No. 23-537

In the Supreme Court of the United States

FAISAL ASHRAF, AKA SAL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
ETHAN A. SACHS
Attorney

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

QUESTION PRESENTED

Whether petitioner, notwithstanding the explicit appeal waivers in his plea agreement, is entitled to an appeal challenging the sufficiency of the factual basis for his conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2023 WL 2570401.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2023. A petition for rehearing was denied on July 6, 2023 (Pet. App. 7a). On September 21, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 1, 2023, and the petition was filed on November 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner

was convicted on three misdemeanor counts of accessing a protected computer without authorization or exceeding authorized access, in violation of 18 U.S.C. 1030(a)(2)(C) and (c)(2)(A). Second Am. Judgment 1. He was sentenced to 18 months of imprisonment, to be followed by one year of supervised release. *Id.* at 1-2. The court of appeals affirmed. Pet. App. 6a.

1. During the 2000s, Hewlett-Packard (HP) operated a rebate program called the "Big Deal." Presentence Investigation Report (PSR) ¶ 14. Under the Big Deal, authorized purchasers could buy HP computer equipment at steep discounts. *Ibid.* As a condition of the program, purchasers could purchase HP equipment only for their own use or for the use of a particular end-user participating in the program; they could not obtain products for resale to non-participating end-users. *Ibid.*

For each end-user, HP maintained a letter (known as a "Big Deal letter") that listed all entities entitled to make purchases for that end-user. PSR ¶ 14. Purchases under the Big Deal were made through an online portal operated by HP. *Ibid.* Accessing the portal required login credentials, and HP did not provide such credentials to resellers who sold products to unauthorized end-users. PSR ¶¶ 14-15.

Petitioner's brother-in-law, Azkar Choudhry, worked at General Electric (GE), a participating end-user under the Big Deal. PSR ¶ 16. In 2006, petitioner and his brother, Umer Haseeb, arranged for Choudhry to add their company, Netcore, to GE's Big Deal letter as an authorized purchaser. *Ibid.* Petitioner and Haseeb also created a fictitious entity called "GE IT Logistics," which they intended to have appear as a legitimate GE-affiliated end-user. *Ibid.*

In January 2007, after Haseeb obtained login credentials to HP's online portal, petitioner and Haseeb, acting as Netcore, began purchasing discounted computer equipment through the Big Deal program. PSR ¶¶ 15-16. Petitioner and Haseeb designated the equipment as intended for GE IT Logistics, but instead resold the products to different end-users. *Ibid.* By April 2007, their scheme had enabled them to obtain more than $2.3 million in unauthorized discounts. PSR ¶ 16. At that point, HP discovered Netcore's fraud and expelled the company from the Big Deal program. *Ibid.*

But petitioner's scheme did not end with Netcore's expulsion. Instead, in May 2007, petitioner and Haseeb began purchasing discounted equipment through a Big Deal intermediary called CompuCom. PSR ¶ 17. Petitioner and Haseeb listed GE IT Logistics as the end-user for those CompuCom purchases, and they arranged for the equipment to be sent to addresses under their control. *Ibid.* Through their second scheme, petitioner and Haseeb obtained an additional $10.8 million in unauthorized discounts from HP. *Ibid.*

2. In 2013, a federal grand jury indicted petitioner on two counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349. D. Ct. Doc. 1, at 1, 20, 22 (June 19, 2013). In November 2015, the government filed a superseding information in which petitioner was charged only with three misdemeanor counts of accessing a protected computer without authorization or exceeding authorized access, in violation of 18 U.S.C. 1030(a)(2)(C) and (c)(2)(A), D. Ct. Doc. 194, at 1, 3-5 (Nov. 16, 2015), in return for petitioner's agreement

to plead guilty to those alternative charges, Pet. App. 14a, 15a, 17a.

As part of the plea agreement, petitioner "admit[ted]" that he "is, in fact, guilty of the offenses to which [he] is agreeing to plead guilty." Pet. App. 21a. Petitioner additionally agreed to the accuracy of the plea agreement's "statement of facts," *ibid*, which (among other things) specified that petitioner "intentionally accessed a protected computer without authorization and exceeding authorization, and thereby obtained information from that computer," *id.* at 22a. The statement of facts also stated "[m]ore specifically" that petitioner, "without authorization and exceeding authorization, intentionally accessed HP's Partner Portal computer system using logins and passwords that his brother Haseeb provided to him," which "HP would not have provided" "had [it] been aware that the products to be purchased were for unauthorized end users." *Ibid.*; see *id.* at 23a (agreeing that petitioner's "use of HP logins and passwords * * * was unauthorized by HP").

