No. 16-424

In the Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts,

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[1] Petitioner's blanket letter of consent to the filing of *amicus* briefs has been filed with this Court. Respondent has consented to the filing of this brief; written documentation of that consent is being submitted concurrently. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL and the clients its attorneys represent because the vast majority of criminal prosecutions end in guilty pleas. NACDL has a strong interest in protecting the fairness of plea bargains through clear default rules that help to level the playing field between prosecutors and defendants.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court, both as direct counsel and as *amicus*. This case implicates several issues of importance to the ACLU's members, including ensuring that unconstitutional statutes that may deter or chill constitutionally protected activity are reviewed at the earliest possible opportunity.

Here, NACDL and the ACLU seek this Court's confirmation of the *Menna-Blackledge* default rule under which a defendant's right to appellate review of a claim that a statute is unconstitutional is not waived *sub silentio* through an unconditional guilty plea.

INTRODUCTION AND SUMMARY OF ARGUMENT

Unconditional guilty pleas do not implicitly waive constitutional challenges to the underlying statute of conviction. A holding to the contrary would contravene this Court's precedents and hinder the judiciary's ability to review and strike down unconstitutional statutes, leaving invalid laws on the books to wrongly chill lawful conduct. There is no good reason to shield an unconstitutional criminal statute from judicial review at the earliest possible opportunity.

Under *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), a guilty plea is "an admission of factual guilt," which "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt." *Menna*, 423 U.S. at 62 n.2. Thus, a defendant's claim that his confession was unconstitutionally coerced is rendered irrelevant by a guilty plea because it is not logically inconsistent with factual guilt. See *Blackledge*, 417 U.S. at 30. But when "the claim is that the State may not convict petitioner no matter how validly his factual guilt is established," that claim is preserved even after an unconditional guilty plea. *Menna*, 423 at 62 n.2. The claim at issue here—that the statute on which the conviction is premised is unconstitutional—falls squarely in the latter category, and therefore should be preserved.

A guilty plea forecloses trial and sets a new course, after which a defendant can challenge case-specific procedural errors relating to his factual guilt only by expressly preserving his appeal rights under

Rule 11(a)(2). But a guilty plea, without more, poses no bar to a substantive constitutional challenge to the statute of conviction, because such a claim goes to the State's very power to impose charges and precludes conviction notwithstanding factual guilt. That is true both with respect to claims that the statute of conviction is unconstitutional on its face and those that the statute is unconstitutional as applied. In both settings, whether the defendant is factually guilty is of no moment, because the claim is that the government lacks the power to prohibit his conduct. See *Haynes* v. *United States*, 390 U.S. 85, 87 n.2 (1968).

Amici therefore fully support Petitioner's argument on the merits: An unconditional guilty plea concedes only factual guilt, and does not, standing alone, relinquish the right to challenge the constitutionality of the statute that forms the basis of the conviction. We write separately to emphasize that there is nothing to be gained—and much to be lost—by letting unconditional guilty pleas, like Petitioner's here, silently foreclose such challenges.

I. As this Court has recognized, today's criminal justice system is largely a system of pleas, not trials. And plea bargaining does not take place on a level playing field. Prosecutors typically have greater resources, more information, and vast discretion in making charges, thus maximizing their leverage during negotiations. Studies show that even defendants who would otherwise be acquitted are likely to plead guilty, given the realities of an under-resourced defense bar and the extraordinary power that prosecutors wield. Both the ubiquity of pleas and the structural imbalances inherent in the

bargaining process demand rules that ensure that constitutional protections are not too readily elided through the guilty plea process.

It would make little sense to require a defendant who does not contest his factual guilt to undertake a trial merely to preserve a constitutional challenge to the statute of conviction. Clarifying that unconditional guilty pleas do not by default waive substantive challenges to the State's very power to bring charges in the first place will ensure that substantive challenges to the statute of conviction are heard at the earliest opportunity. Getting unconstitutional laws off the books sooner rather than later serves the public interest—and not just the individual interest of the criminal defendant. This Court has long recognized that the public interest in preventing punishment of constitutionally protected conduct is so strong that it outweighs even the finality of a conviction. *Ex Parte Siebold*, 100 U.S. 371, 375-377 (1879). There is no basis for denying the opportunity to raise the same challenge on direct appeal.

