

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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RODNEY CLASS, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 16-424  
 )  
 ) UNITED STATES OF AMERICA, )  
 )  
 ) Respondent. )  
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Pages: 1 through 66

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Date: October 4, 2017

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

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Washington, D.C.

Wednesday, October 4, 2017

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

APPEARANCES:

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

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

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1 P R O C E E D I N G S

2 (11:00 a.m.)

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

6 Ms. Amunson.

7 ORAL ARGUMENT OF JESSICA R. AMUNSON

8 ON BEHALF OF THE PETITIONER

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

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

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

20 The question here is whether that  
21 right is nonetheless forfeited solely by  
22 operation of the plea itself. But as Judge  
23 Friendly summarized this Court's  
24 Blackledge-Menna doctrine, a defendant who  
25 pleads guilty can challenge the -- challenge

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

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

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

24 CHIEF JUSTICE ROBERTS: I should know  
25 this, but I don't. The -- in the situation in

1 Blackledge, et al., can the government specify  
2 that those claims are waived; in other words,  
3 spell it out: You are waiving any double  
4 jeopardy claim too.

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

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

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

23 The second class of rights that are at  
24 stake are those procedural and evidentiary  
25 rights that would go to the reliability of the

1 defendant's conviction; so, for example, Fourth  
2 Amendment rights against search and seizure or  
3 Fifth Amendment rights against  
4 self-incrimination.

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

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

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

1 doctrine?

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

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

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

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

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



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

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: But what  
12 about --

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

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

1 the court has no power to impose -- to enter  
2 the conviction or impose the sentence --

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

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

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

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

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

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

25 MS. AMUNSON: Oh. So because, Your

1 Honor, I think that the -- the defendant would  
2 have, in making the plea, had to admit certain  
3 facts that would be -- that the defendant would  
4 then have to be contradicting on appeal.

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

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

17 MS. AMUNSON: So if --

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

21 MS. AMUNSON: So, Your Honor, I think  
22 that is conceivable that that could fall within  
23 the Blackledge-Menna line of cases, but the  
24 Blackledge-Menna line of cases has generally  
25 been held to be constitutional limitations on

1 the -- on the ability of the Court to secure  
2 conviction.

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

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

11 CHIEF JUSTICE ROBERTS: What --

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

15 MS. AMUNSON: Right.

16 JUSTICE SOTOMAYOR: The constitutional  
17 --

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

25 CHIEF JUSTICE ROBERTS: What about,

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

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

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

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

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

24 So the -- the Menna and Blackledge  
25 line of cases is analytically distinct and it

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

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

15 May the defendant challenge it on  
16 direct appeal --

17 MS. AMUNSON: No, Your Honor.

18 JUSTICE KENNEDY: -- under your view?

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

22 JUSTICE KENNEDY: That's my  
23 understanding.

24 MS. AMUNSON: So that defendant I  
25 think would have to go through 2255.

1 JUSTICE KENNEDY: Okay. So -- so if  
2 it's -- so, are we just talking about the  
3 meaning of Rule 11? If it's -- what is the  
4 basis of, the substantive basis for your  
5 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's not affirmatively waived in his  
22 written plea agreement. So we have to then  
23 look to whether it's 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'll quote the words: "A plea, and  
18 conviction under it, comprehends all factual  
19 and legal elements necessary to sustain a  
20 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's no power to impose the -- the

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

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

8 JUSTICE KENNEDY: Yes.

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

12 JUSTICE KENNEDY: But you say --

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

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

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

24 The Defendant's claim is simply that  
25 --

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

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

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

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

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

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

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

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

1 MS. AMUNSON: Well, if I can just go  
2 back again to Judge Friendly's formulation.  
3 It's where the -- the claim is that the state  
4 would be precluded from obtaining a valid  
5 conviction against him.

