somewhat unrelated to that
16 factual admission of guilt, but let me -- let
17 me add a couple more points. First of all,
18 you're exactly right, you are admitting that
19 you can be convicted for it. And the Court was
20 clear in *Broce*, just as it was clear in *Brady*,
21 just as it was clear in *Alabama against Boykin*,
22 just as it was clear in *Florida against Nixon*,
23 that that admits legal guilt as well as factual
24 guilt.

25 JUSTICE BREYER: No, that can't be

1 right because, after all, if you're admitting
2 that they can convict you and put you in prison
3 for it, we wouldn't have Blackledge and Menna,
4 because in Blackledge and Menna, they admitted
5 they did what the statute forbids, but still
6 they could claim that it's double jeopardy or
7 vindictive prosecution.

8 MR. FEIGIN: Your Honor, let me give
9 you one -- yet one more counterexample aside
10 from Tollett, and then let me please address
11 Blackledge against Menna and why I don't think
12 they stand for what you say. But I think
13 actually the closest analogue we have to this
14 case is Brady against United States, which,
15 unlike Blackledge and Menna, was a challenge to
16 the act of the legislature, not the act of
17 bringing the prosecution.

18 In Brady against United States, you
19 had a statute where a defendant was only
20 exposed to the death penalty if the jury
21 recommended the death penalty. And the Court
22 held in Brady, as explained by Tollett, that
23 once a defendant pleads guilty, he cannot claim
24 that his conviction is invalid because of
25 the -- a structural defect in that statute,

1 that structural defect being that it
2 unconstitutionally burdened his right to choose
3 a jury trial. That has nothing to do with his
4 factual guilt.

5 JUSTICE GORSUCH: Well, Mr. Feigin --
6 Mr. Feigin, on that, I -- I look to history to
7 start with. And -- and Justice Harlan in
8 Haynes suggested otherwise, that you could
9 challenge the constitutionality of the statute.
10 And he cited a Second Circuit case, and we
11 traced it back and it goes all the way back to
12 1869 and Justice Ames in Massachusetts,
13 indicating quite clearly almost exactly what
14 Justice Breyer just -- he might have channeled
15 his inner Justice Ames there. And it's
16 suggesting that not only is it -- you're not
17 admitting even to what the statute says; you're
18 admitting to what's in the indictment. Isn't
19 that maybe the most natural and historically
20 consistent understanding of what a guilty plea
21 is?

22 I plead guilty to that which I am
23 charged. What's in the indictment.

24 MR. FEIGIN: Well, Your Honor, I also
25 believe that there is an aspect of it that

1 admits that the court can convict you and
2 impose punishment. And that's particularly
3 apparent in --

4 JUSTICE GORSUCH: Well, what do I do
5 about the Haynes and -- and this 150 years of
6 history?

7 MR. FEIGIN: Well, Your Honor, I think
8 that that would be a better argument if this
9 case came before the Court in 1982 before the
10 enactment of Rule 11(a)(2).

11 JUSTICE GORSUCH: Well, putting aside
12 Rule 11, because I have some of the same
13 difficulties that haven't been addressed yet as
14 Justice Kagan expressed, but just -- just
15 understanding of what a guilty plea means.

16 MR. FEIGIN: So, Your Honor, I don't
17 think Haynes goes to what a guilty -- I don't
18 think Haynes reflects this Court's
19 consideration of what a guilty plea means,
20 first of all, because Haynes was unconnected
21 from --

22 JUSTICE GORSUCH: Justice Harlan
23 didn't mean what he wrote?

24 MR. FEIGIN: Well, Your Honor, it
25 wasn't disputed in that case. Neither party

1 had briefed it. I think, at most, Haynes
2 stands for the proposition that -- and we don't
3 say otherwise -- that this isn't a
4 jurisdictional rule; that is, it's more in the
5 nature of a mandatory claims processing rule.
6 If the government doesn't raise it, then the
7 defendant can proceed -- can proceed to bring
8 the claim.