II. The government's proposed alternatives to a presumption of prompt judicial review—relying upon the prosecutor's *noblesse oblige* to secure a conditional guilty plea under Rule 11(a)(2), or attempting to raise a substantive challenge on collateral review—are inferior alternatives. Neither procedure guarantees criminal defendants who plead guilty what is theirs by right: the opportunity to raise a timely challenge to the State's imposition of a punishment that is beyond its authority to impose. If such a right is waivable at all, it is only through a knowing, intelligent, and voluntary waiver expressly

provided in the plea agreement itself. No such waiver occurred here.

ARGUMENT

I. THE *MENNA-BLACKLEDGE* DOCTRINE SERVES THE PUBLIC INTEREST IN TESTING THE CONSTITUTIONALITY OF CRIMINAL STATUTES

Plea bargaining is central to today's criminal justice system. Who goes to prison, and for how long, is largely determined through the plea-bargaining process. In that context, the *Menna-Blackledge* doctrine plays a critical role in preserving challenges to the constitutionality of criminal statutes—and ensuring that lawful conduct is not chilled—by helping to strike down unconstitutional laws as soon as possible.

A. Plea Bargaining Dominates The Criminal Justice System

This Court has recognized that the criminal justice system is "for the most part a system of pleas, not a system of trials." *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012). Following decades of decline, the percentage of federal criminal cases culminating in a plea of guilty or nolo contendere has risen since 1980, as many cases that previously would have gone to trial are resolved through guilty pleas instead—including cases that would have resulted in acquittals. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 90-91, 105-106 (2005). In 1980,

just 81% of federal criminal convictions were the result of guilty pleas.[2] According to the most recent figures available, guilty pleas now account for 97% of federal convictions.[3]

State felony convictions tell a similar story. In 1970, it was estimated that between 70 and 85% of state felony convictions were the result of guilty pleas. See *Brady* v. *United States*, 397 U.S. 742, 752 n.10 (1970). By 2006, 94% of state felony convictions resulted from pleas of guilty or nolo contendere.[4] Critical constitutional guarantees thus cannot be given effect without accounting for "the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 566 U.S. at 170; see also *Missouri* v. *Frye*, 566 U.S. 133, 143-144 (2012); *Padilla* v. *Kentucky*, 559 U.S. 356, 373-374 (2010).

Defendants plead guilty at such high rates because broad criminal statutes and severe, mandatory sentences give prosecutors enormous leverage over them. See Wright, 154 U. Pa. L. Rev. at 85. As a result of overlapping criminal statutes, "a single episode may fall within the definition of several criminal offenses, ranging from trivial

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[2] See Ronald F. Wright, *Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background*, Wake Forest Univ. Legal Studies Paper (Sept. 2005), Appendix 1 (Disposition of Federal Criminal Cases and Defendants, 1871-2002), http://bit.ly/2r8Q8tg.

[3] See University at Albany, Sourcebook of Criminal Justice Statistics Online, Table 5.34.2010, http://bit.ly/2pPBmnb.

[4] Dept. of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006, at 1 (2010), http://bit.ly/2oSOEC2.

misdemeanors to serious felonies." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1962 (1992). At the same time, mandatory minimum penalties and structured sentencing make sentencing outcomes predictable, particularly in the federal system. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1128 (2011).

Prosecutors thus have the power to determine the length of a defendant's likely sentence through their charging decisions—and are free to invoke the threat of greater punishment to induce a plea of guilty. See *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). Indeed, one of the very *purposes* of longer statutory sentences is to enhance the already-significant power of prosecutors by giving them more "plea-bargaining chips." Bibas, *Regulating the Plea-Bargaining Market*, 99 Cal. L. Rev. at 1128; see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006) ("[L]onger sentences exist on the books largely for bargaining purposes."). And federal prosecutors are required to use every chip at their disposal: Just last week, the Attorney General issued a memorandum announcing that "it is a core principle that prosecutors should charge and pursue the most serious, readily provable offense." Dept. of Justice, Memorandum for All Federal Prosecutors from the Att'y Gen., *Department Charging and Sentencing Policy* (May 10, 2017), http://bit.ly/2qaeaTG.