Petitioner's plea agreement also included multiple waivers of his appellate rights. In a section titled "Waiver of Appeal of Conviction," petitioner agreed that he "understands that, with the exception of an appeal based on a claim that [his] guilty pleas were involuntary, by pleading guilty [he] is waiving and giving up any right to appeal [his] convictions on the offenses to which [he] is pleading guilty." Pet. App. 28a. In another section, petitioner specifically agreed to "[n]ot contest facts agreed to in this agreement." *Id.* at 15a. And in yet another portion of the plea agreement, petitioner confirmed that he "understands potential arguments that might be raised pursuant to *United States v. Nosal*,

676 F.3d 854 (9th Cir. 2012) (en banc) and waives those arguments." Pet. App. 15a.

In *United States* v. *Nosal*, 676 F.3d 854 (2012) (en banc), the Ninth Circuit reviewed a conviction under the Computer Fraud and Abuse Act of 1986 (CFAA), 18 U.S.C. 1030—the same statute under which petitioner had been charged—and interpreted the statutory requirement that the defendant "exceed[] authorized access," which appears in multiple CFAA prohibitions. See 676 F.3d at 856-864; see also 18 U.S.C. 1030(a)(1), (2), (4), (7)(B), and (e)(6). The *Nosal* court "h[eld] that 'exceeds authorized access' in the CFAA is limited to violations of restrictions on *access* to information, and not restrictions on [the information's] *use*." 676 F.3d at 863-864.

3. After petitioner entered his plea agreement, the district court held a change-of-plea hearing in which it went "through the plea sequentially, page by page" with petitioner, his counsel, and the government. C.A. Supp. E.R. 10. At the hearing, petitioner confirmed, among other things, that he understood he was giving up his "right to appeal [his] conviction," *id.* at 29, as well as his right to "contest[] facts agreed to in [the plea] agreement," *id.* at 13. He also agreed that the factual basis in the plea agreement was "correct." *Id.* at 23.

In the course of reiterating the plea agreement's terms, the district court noted petitioner's agreement to waive "the potential arguments that might be raised pursuant to *United States v. Nosal*," and asked government counsel to "explain those rights." C.A. Supp. E.R. 11. Per the court's request that the government "summarize" the case, government counsel offered a brief overview of *Nosal*'s facts, explaining that the case involved a defendant who had, upon leaving a company's

employment, asked former colleagues to send him internal company information to which they (but not he) retained access. *Id.* at 11-12. Government counsel stated that "ultimately the Ninth Circuit said that that is not a crime" under the CFAA. *Id.* at 12.

Government counsel further explained that while the government "believe[d]" petitioner's case to be "distinguishable" from *Nosal*, "to the extent [the] defense for any reason feels that there could be potentially an argument" under the case, the relevant plea agreement language was included to make clear that petitioner "understand[s] the case and waive[s] any potential arguments you believe you might have under that case to say that there's a problem with this information and it wouldn't be a crime." C.A. Supp. E.R. 12. The court asked petitioner whether he "underst[ood] everything that [government] Counsel said," and petitioner answered "Yes, Your Honor, I do." *Id.* at 13.

After confirming several additional times that petitioner understood the proceeding and had no questions, see C.A. Supp. E.R. 13-35, the district court found that petitioner's plea was knowing, voluntary, and supported by a sufficient factual basis, and that petitioner understood the nature and consequences of his plea, including the "rights" he was "waiv[ing], *id.* at 37. And in a subsequent hearing, the court sentenced petitioner to 18 months of imprisonment, to be followed by one year of supervised release, and ordered him to pay approximately $12.6 million in restitution. Second Am. Judgment 1-2.