9 But I think a guilty plea inherently
10 acquiesces to judgment and conviction being
11 entered against you and to the imposition of a
12 sentence because that's directly what a court
13 goes and does following a guilty plea. If I
14 could give an --

15 JUSTICE GORSUCH: Well, but -- well,
16 but if I plead guilty, I'm -- I'm admitting the
17 facts and I'm admitting the elements that are
18 charged in the complaint or the indictment.
19 And it would follow that a court could enter a
20 judgment, absent some other bar, I would think,
21 but I don't necessarily see how that precludes
22 even a motion to dismiss the indictment under
23 statutory grounds.

24 MR. FEIGIN: Well, again, Your Honor,
25 I'd go back to the statement in Broce that I

1 believe Justice Ginsburg read earlier, that
2 this Court has said, more recently than Haynes,
3 that a guilty plea encompasses all the factual
4 and legal admissions necessary for the entry of
5 conviction and the imposition of a sentence.

6 JUSTICE GINSBURG: Yes, but that could
7 just mean that the defendant admits all -- that
8 all the elements of the crime are established,
9 all the factual and legal elements of the
10 crime, not that the crime then becomes
11 insulated from constitutional challenge.

12 MR. FEIGIN: We know it means more
13 than that because we know that from Tollett and
14 we know that from Brady. But let me give a
15 real concrete example of why I think their rule
16 would be quite impractical.

17 Consider a circumstance in which the
18 government charges someone with, say,
19 distribution of child pornography, and during
20 the pendency of those proceedings, the
21 defendant engages in witness tampering. And
22 there's a plea agreement in which the
23 government and the defendant agree that the
24 defendant will plead guilty to the child
25 pornography charges and the government agrees

1 not to bring the witness-tampering charges.

2 No mention is made of any effort on
3 the part of the defendant that he wants to
4 preserve some right to appeal. And then he
5 turns right around after sentence is imposed,
6 and he challenges the constitutionality of the
7 child pornography statute, say, on First
8 Amendment grounds.

9 At that point, the government --
10 unless this Court is going to make clear that
11 appeal waivers would be enforceable in those
12 circumstances, the government has already lost
13 the benefit of its plea agreement, depending on
14 how the appellate proceedings go and what might
15 happen if some -- if the government loses and
16 some kind of remand is ordered, it's not
17 entirely clear that the government could
18 reinstate the witness-tampering charges. I
19 think another problem with the rule that --

20 JUSTICE BREYER: That's a special -- I
21 mean, you've created a case where you have
22 special circumstances where under those
23 circumstances they -- you want to argue that
24 that might be the equivalent of your having
25 written into the plea agreement: And I promise

1 I will not bring a constitutional claim either.

2 And you're saying the reason that you
3 should read that in here is because, otherwise,
4 we lose the benefit of our dropping the
5 witness-tampering charge. Okay. I -- I -- I
6 --

7 MR. FEIGIN: Your Honor, I didn't --

8 JUSTICE BREYER: We'll leave that for
9 a different time, but this is not some special
10 circumstance. This is an ordinary case. And
11 should we read that nonexistent, "and I promise
12 not to bring constitutional claims" into this
13 opinion?

14 MR. FEIGIN: Your Honor --

15 JUSTICE BREYER: And now we're back,
16 and I want to be sure -- I'll let you speak, I
17 promise. I just want -- because I want to
18 hear -- since Justice Gorsuch and, I think,
19 probably Justice Kagan and I were all asking --
20 putting the same kind of objection to you, I
21 want to be sure I hear your answer to that
22 whole range or whatever you want to say there.

23 MR. FEIGIN: Just as a prefatory
24 matter, Your Honor, I didn't invent that case.
25 That's this case. We dropped a

1 failure-to-appear charge in return for the plea
2 agreement here.

3 But let me just address the basic
4 point of why this should be the default rule.
5 And I think there are two basic reasons for
6 that.

7 Number one is there's a serious
8 information imbalance here. Only the defendant
9 knows what kinds of claims he might want to
10 bring after a guilty plea and in what respects
11 he doesn't intend his guilty plea to be final.

12 The defendant here raised some 36
13 claims in the district court, as he had every
14 right to do, but the government and the
15 district court can't guess which claims those
16 are going to be. We can't be sure that they've
17 been properly litigated, even if --

18 JUSTICE GINSBURG: He didn't waive
19 this one. I mean, I -- I think he couldn't
20 make this claim unless he had raised it in the
21 district court. In the district court, he did
22 raise unconstitutionality of the statute.