On the other side of the ledger, significant sentencing discounts are available to defendants who comply with prosecutors' demands. See, *e.g.*, U.S.

Sentencing Guidelines Manual § 3E1.1 (decreasing the offense level where the defendant "clearly demonstrates acceptance of responsibility for his offense"); *id.* § 5K1.1 (providing for departure from the guidelines recommendation "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person"). These developments have made it extraordinarily costly for a criminal defendant to refuse a guilty plea. It is therefore unsurprising that "fewer [have] paid the price each year." Wright, 154 U. Pa. L. Rev. at 85.

The pressure to plead guilty is particularly acute for indigent defendants. Overburdened public defenders often lack the time and resources necessary to try cases or to negotiate more favorable plea agreements for their clients. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2479-2480 & n.60 (2004). Court-appointed counsel are subject to similar pressures. See *id.* at 2477. Indigent defendants therefore plead guilty at higher rates than other defendants. See Dept. of Justice, Bureau of Justice Statistics, Special Report, *Defense Counsel in Criminal Cases*, at 8 (2000), http://bit.ly/2oQCWE8 ("State and Federal inmates who used public attorneys were less likely than those with private attorneys to have been tried by jury.").

These dynamics—broad and overlapping criminal statutes, severe mandatory minimum sentences, "acceptance of responsibility" sentencing discounts, and often-inadequate representation—not only place increased pressure upon indigent defendants to plead guilty, but may also decrease the quality of bargains

that are offered to them. After all, prosecutors have little reason to offer concessions to defendants who are already under tremendous pressure to plead. See Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. at 2477.

Given these power imbalances, and assuming it is even constitutionally permissible to foreclose substantive constitutional challenges to criminal statutes when defendants elect to concede factual guilt and forgo a trial, it should be the government's burden to negotiate an express waiver, rather than the defendant's obligation to try to secure a conditional plea. See also *infra*, at 21-22. That default rule helps to cabin the "coercive power of criminal process" that prosecutors already exert. *Town of Newton* v. *Rumery*, 480 U.S. 386, 400 (1987) (O'Connor, J., concurring).

B. Post-Plea Challenges To Unconstitutional Statutes Are Important

Given the preeminent role of pleas in the criminal justice system, it would make little sense to require a defendant who does not contest his factual guilt to undertake a trial merely to preserve a constitutional challenge to the statute of conviction. And that applies to both facial and as-applied challenges: Whether facial or as-applied, challenges to the constitutionality of the statute of conviction place at issue the government's power to prohibit conduct, not factual guilt. See Pet'r's Br. at 42-44. This Court's precedents confirm as much, as *Menna* and *Haynes*, where the Court heard substantive constitutional challenges on direct appeal notwithstanding a guilty plea, were both as-applied challenges. *Id.* at 42-43.

But aside from wasting judicial resources, the D.C. Circuit's holding that an unconditional guilty plea forfeits a constitutional challenge to the statute of conviction deprives courts of the opportunity to resolve important constitutional issues at the earliest possible opportunity—and within a context devoid of factual disputes. Landmark rulings been made in cases involving post-plea constitutional challenges, and permitting such challenges is consistent with the admonition that, when the Constitution places certain conduct beyond the power of the government to punish, there "is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Welch* v. *United States*, 136 S. Ct. 1257, 1266 (2016) (quoting *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.)).

1. Permitting challenges to the constitutionality of a statute on direct appeal following a guilty plea furthers the strong public interest in determining the constitutionality of criminal statutes sooner rather than later. This Court has often recognized the imperative to provide early relief from an unconstitutional statute, lest protected behavior—*i.e.*, behavior beyond the government's power to punish—be chilled or deterred. That principle applies with special force where, as here, a criminal conviction, and the consequent loss of liberty, are at stake.