4. Notwithstanding his appeal waiver, petitioner filed an appeal in which he argued, *inter alia*, that his conviction should be "vacated because the factual basis in support of his guilty plea was insufficient to support

his conviction." Pet. C.A. Br. 4.[1] Petitioner based that argument on this Court's decision in *Van Buren* v. *United States*, 141 S. Ct. 1648 (2021), which was issued after his plea. Pet. C.A. Br. 20-22. *Van Buren*, like the Ninth Circuit's decision in *Nosal*, interpreted the statutory phrase "exceeds authorized access" in the CFAA, 18 U.S.C. 1030(e)(6), and held that "an individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him." *Van Buren*, 141 S. Ct. at 1662; see *id.* at 1654. For the same reasons that he viewed the factual basis in his plea as insufficient, petitioner also argued that his plea was unknowing and involuntary, and that the district court violated Rule 11(b)(3) of the Federal Rules of Criminal Procedure by accepting it. Pet. C.A. Br. 4, 22-23.

In an unpublished order, the court of appeals found petitioner's sufficiency-based claims to be precluded by the explicit appeal-waiver provisions in his plea agreement. Pet. App. 2a-3a. Citing circuit precedent, the court explained that "[a]n appeal waiver in a plea agreement is enforceable if the language of the waiver encompasses the defendant's right to appeal on the grounds raised, and if the waiver was knowingly and voluntarily made." *Id.* at 2a (quoting *United States* v. *Minasyan*, 4 F.4th 770, 777-778 (9th Cir. 2021), cert. denied, 142 S. Ct. 928 (2022)). The court acknowledged petitioner's argument that "his factual-basis claim goes to knowledge and voluntariness," and it observed that the factual-basis requirement in Rule 11(b)(3) "may have the purpose of protecting uninformed defendants."

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[1] Petitioner's other challenges to his conviction and the restitution order are not before this Court.

Ibid. But the court explained that not "every Rule 11(b)(3) violation renders the plea unknowing or involuntary." *Ibid.* And the court determined that here, "the record shows that [petitioner] was fully informed that his admitted conduct might not constitute a crime." *Ibid.*

The court of appeals emphasized that petitioner had specifically waived "any argument 'pursuant to *United States v. Nosal* * * * ' that his conduct was noncriminal." Pet. App. 3a. The court acknowledged petitioner's assertion that his factual-insufficiency argument was pursuant to *Van Buren*, not *Nosal*. *Ibid.* But it found that assertion "implausibl[e]," because *Van Buren* "endorsed *Nosal*'s holding" and "resolv[ed] [a] circuit split in favor of *Nosal*." *Ibid.* "Put simply," the court explained, "[petitioner] knew his admitted conduct was arguably noncriminal, and chose to waive the argument and to plead guilty." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-23) that the court of appeals erred in applying the express appeal waivers in his plea agreement to preclude his factual-sufficiency challenge. The unpublished order below is correct, and petitioner fails to identify any court of appeals that would entertain his factual-sufficiency claim notwithstanding the provision of his plea agreement that specifically identified and waived it. No further review is warranted.

1. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as the waiver is knowing and voluntary. See, *e.g.*, *Ricketts* v. *Adamson*, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double-jeopardy defense); *Town of Newton* v. *Rumery*,

480 U.S. 386, 389, 397-398 (1987) (waiver of right to file action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. *Ibid.*

In accord with those principles, the courts of appeals have uniformly enforced knowing and voluntary waivers of the right to appeal or collaterally attack a sentence.[2] As the lower courts have recognized, such waivers benefit defendants by providing them with "an additional bargaining chip in negotiations with the prosecution." *United States* v. *Teeter*, 257 F.3d 14, 22 (1st Cir. 2001); see *United States* v. *Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001). And appeal waivers correspondingly benefit the government (and the courts) by enhancing the finality of judgments and discouraging meritless appeals. See *United States* v. *Andis*, 333 F.3d 886, 889 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); *Teeter*, 257 F.3d at 22.