23 MR. FEIGIN: Well, this -- the Second
24 Amendment claim -- he mentioned the Second
25 Amendment in the District Court, but that claim

1 has gotten much more focused on appeal, to the
2 point where it might have been useful had the
3 government been able to actually answer in the
4 district court, where it would have been able
5 to submit evidence.

6 There's a second claim, a vagueness
7 claim --

8 JUSTICE GINSBURG: But, there wasn't
9 any evidence involved. He said I admit all the
10 facts I was charged with, but you can't
11 prosecute me for this because I have a Second
12 Amendment right to bear arms.

13 MR. FEIGIN: Yeah, Your Honor, he
14 raised the Second Amendment, and he's now
15 challenging whether the statute under which he
16 was convicted is constitutional as applied.

17 It wasn't even clear in District
18 Court, it was an as-applied challenge. And
19 some of the arguments he makes on appeal about
20 the necessity of protecting the Capitol Grounds
21 are things we could have submitted evidence on.
22 Let me --

23 JUSTICE GORSUCH: Mr. Feigin, is this
24 information asymmetry problem a suggestion that
25 the government lacks sufficient bargaining

1 power in the plea bargaining process?

2 MR. FEIGIN: No, Your Honor, but it is
3 -- it is in -- this is a particular instance
4 where the only person who knows the contours of
5 this particular aspect of the plea agreement or
6 -- or what the defendant even intends the plea
7 to be is going to be the defendant.

8 JUSTICE GORSUCH: And the government
9 lacks --

10 CHIEF JUSTICE ROBERTS: And that's not
11 -- that's not -- that's not accurate. He may
12 not know. I mean, he enters this plea
13 agreement and the next day this Court issues a
14 decision saying that statute is
15 unconstitutional.

16 You would still hold him to the plea
17 agreement, but he didn't necessarily know he
18 was giving up that claim.

19 MR. FEIGIN: Well, Your Honor, he'd be
20 able to get relief very easily under that
21 circumstance, at the very least under 28 U.S.C.
22 2255 in a post-conviction motion, but if I
23 could get to the second --

24 JUSTICE SOTOMAYOR: All right. In --
25 in -- in a bunch of different cases, Bailey

1 being one of them, the government relied in
2 many where we found things retroactive, the
3 government has relied on plea waivers. And
4 most circuits have thrown out those cases by a
5 defendant.

6 MR. FEIGIN: Well, Your Honor, we
7 would not seek to enforce, and I'm not aware of
8 courts enforcing waivers, for example,
9 collateral relief waivers in circumstances
10 where this Court has held a statute to be
11 unconstitutional.

12 JUSTICE SOTOMAYOR: You -- you have.
13 I have examples of them. There are cases in
14 which you've done that across -- maybe not you
15 personally, but I'm talking about U.S. -- U.S.
16 attorneys across the country have.

17 And courts have on the basis of plea
18 waivers not applied retroactive law.

19 MR. FEIGIN: Well, Your Honor, it --
20 there are particular -- particular cases bear
21 on particular facts. So, for example, there is
22 currently litigation about the effect of this
23 Court's decision in Johnson against United
24 States.

25 And in some cases, we've resisted the

1 application of particular defendants because we
2 don't think they're really make Johnson claims,
3 they're trying to use Johnson to make claims
4 that are actually statutory and are barred.
5 And in those circumstances, we seek to enforce
6 the appeal -- the collateral attack waivers,
7 and we've been somewhat successful.

8 But in the just -- I just want to get
9 to the second reason, I think this is a good
10 default rule, which is that it does what a
11 default rule is supposed to do in that it
12 reflects the expected and efficient result that
13 I think the parties would expect.

14 Very few defendants have
15 constitutional challenges to the statute under
16 they were convicted that have a reasonable
17 prospect of succeeding on appeal.

18 Therefore, it's not a right that's
19 going to matter to most defendants, and it's --
20 if the defendant believes he has the rare case
21 in which that's the kind of thing he wants to
22 preserve, he's the only person who could
23 potentially know it. And it's uncumbent upon
24 him to tell the court.