Thus, for example, this Court's precedents permit pre-enforcement review of the constitutionality of criminal statutes, even in the face of federalism concerns. When prosecution is threatened under a statute, it "is not necessary that [a person] first expose himself to actual arrest or prosecution to be

entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Steffel* v. *Thompson,* 415 U.S. 452, 459 (1974)); see also *Wooley* v. *Maynard*, 430 U.S. 705, 710 (1977). That is so even when it is a state prosecution that is threatened, because "a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity." *Steffel*, 415 U.S. at 462.

Relatedly, in the First Amendment context, courts may review claims that a statute is facially overbroad even when presented by a plaintiff to whom the statute could constitutionally be applied. Under the overbreadth doctrine, "persons who are themselves unharmed by the defect in a statute" may "nevertheless . . . challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 484 (1989) (internal quotation marks omitted). Waiting for the perfect plaintiff—who may never materialize because the statute deters his or her protected speech—makes no sense when the constitutional harm would otherwise go unremedied. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973).

Similarly, the foundational doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permitting federal courts to enjoin the enforcement of state statutes on any constitutional ground, rests on the premise that federal courts should be open early to claims that a state prosecution would be unconstitutional, rather than require an individual or company to "await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court." *Id.* at 165. The "great risk" of wrongly imposed punishment, including fines and imprisonment, overrides even Eleventh Amendment concerns. *Ibid.*

A direct appeal challenging the constitutionality of a statute following an unconditional guilty plea serves this same goal of preventing unnecessary constitutional harm. In such a case, the individual has risked more than those for whom prosecution is merely threatened, by conceding his factual guilt (and the authority of the government to punish him if his constitutional argument is wrong). There is no reason to require a defendant to expend resources on a trial when there are no facts to find, just to bring a challenge on direct appeal. And there is every reason not to: Post-plea appeals further the strong public interest in early invalidation of unconstitutional statutes and present an excellent opportunity to resolve constitutional questions in a case where the facts are undisputed.

This Court's cases reveal as much. Landmark rulings have been made in cases in which individuals entered unconditional guilty pleas and then challenged the constitutionality of the statutes under

which they were convicted. For example, after their motions to dismiss the charges on constitutional grounds were denied, the petitioners in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), both entered pleas of nolo contendere to the criminal charges against them for violating the Texas anti-sodomy law, *id.* at 563, which under Texas law automatically preserved all issues previously asserted by written motion, Tex. Code Crim. P. Art. 44.02. Their appeals following those pleas resulted in this Court's ruling that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their [private sexual] conduct without intervention of the government," *Lawrence*, 539 U.S. at 578, overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). Moreover, because it appears that the *Lawrence* petitioners were sentenced only to fines, federal habeas review would not have been available to them.

There are other examples, too, in which a defendant who did not contest his or her factual guilt vindicated important constitutional rights. In the landmark decision *Loving* v. *Virginia*, 388 U.S. 1 (1967), this Court struck down Virginia's unconstitutional antimiscegnation statute and reversed the convictions of the petitioners on collateral review, notwithstanding the fact that they had pleaded guilty. See *id.* at 3; see also *United States* v. *Knowles*, 29 F.3d 947, 950-951 (5th Cir. 1994) (reversing conviction under Gun Free School Zones Act on direct appeal following unconditional plea).

It is not uncommon for a defendant to concede factual guilt, even if he has a substantial constitutional claim that he should be allowed to

engage in the conduct the state seeks to prohibit. Permitting direct appeals on such claims following unconditional guilty pleas allows the courts to vindicate both the individual's interest in not being prosecuted for protected conduct, and society's interest in removing unconstitutional statutes from the books at the earliest opportunity.