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[2] See *United States* v. *Teeter*, 257 F.3d 14, 21-23 (1st Cir. 2001); *United States* v. *Riggi*, 649 F.3d 143, 147-150 (2d Cir. 2011); *United States* v. *Khattak*, 273 F.3d 557, 560-562 (3d Cir. 2001); *United States* v. *Marin*, 961 F.2d 493, 495-496 (4th Cir. 1992); *United States* v. *Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) (per curiam); *Watson* v. *United States*, 165 F.3d 486, 489 (6th Cir. 1999); *United States* v. *Woolley*, 123 F.3d 627, 631 (7th Cir. 1997); *United States* v. *Andis*, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); *United States* v. *Abarca*, 985 F.2d 1012, 1014 (9th Cir.), cert. denied, 508 U.S. 979 (1993); *United States* v. *Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998); *United States* v. *Bushert*, 997 F.2d 1343, 1347-1350 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994); *United States* v. *Guillen*, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

2. The decision below correctly enforced the appeal-waiver provisions of petitioner's plea agreement.

a. In determining whether a waiver mandates dismissal of a particular appeal, courts "look to whether the defendant knowingly and intelligently agreed to waive the right to appeal." *United States* v. *Cohen*, 459 F.3d 490, 494 (4th Cir. 2006) (citation and internal quotation marks omitted), cert. denied, 549 U.S. 1182 (2007); see *Garza* v. *Idaho*, 139 S. Ct. 738, 745 (2019). The court must also determine whether the issue sought to be raised on appeal is within the waiver's scope. See *Garza*, 139 S. Ct. at 744. The court of appeals in this case correctly determined that those requirements were met here. Pet. App. 2a-3a.

A "plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel," is voluntarily made unless it was "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Brady* v. *United States*, 397 U.S. 742, 755 (1970) (citation omitted). Here, the relevant waivers are memorialized in a written plea agreement signed by petitioner. See Pet. App. 15a, 25a-26a, 28a, 34a; see also pp. 4-5, *supra*. The district court also reviewed the terms of the waivers, in detail, with petitioner and his counsel during the change-of-plea hearing, and confirmed several times that petitioner understood and continued to agree to the provisions to which he had acceded. See pp. 5-6, *supra*.

And, as the court of appeals recognized, the particular argument petitioner attempted to raise on appeal—

the contention that his conduct does not constitute a violation of the CFAA, 18 U.S.C. 1030—fell within the waiver's scope. See Pet. App. 2a-3a. As described above, see pp. 4-5, *supra*, in addition to his general waiver of "any right to appeal [his] convictions on the offenses to which [he] is pleading guilty," Pet. App. 28a, petitioner specifically agreed that he was "waiv[ing]" "potential arguments that might be raised pursuant to *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc)," Pet. App. 15a. As the court of appeals explained, the plea agreement's specific identification of *United States* v. *Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc)—a Ninth Circuit case agreeing with a CFAA defendant's argument that his conduct did not fall within the statute's terms, see p. 5, *supra*—demonstrated that petitioner "was fully informed that his admitted conduct might not constitute a crime" in the jurisdiction in which he was prosecuted. Pet. App. 2a.

The court of appeals also properly rejected petitioner's "implausibl[e]" attempt to circumvent the *Nosal* waiver by contending that his argument instead arose under this Court's more recent decision in *Van Buren* v. *United States*, 141 S. Ct. 1648 (2021). Pet. App. 3a. As a threshold matter, a "voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady*, 397 U.S. at 757; see *id.* at 749-758 (rejecting challenge to knowing and voluntary nature of plea notwithstanding later judicial invalidation of statutory provision); see also *United States* v. *Ruiz*, 536 U.S. 622, 630 (2002) (explaining that a plea may be knowing, intelligent, and valid notwithstanding a defendant's misapprehension about the availability of a "potential

defense"). And in this case, as the court below explained, "*Van Buren* * * * endorsed *Nosal*'s holding," such that petitioner's awareness and waiver of potential arguments under *Nosal* carried over to *Van Buren* as well. Pet. App. 3a.

b. Petitioner offers no sound basis to undermine the court of appeals' fact-bound application of the appeal waivers in his plea agreement. He notes that "*Nosal* arose under a different section of the CFAA, whereas *Van Buren* interpreted the same section under which petitioner pleaded guilty." Pet. 10. But while the defendant in *Nosal* was charged under Section 1030(a)(4), whereas petitioner and the defendant in *Van Buren* were charged under Section 1030(a)(2), both paragraphs criminalize "access[ing]" a "computer" while "exceed[ing] authorized access," and both judicial decisions focused on the meaning of that latter phrase—a phrase that carries the same definition in both offenses. 18 U.S.C. 1030(a)(2) and (4); see 18 U.S.C. 1030(e)(6) (providing statutory definition); see also *Van Buren*, 141 S. Ct. at 1654 (explaining that "[h]ere, the most relevant text is the phrase 'exceeds authorized access'"); *Nosal*, 676 F.3d at 856-857.