6 So where the constitutional --

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

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

21 MS. AMUNSON: That --

22 JUDGE BREYER: All they wrote were the  
23 words, I plead guilty. So the question is, do  
24 those words have the same effect as if they'd  
25 exercised their undoubted power to stop the

1 individual from raising the claim by writing it  
2 out specifically. Is that right?

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

5 JUSTICE ALITO: Is the question -- I'm  
6 sorry. Is the question what does the defendant  
7 implicitly concede by pleading guilty?

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

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

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

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

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

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

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

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

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

18 MS. AMUNSON: Right.

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

23 MS. AMUNSON: Right. We're  
24 essentially talking about a federal forfeiture  
25 rule that where -- and here, as I've said, the

1 government concedes that the plea agreement  
2 does not explicitly waive the defendant's right  
3 to appeal his conviction and challenge the  
4 constitutionality of the sentence.

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

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

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

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

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

25 JUSTICE ALITO: Well, it doesn't



1 forever preclude him if it's waiveable.

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

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

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

25 Is -- is -- is that the right line or

1 are you drawing a different line? And, if so,  
2 why?

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

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

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

25 MS. AMUNSON: That's right, Your

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

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

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

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

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

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

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

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

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

16 MS. AMUNSON: Right.

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

20 MS. AMUNSON: There are examples, Your  
21 Honor, in the lower courts --

22 JUSTICE KENNEDY: What is the rule  
23 that you propose us to -- that you would  
24 propose for us to adopt in that case?

25 MS. AMUNSON: So I think that that

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

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

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

24 JUSTICE GORSUCH: I guess I'm a little  
25 confused by that reply. Why would it be that

1 you would implicitly waive statutory but not  
2 constitutional claims by your guilty plea?

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

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

13 JUSTICE GORSUCH: Okay, okay, but --  
14 (Laughter.)

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

19 JUSTICE GORSUCH: How? How,  
20 analytically, would that work?

21 MS. AMUNSON: Because the Constitution  
22 is the primary bar on this -- on the --

23 JUSTICE GORSUCH: It's more important  
24 than statutes.

25 MS. AMUNSON: -- lawmaking authority's

1 ability to proscribe criminal conduct.

2 If I may reserve the balance of my  
3 time.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE RESPONDENT

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

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

15 JUSTICE SOTOMAYOR: I'm sorry, how can  
16 11 -- how can the federal rules undo a  
17 constitutional rule? Blackledge and Menna were  
18 constitutional rules. So, can Rule 11(c) undo  
19 those?

20 MR. FEIGIN: Let me say a couple  
21 things about that, Your Honor. First of all, I  
22 think Ms. Amunson just conceded that Blackledge  
23 and Menna are not constitutional rules. And so  
24 in -- the federal rules could override them.

25 Second, I think what the drafters of

1 the rule --

2 JUSTICE SOTOMAYOR: It's almost a  
3 vicious circle because the rules say --

4 MR. FEIGIN: Well --

5 JUSTICE SOTOMAYOR: -- we're not  
6 affecting that doctrine. So --

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

13 I think what the drafters of Rule  
14 11(a)(2) did -- and this is clear in the  
15 advisory notes -- is, to be quite honest, I  
16 think they were a little confused by Blackledge  
17 and Menna. They weren't quite sure what to  
18 make of them. They respected what this Court  
19 had done in those particular situations and  
20 instructed that the rule should not be  
21 interpreted to apply in the situations at issue  
22 in those cases, which they described with some  
23 specificity. But I don't think they viewed  
24 Blackledge and Menna as the tip of an iceberg  
25 for the kind of rule Petitioner is proposing,



1     which would, in theory, allow every criminal  
2     defendant in the system who pleads guilty, and  
3     there are over 50,000 of them each year, in  
4     theory, to raise a substantive challenge to  
5     their conviction without having notified the  
6     government or the court of their intent to do  
7     so.