2. The government appears to concede that a defendant who pleaded guilty and "seeks the benefit of a substantive ruling establishing that the statute of conviction is unconstitutional" could "seek" relief on collateral review—if a *different* defendant secured that constitutional ruling first. Br. in Opp. at 18. That is the correct rule, provided that the petitioner is otherwise able to overcome the procedural hurdles to relief. In *Bousley* v. *United States*, 523 U.S. 614 (1998), for example, this Court held that a defendant who pleaded guilty to use of a firearm was entitled to review of his habeas petition on the merits, if he could show that a subsequent decision limiting the scope of conduct proscribed by the statute of conviction rendered him actually innocent of the charge. *Id.* at 616. In reaching that conclusion, this Court emphasized that, where there has been a subsequent decision holding that "a substantive federal criminal statute does not reach certain conduct," such that the petitioner is able to show that he is actually innocent of the crime with which he has been convicted, it would be "inconsistent with the doctrinal underpinnings of habeas review" to preclude a court from reaching his claim on the merits. *Id.* at 620-621.

But the government's suggestion that defendants like Petitioner simply wait for somebody else to

challenge the statute of conviction is hardly sufficient to protect the relevant constitutional interests. The reason why substantive rules can be used to vacate even decades-old convictions (and thus override the State's interest in finality), is that they conclusively establish that a defendant's confinement is unlawful—and has always been unlawful—rather than simply raise the risk that it might be inaccurate. *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 729-730 (2016). That rationale applies with equal force in the context of a direct appeal where, as here, a defendant maintains that a statute is unconstitutional—a paradigmatic substantive rule. *Welch*, 136 S. Ct. at 1265 ("[C]onstitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" are substantive rules.).

Whatever finality interest might be secured by a guilty plea, it is manifestly less than the interest in finality of convictions *after* direct review, which must nevertheless give way to claims of substantive unconstitutionality. *Montgomery*, 136 S. Ct. at 730. The government should not be able to insist that a defendant wait in jail for someone else to secure a substantive constitutional ruling (see Br. in Opp. at 18), simply because the defendant does not contest the factual allegations against him.

This Court has explained that collateral attack is available after a guilty plea when the plea was not knowing and voluntary, or "where on the face of the record the court had no power to enter the conviction or impose the sentence"—citing *Menna* and *Blackledge* as examples of the latter condition. *United States* v. *Broce*, 488 U.S. 563, 569, 574 (1989).

A court therefore lacks the power to enter a conviction where, as here, the statute of conviction is unconstitutional. See *Montgomery*, 136 S. Ct. at 730 (A "conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.") (internal quotation marks omitted).

The *Menna-Blackledge* distinction between claims that are inconsistent with factual guilt (barred) and claims that require relief even if factual guilt is established (not barred) is therefore analogous to the procedural/substantive distinction in the habeas context. Procedural rules regulate the "manner of determining the defendant's culpability" and merely "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Montgomery*, 136 S. Ct. at 730 (emphasis and internal quotation marks omitted). They are "not logically inconsistent" with factual guilt. *Menna*, 423 U.S. at 62 n.2. Substantive rules, on the other hand, "stand in the way of conviction" even "if factual guilt is validly established." *Ibid.*; see also *Montgomery*, 136 S. Ct. at 730 (recognizing that there is no possibility of a "valid result" "where a substantive rule has eliminated a State's power to proscribe the defendant's conduct").

The same societal interest and constitutional imperative recognized in habeas cases as requiring relief from even decades-old convictions also favors not barring adjudication of substantive constitutional claims on direct appeal simply because a defendant

entered an unconditional guilty plea.[5] To deprive a defendant of his right to challenge the statute of conviction on direct appeal merely because he does not contest *factual* guilt would allow the State to punish conduct that it may not be permitted to punish in the first place—all without appellate review. There is no legitimate rationale for precluding such claims on direct appeal.