25 JUSTICE KAGAN: Can I -- can I -- can

1 I ask, Mr. Feigin, how the rule that you are
2 espousing fits with the language that we've
3 used in Blackledge and Menna and Broce?
4 Because when I look at those cases, the
5 language that we use seems totally consistent
6 with the theory that Justice Gorsuch and
7 Justice Breyer raised, and not consistent with
8 yours.

9 So when they were talking about what
10 -- what -- what's not precluded by a guilty
11 plea, they say, well, where you have a right
12 not to be hailed into court at all, they say
13 where the charge is one that the state cannot
14 constitutionally prosecute; that last one is
15 from Menna, and they say where the court had no
16 power to enter the conviction; that last one is
17 from Broce.

18 So, in all three of those cases, the
19 language used is where, you know, in the end
20 you find that the -- that you've -- you've --
21 you've done the facts, you've satisfied the
22 elements, but still the state can't prosecute
23 you constitutionally or properly.

24 And that's exactly what fits with
25 Justice Gorsuch's and Justice Breyer's theory.

1 Three -- three times we've said it.

2 MR. FEIGIN: Well, let me say a couple
3 of things. First of all, I don't think -- I
4 think, as the colloquy with opposing counsel
5 demonstrates, that does not produce a clear
6 rule and a clear rule is important in these
7 circumstances.

8 Second, I don't even think the author
9 of Blackledge, Justice Stewart, viewed his
10 opinion that way, and I think that's clear if
11 you look at the dissent, he joined in Ellis
12 against Dyson.

13 And, third, I don't think anything
14 that this Court said in Blackledge and Menna
15 reflects that they're really the tip of the
16 iceberg that would allow claims by all sorts of
17 defendants.

18 In those cases, you had the court
19 outside the context of any sort of conditional
20 plea procedure asking whether there's any
21 recourse for a defendant who wanted on the one
22 hand to plead guilty and on the other hand to
23 preserve a claim that he was charged under --
24 he was charged for primary conduct for which
25 he'd already been charged and convicted. And

1 the court allowed a defendant to do that and
2 preserve those claims, but as the Brady example
3 illustrates, it's treated legislative claims
4 differently.

5 There's one more important point I'd
6 really like to make, which is that I believe I
7 heard opposing counsel to say that under their
8 rule, as they interpret Blackledge and Menna,
9 which, again, I think the contours of which are
10 not clear, and I would caution this Court we
11 really do need rules in this area. Under their
12 rule, the error has to be clear on the face of
13 the indictment.

14 I think if the Court looks at the face
15 of the indictment in this case, the Court is
16 not going to find anything that relates to the
17 as-applied Second Amendment challenge.

18 The claim simply says that petitioner
19 possessed weapons on Capitol Grounds, full
20 stop, and the as-applied nature of the claim is
21 that the -- it relates to exactly where the
22 defendant was and what he saw and that sort of
23 thing.

24 And I don't really understand how that
25 claim could properly be preserved under their

1 rules. So even under their rule, I think the
2 government would win this case.

3 The other --

4 JUSTICE GINSBURG: I thought he was
5 saying now, he may be totally wrong on the law,
6 but saying that a statute that says I can't
7 bring guns on the Capitol Grounds is
8 unconstitutional, period. Why is it as
9 applied?

10 MR. FEIGIN: He has framed his claim
11 as an as-applied claim, where he claims that it
12 infringes on the rights of a law-abiding
13 citizen as applied to him because he was in a
14 parking lot.

15 If you look at his Court of Appeals
16 brief, or the amicus brief in the Court of
17 Appeals that he's adopted, he makes much out of
18 exactly where he was and the fact that he
19 possessed weapons only in his car.

20 I want to make one more point about
21 appeal waivers, to get back to Justice Kagan's
22 question earlier, which is I wouldn't want to
23 sit down without informing the Court that there
24 are -- 25 percent of the pleas in the federal
25 system don't even involve plea agreements.