8                   JUSTICE BREYER: Well, all you have to  
9     do --

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

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

20                   But let me say a few things about  
21     appeal waivers. Under current law, we have a  
22     couple of difficulties with appeal waivers.  
23     One is that some District Judges believe that  
24     they have discretion not to accept a plea  
25     agreement that includes an appeal waiver, and

1 so, as a practical matter, we can't get appeal  
2 waivers in those districts.

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

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

16 The other thing I'd say about appeal  
17 waivers --

18 JUSTICE SOTOMAYOR: Mr. Feigin, all  
19 you're saying is how much power you have and  
20 how much power to coerce you have.

21 The other side is simply saying if a  
22 defendant wants to accept your power, let him  
23 do so expressly. You can worry about what  
24 courts are doing separately, but that shouldn't  
25 bind him or her to the whim of whether you will

1 let them plead guilty based on an appeal waiver  
2 that's so broad that they can't challenge  
3 anything that's a constitutional violation.

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

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

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

20 JUSTICE GINSBURG: And -- and clear to  
21 the defendant what he is giving up. And in  
22 this case, in the plea colloquy, the Court  
23 informed Mr. Class you can appeal a conviction  
24 after a guilty plea if you believe that your  
25 guilty plea was somehow unlawful. And the

1 defendant expressed some uncertainty about what  
2 that meant.

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

8 MR. FEIGIN: Well, Your Honor, a  
9 factual response to that and then a legal  
10 response.

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

22 The Court again -- and this is on page  
23 76 -- tells the defendant that the plea  
24 agreement actually precludes him from  
25 challenging his conviction on appeal, which

1 isn't correct, but if he thought he had wanted  
2 to actually bring an appeal challenging his  
3 conviction, he might have spoken up at that  
4 point.

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

11 JUSTICE KENNEDY: Well, isn't the  
12 broader --

13 JUSTICE GINSBURG: Let me ask you the  
14 case --

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

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

23 JUSTICE GINSBURG: Let me -- let me  
24 put a case to you that seems to be strongly for  
25 the other side, and it is Loving against

1 Virginia.

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

9           MR. FEIGIN: So, Your Honor --

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

14           MR. FEIGIN: So, Your Honor, that  
15 case, as the caption reflects, came up through  
16 the state courts. I think this Court's been  
17 quite 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 where 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 through the federal system  
12 in 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 we're married to each other, and they would  
23 preserve every single possible claim they could  
24 bring after a trial.

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

11 JUSTICE SOTOMAYOR: And "may" -- "may"  
12 doesn't "should." And "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're raising are the kinds of  
23 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) to -- a particular class of claims --

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's nothing in Rule 11 that  
12 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's 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's 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's no dispute that this is a  
13 non-jurisdictional claim.

14 CHIEF JUSTICE ROBERTS: Except for --  
15 except for the Black -- Blackledge-Menna  
16 doctrine.

17 MR. FEIGIN: So, Your Honor --

18 CHIEF JUSTICE ROBERTS: And it's, you  
19 know, it's obvious the key word is doctrine.  
20 It suggests to me that there's more covered by  
21 that than just Blackledge and Menna --

22 MR. FEIGIN: I'm not sure that's  
23 right, Your Honor. I think, first of all, the  
24 drafters of the rule were quite well aware of  
25 the issue that's before the Court here. And I

1 think it says something that they did not  
2 actually identify it as one of the exceptions.

3 I think they looked at Blackledge and  
4 Menna and sort of took them as they were and  
5 didn't want to interfere with the work that  
6 this Court was doing.

7 But I don't think there's any reason  
8 to believe that they silently intended to  
9 create another exception for the kinds of  
10 claims at issue in this case.

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

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

23 So then we have to face the problem of  
24 whether, by saying guilty, that's a waiver.  
25 And I thought, having looked at Blackledge and

1 Menna, the rule is simply this: When you say  
2 guilty, you have admitted you did what the  
3 statute forbids. Okay?

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

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

22 Two, you didn't admit double jeopardy.  
23 I did it, I did it. Ha, ha, you still can't  
24 prosecute me because you did once before. I  
25 did it, I did it, but you cannot take away from

1 me the right to claim that the statute's  
2 unconstitutional because my guilty plea has  
3 nothing to do with that.