II. THE GOVERNMENT'S PROPOSED ALTERNATIVES ARE NO SUBSTITUTE FOR DIRECT APPEAL

The government has suggested that curtailing the *Menna-Blackledge* doctrine will have "limited practical importance" because defendants can choose to enter a conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2) or seek collateral relief from their convictions in the event that some other defendant has succeeded in a constitutional challenge to the same statute. Br. in Opp. at 18. But neither the conditional plea mechanism set forth in Rule

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[5] The *Menna-Blackledge* test turns upon whether the claim at issue is "logically inconsistent with the valid establishment of factual guilt." *Menna*, 423 U.S. at 62 n.2. The language from *Menna* referring to the State being precluded "from haling a defendant into court on a charge," *id.* at 62, was not meant to limit the scope of issues appealable from unconditional pleas. But even if the Court were to agree that only those constitutional challenges that prohibit a State "from haling a defendant into court" can be appealed, challenges to the constitutionality of the convicting statute would satisfy that test. When a statute is unconstitutional, the government *never* had the power to proscribe that conduct, and the government violates the Constitution by haling a defendant into court to defend conduct that is constitutionally protected.

11(a)(2) nor collateral review procedures provide meaningful alternatives to direct appeal. If this Court affirms the limitations that the D.C. Circuit grafted on to the *Menna-Blackledge* doctrine, a crucial mechanism for assessing the constitutionality of criminal statutes will simply be lost.

A. Rule 11(a)(2) Does Not Provide A Meaningful Alternative To Direct Appeal

The government maintains that Rule 11(a)(2) provides an adequate opportunity for defendants to preserve constitutional claims in the context of a guilty plea, and that, in effect, the burden should be on the defendant to invoke this rule if he or she seeks to pursue a constitutional challenge. But that argument places too much weight on the availability of Rule 11(a)(2).

To begin with, Rule 11(a)(2) has no bearing on a *state* defendant's guilty plea, and therefore provides no general solution to the problem. Conditional plea mechanisms vary by state, see *People* v. *Neuhaus*, 240 P.3d 391, 394-395 (Colo. Ct. App. 2009) (surveying state law of conditional pleas), and several states do not permit them at all, see, *e.g.*, *State* v. *Keohane*, 814 A.2d 327, 329 (R.I. 2003) (per curiam). Thus, even assuming that the government is correct that Rule 11(a)(2) obviates the need for the *Menna-Blackledge* doctrine (and it is not), that argument, by its own terms, applies only to those defendants lucky enough to be charged in jurisdictions that allow conditional pleas in the first place.

In any event, while Rule 11(a)(2) provides a limited mechanism for federal defendants who plead guilty to preserve certain claims for appeal, it does

nothing to alter a federal criminal defendant's right to challenge the constitutionality of the statute under which he has been convicted. Nothing in the text of the rule even suggests that such challenges are irrevocably waived if not preserved in the form of a conditional plea. To the contrary, the Advisory Committee on Rules has expressly stated that, contrary to the government's position here, "[s]ubdivision 11(a)(2) . . . should *not* be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." Fed. R. Crim. P. 11, Advisory Committee's Notes to 1983 Amendment (emphasis added).

That is not surprising. The conditional plea mechanism provided for by Rule 11(a)(2) is a poor substitute for direct appeal. The practical effect of requiring defendants to obtain conditional pleas would be the near-elimination of such challenges altogether. Rule 11(a)(2) is "intended to benefit courts and prosecutors, not defendants." *Gould* v. *United States*, 657 F. Supp. 2d 321, 330 (D. Mass. 2009). Thus, the rule provides that a conditional guilty plea may be entered only "[w]ith the consent of the court and the government." Fed. R. Crim. P. 11(a)(2). A prosecutor may withhold such consent "for any reason or for no reason at all." *United States* v. *Fisher*, 772 F.2d 371, 374 (7th Cir. 1985) (per curiam). Moreover, "[c]onditional pleas are not commonly offered by most prosecutors." *United States* v. *Drayton*, No. 12-2568-KHV, 2013 WL 789027, at *5 n.5 (D. Kan. Mar. 1, 2013); see also *United States* v. *Carvajal-Mora*, No. 08-CR-0059-CVE, 2009 WL 5171822, at *6 (N.D. Okla. Dec. 21,

2009); *Mackins* v. *United States*, No. 04-cv-261, 2009 WL 1563920, at *5 (W.D.N.C. June 1, 2009).