1 They're open pleas.

2 And when a defendant enters a plea
3 without an agreement and the District Court and
4 the government have every expectation that that
5 ends the case, the defendant should not be able
6 silently to reserve a challenge to the
7 substance of the conviction that the defendant
8 assented to the court entering. If the court
9 --

10 CHIEF JUSTICE ROBERTS: I'm sorry.
11 What do you mean an open plea?

12 MR. FEIGIN: We call them open pleas.
13 It's just a term for a plea without a plea
14 agreement. So the defendant simply decides to
15 plead guilty himself so the -- without a plea
16 agreement. He gets acceptance of
17 responsibility points for that.

18 And in those circumstances the
19 government and the District Court have every
20 reason to believe that the case is over, so
21 long as the plea was knowing and voluntary.

22 JUSTICE SOTOMAYOR: Why? You haven't
23 given him that. You think it's in the plea.

24 MR. FEIGIN: Because that's in the
25 nature of the plea.

1 JUSTICE SOTOMAYOR: No. The -- the
2 nature of a plea shouldn't be to automatically
3 say you've lost all rights because you pled
4 guilty. That's basically what your position is
5 today.

6 MR. FEIGIN: May I answer, Your Honor?
7 Your Honor, you don't lose all rights. There
8 is a procedure --

9 JUSTICE SOTOMAYOR: To -- to the
10 appeal.

11 MR. FEIGIN: -- that was draft -- that
12 was crafted for entering a conditional plea.
13 And if a defendant does not believe that a case
14 is ended by his plea, he should -- it's
15 incumbent upon him to tell the District Court
16 and tell the government that that's what he
17 means when he pleads.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Counsel.

21 Ms. Amunson, four minutes.

22 REBUTTAL ORAL ARGUMENT OF

23 JESSICA R. AMUNSON.

24 ON BEHALF OF THE PETITIONER.

25 MS. AMUNSON: Thank you, Your Honor.

1 I'll begin with Mr. -- one of Mr. Feigin's last
2 points, which was whether the error must be
3 clear on the face of the indictment. And, in
4 fact, the claim must be clear on the face of
5 the record at the time of pleading guilty, and
6 that is clear from this Court's opinion in
7 Broce.

8 And then if I can just address quickly
9 the Rule 11 claim that the government is making
10 here about the drafters of Rule 11. As the
11 Chief Justice pointed out, those drafters used
12 the term "doctrine."

13 And the Court need look no further
14 than Judge Friendly's opinion, which is
15 essentially contemporaneous with the enactment
16 of the 1983 amendments to Rule 11 establishing
17 the conditional plea procedures to look to the
18 definition of that doctrine.

19 That doctrine is also explained in the
20 sources that are cited in the Rule 11 advisory
21 notes. And that doctrine was understood at the
22 time to include constitutional challenges to
23 the statute of conviction as it was enacted
24 against the background of Haynes, as Justice
25 Gorsuch pointed out, where the Court considered

1 it obvious, so obvious that it put it in a
2 footnote that, of course, a defendant's guilty
3 plea did not preclude his later constitutional
4 challenge.

5 Briefly, just to address the colloquy,
6 I just want to point out that the colloquy
7 cannot waive the defendant's rights because it
8 is, first of all, a third-party that the
9 defendant would be effectively contracting with
10 when there is no plea waiver or no appeal
11 waiver in his plea agreement.

12 And that the plea agreement itself has
13 an integration clause, which says that it
14 comprises the totality of the agreement between
15 the government and that anything further will
16 be entered into in writing.

17 Finally, as to Mr. Feigin's point
18 about the potential information imbalance and
19 the government not getting the information that
20 it needs in pleading guilty, as this Court has
21 recognized, it takes practicalities into --
22 into account.

23 And here, if there's any imbalance, it
24 is on the defendant. The defendant enters the
25 plea bargaining process with certain rights.

1 One of those is a statutory right to appeal.

2 And if the government wants the
3 defendant to waive that right, the government
4 should ask for an explicit waiver of that right
5 in its plea agreement.

6 The government did not do so here.
7 And we ask the Court to reverse the judgment
8 below and allow Petitioner's claims to proceed
9 on the merits in the Court of Appeals.

10 Thank you, Your Honors.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Counsel. The case is submitted.

13 (Whereupon, 12:00 noon, the case was
14 submitted.)

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