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

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

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

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

23 MR. FEIGIN: Well, Your Honor, it does  
24 even more than that because, for example, it's  
25 clear, under Tollett against Henderson, you

1 can't challenge the composition of the grand  
2 jury, but if you went to trial, you would have  
3 a right to challenge the composition of the  
4 grand jury even following conviction. In fact,  
5 the Court said in *Baskett v. Hillary*.

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

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

1     guilt.

2                   JUSTICE BREYER:  No, that can't be  
3     right because, after all, if you're admitting  
4     that they can convict you and put you in prison  
5     for it, we wouldn't have Blackledge and Menna,  
6     because in Blackledge and Menna, they admitted  
7     they did what the statute forbids, but still  
8     they could claim that it's double jeopardy or  
9     vindictive prosecution.

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

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

1 that his conviction is invalid because of  
2 the -- a structural defect in that statute,  
3 that structural defect being that it  
4 unconstitutionally burdened his right to choose  
5 a jury trial. That has nothing to do with  
6 his factual guilt.

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

21 Isn't that maybe the most natural and  
22 historically consistent understanding of what a  
23 guilty plea is? I plead guilty to that which I  
24 am charged. What's in the indictment.

25 MR. FEIGIN: Well, Your Honor, I also



1 believe that there is an aspect of it that  
2 admits that the court can convict you and  
3 impose punishment. And that's particularly  
4 apparent in --

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

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

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

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

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

25 MR. FEIGIN: Well, Your Honor, it

1 wasn't disputed in that case. Neither party  
2 had briefed it. I think, at most, Haynes  
3 stands for the proposition that -- and we don't  
4 say otherwise -- that this isn't a  
5 jurisdictional rule; that is, it's more in the  
6 nature of a mandatory claims processing rule.  
7 If the government doesn't raise it, then the  
8 defendant can proceed -- can proceed to bring  
9 the claim.

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

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

25 MR. FEIGIN: Well, again, Your Honor,

1 I'd go back to the statement in Broce that I  
2 believe Justice Ginsburg read earlier, that  
3 this Court has said, more recently than Haynes,  
4 that a guilty plea encompasses all the factual  
5 and legal admissions necessary for the entry of  
6 conviction and the imposition of a sentence.

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

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

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

1 pornography charges and the government agrees  
2 not to bring the witness-tampering charges.

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

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

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

1 written into the plea agreement: And I promise  
2 I will not bring a constitutional claim either.

3 And you're saying the reason that you  
4 should read that in here is because, otherwise,  
5 we lose the benefit of our dropping the  
6 witness-tampering charge. Okay. I -- I -- I  
7 --

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

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

15 MR. FEIGIN: Your Honor --

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

24 MR. FEIGIN: Just as a prefatory  
25 matter, Your Honor, I didn't invent that case.

1 That's this case. We dropped a  
2 failure-to-appear charge in return for the plea  
3 agreement here.

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

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

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

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

24 MR. FEIGIN: Well, this -- the Second  
25 Amendment claim -- he mentioned the Second

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

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

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

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

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

24 JUSTICE GORSUCH: Mr. Feigin, is this  
25 information asymmetry problem a suggestion that

1 the government lacks sufficient bargaining  
2 power in the plea bargaining process?

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

9 JUSTICE GORSUCH: And the government  
10 lacks --

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

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

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

25 JUSTICE SOTOMAYOR: All right. In --



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

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

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

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

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

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

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

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

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

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

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

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

25 And that's exactly what fits with

1 Justice Gorsuch's and Justice Breyer's theory.  
2 Three -- three times we've said it.

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

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

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

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

1 he'd already been charged and convicted. And  
2 the court allowed a defendant to do that and  
3 preserve those claims, but as the Brady example  
4 illustrates, it's treated legislative claims  
5 differently.