Nor are courts under any obligation to enter such pleas. Even a "blanket prohibition" on the entry of all conditional pleas may not "constitute error in any given case." *United States* v. *Davis*, 900 F.2d 1524, 1527-1528 (10th Cir.), *cert. denied*, 498 U.S. 856 (1990) (finding no error where district court refused to enter conditional plea on the ground that it would enable the defendant to appeal pretrial orders "while . . . serving his time"). Requiring a defendant to follow the procedure set forth in Rule 11(a)(2) to preserve constitutional challenges to his statutes of conviction would effectively leave him "at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). Fundamental constitutional rights should not be so readily swept aside based on the mere possibility that prosecutors—who already have enormous leverage to extract unconditional guilty pleas—might choose to offer federal defendants a conditional plea under Rule 11(a)(2).

To be sure, some constitutional rights can be waived, assuming that waiver is knowing, intelligent, and voluntary, and made with sufficient awareness of the likely consequences. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Bousley*, 523 U.S. at 620. The *Menna-Blackledge* doctrine is best read as providing a default rule: A guilty plea, without more, cannot waive challenges that are not inconsistent with factual guilt, such as challenges to the constitutionality of the statute of conviction. That default rule does not bar waivers of substantive or constitutional claims, but puts the burden on the prosecutor to obtain from the defendant an express,

unambiguous waiver rather than tasking an already out-leveraged defendant with seeking the prosecutor's uncertain permission to preserve claims under a Rule 11(a)(2) conditional plea. Because plea bargains, like any contract, are negotiated in the shadow of the law, placing the burden on prosecutors to secure knowing waivers helps level the playing field.

The facts of this case illustrate why such a clear default rule is necessary—and why any ambiguity as to the scope of the rights being waived should be construed against the government, which holds most of the cards in the plea bargaining process. Petitioner, proceeding *pro se*, vigorously litigated his claims challenging the constitutionality of Section 5104 before accepting a plea agreement. That plea agreement did not expressly waive Petitioner's right to appeal the trial court's resolution of those constitutional claims. To the contrary, the agreement expressly disavowed any "promises, understandings, or representations . . . other than those contained in writing herein." J.A. 159.

The government relies on language in the agreement stating "[y]ou understand that by pleading guilty in this case you agree to waive certain rights afforded by the Constitution." J.A. 156. But that language does not on its face explain which "certain" constitutional claims were being waived, and is included in a section of the plea agreement entitled "Trial Rights"—strongly indicating that what Petitioner was waiving was only his constitutional trial rights, not his right to challenge the *constitutionality* of Section 5104. The "Appeal Rights" section of the agreement, moreover, states

only that Petitioner waived "the right to appeal the sentence in this case."[6] J.A. 157.

That is not an express waiver of all appeal rights. It is a fair reading of this record that the government knew or should have known that Petitioner did not intend to give up his claims regarding the constitutionality of Section 5104—and that he might have refused to plead guilty if he understood that to be the case. The government had ample opportunity to clarify these issues, both in drafting the plea agreement and during the course of the colloquy. It should not now benefit from its failure to do so—much less from its decision not to offer Petitioner, who proceeded *pro se* below, a Rule 11(a)(2) conditional plea deal.

B. Collateral Review Is No Substitute For Direct Appeal Under *Menna* And *Blackledge*

The government also suggests that a defendant raising a substantive constitutional challenge to the statute of his conviction could, under certain circumstances, seek relief from conviction on collateral review, based on a constitutional ruling secured by some other defendant. Br. in Opp. at 18. But a defendant should not have to wait for someone

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[6] Nor was Petitioner clearly informed that those claims were being waived. To the contrary, he was told that he could "appeal . . . if [he] believe[d] that [his] guilty plea was *somehow unlawful*." S.A. 102 (emphasis added). Petitioner immediately thereafter challenged the lawfulness of his conviction on appeal, providing further evidence that he never intended to waive those claims.

else to obtain a constitutional ruling—an uncertain prospect at best—in order to challenge his statute of conviction. Furthermore, collateral review, if it is available at all, provides a wholly inadequate substitute for direct appeal. Collateral review procedures present enormous, often insurmountable, obstacles to prisoners. Forcing defendants who contest the constitutionality of their statute of conviction to pursue their claims on collateral review would drastically reduce the likelihood of those claims being heard at all.