That is why this Court's decision in *Van Buren* cited *Nosal* as part of "the split in authority regarding the scope of liability under the CFAA's 'exceeds authorized access' clause"—*i.e.*, the circuit conflict that the Court was resolving. *Van Buren*, 141 S. Ct. at 1653-1654 & n.2; see Pet. App. 3a (observing this). Furthermore, both decisions interpreted the relevant phrase in essentially the same way: to encompass situations where an individual accesses a portion of a computer he is not permitted to access, but not situations where an individual

exploits unrestricted access for an unauthorized purpose. See *id.* at 1655, 1657, 1662; *Nosal*, 676 F.3d at 858, 863. That interpretation was the basis of petitioner's appellate argument that his conduct did not violate the CFAA, see Pet. C.A. Br. 17, 20-21, and the argument was therefore knowingly waived under the *Nosal* provision in his plea agreement.[3]

3. Petitioner errs in contending (Pet. 11-23) that the courts of appeals have reached conflicting decisions regarding the circumstances in which an appeal waiver can preclude a defendant's factual-sufficiency challenge to a conviction. Both the court below and all of the circuits cited in the petition recognize that an appeal waiver can be overcome at least in circumstances where the defendant did not knowingly and voluntarily waive his ability to raise such a claim. See Pet. App. 2a; *United States* v. *Minasyan*, 4 F.4th 770, 777-778 (9th Cir. 2021), cert. denied, 142 S. Ct. 928 (2022); *United States* v. *Goodman*, 971 F.3d 16, 19 (1st Cir. 2020); *United States* v. *Adams*, 448 F.3d 492, 497-498 (2d Cir. 2006); *United States* v. *McCoy*, 895 F.3d 358, 364 (4th Cir.), cert. denied, 139 S. Ct. 494 (2018); *United States* v. *Trejo*, 610 F.3d 308, 312-313 (5th Cir. 2010); *United States* v. *Martin*, No. 23-3045, 2023 WL 4858015, at *3 (10th Cir. July 31, 2023) (per curiam); *United States* v. *Puentes-Hurtado*, 794 F.3d 1278, 1284-1285 (11th Cir.

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[3] Petitioner emphasizes (Pet. 10) that "the government had affirmatively represented at the plea hearing that *Nosal* was 'distinguishable'" from petitioner's case. But government counsel was merely relaying to the district court (and thereby preserving) the government's position that, even under *Nosal*'s interpretation, petitioner's conduct still constituted a CFAA violation; counsel also made clear that the *Nosal* waiver provision was included in the plea agreement "to the extent [the] defense for any reason feels that there could be potentially an argument." C.A. Supp. E.R. 12.

2015); *In re Sealed Case*, 40 F.4th 605, 608 (D.C. Cir. 2022).

Contrary to petitioner's suggestion (Pet. 12), none of the courts of appeals adheres to a rule under which an appeal waiver invariably precludes a factual-basis challenge. In the unpublished decision below, for instance, the Ninth Circuit considered petitioner's argument that "his factual-basis claim goes to knowledge and voluntariness," Pet. App. 2a; the court simply determined, based on petitioner's additional, specific waiver of the particular factual-insufficiency claim at issue, that his waiver of the *Nosal/Van Buren* claim was in fact made with sufficient awareness of what he was relinquishing. See pp. 7-8, 10-12, *supra*. Furthermore, petitioner himself acknowledges that the Ninth Circuit has reviewed factual-sufficiency claims in the face of appeal waivers in other cases. See Pet. 13-14 n.3. Even assuming that petitioner were correct (*ibid.*) that the Ninth Circuit has been inconsistent in its practices, that would at most amount to an intra-circuit conflict not worthy of this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Similarly, in the D.C. Circuit's decision in *In re Sealed Case*, the defendant's plea agreement contained not just a general appeal waiver but also a specific provision stating that the defendant "'waive[d] any argument that . . . his admitted conduct does not fall within the scope of the statute' to 'which he is pleading guilty.'" 40 F.4th at 607 (citation omitted; brackets in original). And because the defendant had "expressly waived his ability to present the exact claim he [sought] to raise on appeal," the D.C. Circuit accordingly declined to review his argument that his conduct did not violate the statutes of conviction. *Id.* at 607-608. Finally, the Tenth