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

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

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

25           And I don't really understand how that

1 claim could properly be preserved under their  
2 rule. So even under their rule, I think the  
3 government would win this case.

4 The other --

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

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

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

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

1 system don't even involve plea agreements.  
2 They're open pleas.

3 And when a defendant enters a plea  
4 without an agreement and the district court and  
5 the government have every expectation that that  
6 ends the case, the defendant should not be able  
7 silently to reserve a challenge to the  
8 substance of the conviction that the defendant  
9 assented to the court entering. If the court  
10 --

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

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

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

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

25 MR. FEIGIN: Because that's in the

1 nature of the plea.

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

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

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

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

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Ms. Amunson, four minutes.

23 REBUTTAL ORAL ARGUMENT OF 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, at 12:00 noon, the case  
14 was submitted.)

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<b>1</b>	<b>add</b> <sup>[1]</sup> 45:19 <b>address</b> <sup>[4]</sup> 46:12 53:4 64:8 65:5 <b>addressed</b> <sup>[3]</sup> 38:9 39:4 48:14 <b>admission</b> <sup>[2]</sup> 9:17 45:18 <b>admissions</b> <sup>[5]</sup> 7:23 8:14,14 13:20 50:5 <b>admit</b> <sup>[6]</sup> 11:2 13:6 43:5,12,22 54:10 <b>admits</b> <sup>[4]</sup> 13:6 45:25 48:2 50:8 <b>admitted</b> <sup>[7]</sup> 43:2,14,16,17,17 44:21 46:6 <b>admitting</b> <sup>[8]</sup> 45:8,10,20 46:3 47:19,20 49:17,18 <b>adopt</b> <sup>[1]</sup> 27:24 <b>adopted</b> <sup>[1]</sup> 61:18 <b>advanced</b> <sup>[1]</sup> 44:13 <b>advised</b> <sup>[1]</sup> 14:11 <b>advisory</b> <sup>[4]</sup> 4:14 31:15 41:7 64:20 <b>affecting</b> <sup>[1]</sup> 31:6 <b>affirmatively</b> <sup>[7]</sup> 5:18,20 6:7 15:18,21 19:17 24:6 <b>agree</b> <sup>[5]</sup> 17:3 38:15,19,21 50:24 <b>agreement</b> <sup>[26]</sup> 3:16 5:11 15:22 20:12,17 22:21 23:1 24:24 32:14,25 35:24 42:16 50:23 51:14 52:1 53:3 55:6,14,18 62:4,15,17 65:11,12,14 66:5 <b>agreements</b> <sup>[1]</sup> 62:1 <b>agrees</b> <sup>[2]</sup> 41:3 51:1 <b>ahead</b> <sup>[1]</sup> 34:17 <b>al</b> <sup>[1]</sup> 5:1 <b>alabama</b> <sup>[1]</sup> 45:23 <b>alito</b> <sup>[11]</sup> 6:19 7:4,11 17:13 21:5,10 23:11,17,25 25:18 26:14 <b>allow</b> <sup>[3]</sup> 32:1 59:17 66:8 <b>allowed</b> <sup>[1]</sup> 60:2 <b>almost</b> <sup>[2]</sup> 31:2 47:15 <b>already</b> <sup>[2]</sup> 51:13 60:1 <b>although</b> <sup>[1]</sup> 38:16 <b>amassed</b> <sup>[2]</sup> 6:18 9:9 <b>amendment</b> <sup>[17]</sup> 4:6 6:2,3 17:17 22:2 24:9,10 34:13,14 43:9,10 51:9 53:25 54:1,13,15 60:18 <b>amendments</b> <sup>[1]</sup> 64:16 <b>america</b> <sup>[1]</sup> 1:6 <b>ames</b> <sup>[2]</sup> 47:14,17 <b>amicus</b> <sup>[1]</sup> 61:17 <b>amunson</b> <sup>[64]</sup> 1:18 2:3,9 3:6,7,9 5:5 7:2,6,18 8:10,21 9:18 10:5,18,25 11:17,21 12:15,18 13:11 14:17,19,24 15:6,10 16:21 17:16,23 18:4,9,13,19 19:6,10,19 20:1,21 21:3,8,22 22:14,18,23 23:16,19 24:2,15 25:3,25 26:17 27:1,9,16,20,25 29:10,15,21,25 30:22 63:22,23,25 <b>analogue</b> <sup>[1]</sup> 46:15 <b>analytically</b> <sup>[2]</sup> 13:25 29:20 <b>another</b> <sup>[5]</sup> 6:19 23:18 42:9 43:16 51:20 <b>answer</b> <sup>[6]</sup> 23:7 25:19 40:25 52:22 54:4 63:7 <b>apparent</b> <sup>[1]</sup> 48:4 <b>apparently</b> <sup>[1]</sup> 37:21	<b>appeal</b> <sup>[44]</sup> 3:13,17 6:23,25 7:5,10,13,16 10:21 11:4 13:9,15,20 14:16 15:17 23:3 25:8,17,23 27:2 32:21,22,25 33:1,5,11,15,16 34:1,23 35:25 36:2 39:16,19 51:5,12 54:2,20 57:7,18 61:22 63:11 65:10 66:1 <b>appealed</b> <sup>[3]</sup> 7:5,6,10 <b>appeals</b> <sup>[4]</sup> 33:4 61:16,18 66:9 <b>appearances</b> <sup>[1]</sup> 1:17 <b>appellate</b> <sup>[1]</sup> 51:15 <b>appendix</b> <sup>[1]</sup> 35:13 <b>application</b> <sup>[3]</sup> 4:19,23 57:2 <b>applied</b> <sup>[4]</sup> 54:17 56:19 61:10,14 <b>applies</b> <sup>[1]</sup> 34:10 <b>apply</b> <sup>[2]</sup> 31:21 33:6 <b>approach</b> <sup>[1]</sup> 13:2 <b>area</b> <sup>[1]</sup> 60:12 <b>argue</b> <sup>[2]</sup> 7:15 51:24 <b>arguing</b> <sup>[1]</sup> 12:7 <b>argument</b> <sup>[13]</sup> 1:14 2:2,5,8 3:4,7 15:5 19:8 30:7 36:16 40:4 48:9 63:23 <b>arguments</b> <sup>[1]</sup> 54:20 <b>arms</b> <sup>[1]</sup> 54:13 <b>around</b> <sup>[1]</sup> 51:6 <b>as-applied</b> <sup>[4]</sup> 54:19 60:18,21 61:12 <b>aside</b> <sup>[2]</sup> 46:11 48:12 <b>aspect</b> <sup>[2]</sup> 48:1 55:6 <b>assented</b> <sup>[1]</sup> 62:9 <b>asserted</b> <sup>[1]</sup> 4:2 <b>asserting</b> <sup>[1]</sup> 6:21 <b>assistant</b> <sup>[1]</sup> 1:20 <b>assume</b> <sup>[3]</sup> 20:15 42:13,20 <b>asymmetry</b> <sup>[1]</sup> 54:25 <b>attack</b> <sup>[1]</sup> 57:7 <b>attempts</b> <sup>[1]</sup> 16:8 <b>attorney</b> <sup>[1]</sup> 32:13 <b>attorney's</b> <sup>[1]</sup> 38:16 <b>attorneys</b> <sup>[1]</sup> 56:17 <b>author</b> <sup>[1]</sup> 59:9 <b>authority's</b> <sup>[2]</sup> 28:22 29:25 <b>automatically</b> <sup>[1]</sup> 63:3 <b>aware</b> <sup>[3]</sup> 36:7 41:24 56:8 <b>away</b> <sup>[3]</sup> 20:16 43:25 45:14 <b>awfully</b> 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