To begin with, there are considerable practical hurdles even to bringing a petition for collateral relief. Most significantly, prisoners seeking collateral review of their convictions have limited resources at their disposal—and most importantly, *no right to counsel*, see *Murray* v. *Giarratano*, 492 U.S. 1, 3-4 (1989); *Penn.* v. *Finley*, 481 U.S. 551, 555 (1987). Prisoners are thus largely on their own when it comes to navigating the various legal hurdles to collateral relief, of which there are many.[7]

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[7] Navigating the complex collateral review process can be challenging even for an experienced advocate. For many state and federal prisoners, those challenges may well be insurmountable. State and federal prison populations are significantly less educated than the general population. See Dept. of Justice, Bureau of Justice Statistics, Special Report, *Education and Correctional Populations*, at 2 (2003), http://bit.ly/2kRy7dn. Prisoners are also more likely to have diagnosed learning disabilities, less likely to have basic literacy skills, See Dept. of Educ., Nat'l Ctr. for Educ. Statistics, *Literacy Behind Bars: Results From the 2003 National Assessment of Adult Literacy Prison Survey*, at 27, 29 (2007), http://bit.ly/2oGboX6, and more likely to suffer from mental

As an initial matter, most U.S. Attorney's offices now include collateral attack waivers in their boilerplate plea agreements (as does the plea agreement in this case, see J.A. 157). See Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87 (2015) (in survey of 114 boilerplate plea agreements including at least one from each federal district, seventy-seven contained collateral attack waiver). Whether raising their own constitutional claims or seeking the benefit of a substantive rule secured by another defendant, federal prisoners who have not waived their right to collateral review must still overcome an array of procedural obstacles, including a strict, one-year limitations period, 28 U.S.C. § 2255(f), and a near-total bar on subsequent or successive petitions, *id.* § 2255(h). Put simply, it would be exceedingly difficult for a federal prisoner to obtain relief from his conviction on collateral review.

State prisoners seeking habeas relief have an even more arduous path. In addition to facing many of the same obstacles as federal prisoners, see 28 U.S.C. § 2254(b) (limitation on successive habeas corpus applications), *id.* § 2244(d)(1) (one-year statute of limitations), state prisoners must also contend with requirements "ranging from exhaustion of remedies, to fair presentment obligations, to procedural default rules, and above all, to the strong deference to the conclusions of fact and law reached by the state

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illness. See Dept. of Justice, Bureau of Justice Statistics, Special Report, *Mental Health Problems of Prison and Jail Inmates*, at 1, 3 (2006), http://bit.ly/2eRfbf2.

courts," *White* v. *United States*, 371 F.3d 900, 903 (7th Cir. 2004) (Wood, J., concurring).

Any one of these requirements standing alone would present a significant barrier to relief. For example, it takes the average non-capital habeas petitioner more than six years just to exhaust state remedies. See Nancy J. King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed By State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 4 (August 2007), http://bit.ly/2pHiqef. Cumulatively, these hurdles will often prove insuperable. See *Edwards* v. *Carpenter*, 529 U.S. 446, 454 (2000) (Breyer, J., concurring) ("[T]he complexity of this Court's habeas corpus jurisprudence . . . in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure.").

The government never explains why its proposed wait-for-a-substantive-decision-in-another-case rule could possibly promote judicial efficiency or public policy. But given the practical and legal barriers discussed above, its suggestion that the availability of collateral review somehow minimizes the impact of the lower court's evisceration of the *Menna-Blackledge* doctrine rings hollow.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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