Circuit's unpublished decision in *Martin* considered the defendant's contention that "the allegedly insufficient factual basis for her plea renders her appeal waiver involuntary," but found that challenged foreclosed by the record and the plain-error standard of review, without setting forth a broad precedential rule. 2023 WL 4858015, at *3.[4]

Petitioner asserts (Pet. 16) that the First, Second, Fourth, Fifth, and Eleventh Circuits all "require consideration" of factual-basis arguments on appeal notwithstanding appellate waivers. But petitioner identifies no precedential decision demonstrating that any of those courts would have entertained his factual-sufficiency challenge in the circumstances here. In particular, none of the decisions on which he relies involved a provision in which the defendant explicitly acknowledged and waived the precise argument that he sought to make on appeal, as the court of appeals found below. See *Goodman*, 971 F.3d at 19; *United States* v. *Gonzalez-Negron*, 892 F.3d 485, 486 (1st Cir. 2018), cert. denied, 139 S. Ct. 1169 (2019); *United States* v. *Ramos-Mejía*, 721 F.3d 12, 14 (1st Cir. 2013); *United States* v. *Lloyd*, 901 F.3d 111, 117 (2d Cir. 2018), cert. denied, 140 S. Ct. 55 (2019); *Adams*, 448 F.3d at 497; *McCoy*, 895 F.3d at 360; *United States* v. *Bates*, No. 22-40508, 2023

[4] Petitioner cites three other Tenth Circuit decisions, but none purports to categorically foreclose consideration of factual-sufficiency arguments based on appeal waivers. See *United States* v. *Novosel*, 481 F.3d 1288, 1295 (2007) (per curiam) (rejecting defendant's argument that his factual-insufficiency argument did not fall within the appeal waiver's scope); *United States* v. *Hahn*, 359 F.3d 1315, 1318, 1328 (2004) (en banc) (per curiam) (considering a sentencing challenge); *Elliott*, 264 F.3d at 1174 (noting defendant's failure to allege that he did not knowingly and voluntarily accept the appeal waiver).

WL 4542313, at *1 (5th Cir. July 14, 2023) (per curiam); *Trejo*, 610 F.3d at 312; *Puentes-Hurtado*, 794 F.3d at 1281.[5]

At the very least, to the extent there is disagreement among the court of appeals as to whether an appeal waiver precludes review of a factual-basis challenge to a guilty plea, petitioner's case would be a poor vehicle for addressing it. Again, the decision below turned not on the presence of a general appeal waiver, but rather on petitioner's agreement to a standalone provision identifying and waiving the specific factual-sufficiency argument he attempted to raise on appeal. See pp. 7-8, 10-12, *supra*. That circumstance could obviate the need for the Court to consider whether or when a more undifferentiated appeal waiver may preclude a defendant's appeal of a factual-insufficiency issue—the subject of petitioner's question presented (Pet. i).

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[5] The Fifth Circuit in *United States* v. *Mendoza*, 842 Fed. Appx. 903 (2021) (per curiam), noted that the defendant in that unpublished case had "waived his trial and appellate rights, including the right to challenge his conviction on the ground that his conduct did not fall within the scope of the statutes under which he was convicted," but there is no indication that the waiver provision specifically referred to any such argument. *Id.* at 905. The appeal waiver in *United States* v. *Balde*, 943 F.3d 73 (2d Cir. 2019), was likewise general, with the exception of its preservation of the defendant's ability to raise an argument different from the one at issue. See *id.* at 93. And while the appeal waiver in the Eleventh Circuit's nonprecedential opinion in *United States* v. *Jean*, 838 Fed. Appx. 370 (2020) (per curiam), cert. denied, 142 S. Ct. 133 (2021), stated that the defendant "agreed to waive his right to 'assert any claim that . . . the admitted conduct does not fall within the scope of the statute of conviction,'" the waiver did not identify a particular factual-sufficiency argument (in contrast to the waiver at issue here), and the court rejected the government's attempt to invoke the waiver in a single sentence of analysis in a footnote, see *id.* at 373 n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
ETHAN A. SACHS
Attorney

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