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Class v. United States: An Imperfect Application of the Menna-Blackledge Doctrine to Post-Guilty Plea Constitutional Claims

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Note

CLASS v. UNITED STATES: AN IMPERFECT APPLICATION OF THE *MENNA-BLACKLEDGE* DOCTRINE TO POST-GUILTY PLEA CONSTITUTIONAL CLAIMS

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In *Class v. United States*,[1] the Supreme Court addressed whether an unconditional guilty plea bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal.[2] Although an unconditional guilty plea does waive some constitutional claims,[3] the Court ruled that a guilty plea does not waive a defendant's ability to challenge the constitutionality of the statute of conviction because such a claim falls within the *Menna-Blackledge* exception.[4] The Court correctly held that the *Menna-Blackledge* doctrine applies to claims that challenge the constitutionality of the statute of conviction because such claims challenge the government's power to constitutionally convict a defendant.[5] The Court's holding is consistent with its ruling in *United States v. Broce*[6] because Class's claim did not contradict the conduct admitted in his guilty plea, and the Court's holding is compatible with Rule 11 of the Federal Rules of Criminal Procedure because the text of the Rule does not require a

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1. 138 S. Ct. 798 (2018).
2. *Id.* at 803.
3. FED. R. CRIM. P. 11(a)(2). The Rule states:

> Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

Id.

4. *Class*, 138 S. Ct. at 805–06.
5. *See infra* Section IV.A.
6. 488 U.S. 563 (1989).

defendant to reserve a constitutional challenge through a conditional plea.[7] Additionally, the Court's holding was appropriate because Rule 11(a)(2) alone does not provide adequate procedural safeguards for defendants as they enter their plea,[8] and the Court properly balanced the defendant's interest in asserting constitutional values and in being free from punishment against the government's interests in maintaining the finality of convictions and conserving resources.[9] The Court, however, failed to promote uniformity in the federal circuits by not addressing the current circuit split on the issue and by neglecting to adopt a clear rule of law.[10]

In Part I, this Note will summarize the factual and procedural background leading to the Court's opinion.[11] Part II will explore the roots of guilty plea jurisprudence[12] and the historical development of guilty pleas as a waiver of constitutional claims on appeal.[13] Part III will explain the reasoning underlying the Court's decision.[14] Finally, Part IV of this Note will (1) assert that the *Menna-Blackledge* doctrine is applicable to Class's claims and is consistent with the Court's holding in *Broce*;[15] (2) contend that the Court's holding is consistent with Rule 11;[16] (3) argue that Rule 11(a)(2) alone inadequately protects defendants' procedural rights;[17] (4) maintain that the Court properly balanced the parties' competing interests;[18] and (5) demonstrate that the Court failed to promote uniformity in the federal circuits.[19]

I. THE CASE

In September 2013, a federal grand jury indicted petitioner Rodney Class for possessing firearms in his parked vehicle on the grounds of the United States Capitol in violation of 40 U.S.C. § 5104(e).[20] Appearing *pro se*, Class asked the United States District Court for the District of Columbia to dismiss the indictment, claiming the statute of conviction violated the

7. FED. R. CRIM. P. 11(a)(2); *see infra* Section IV.B.
8. *See infra* Section IV.C.
9. *See infra* Section IV.D.
10. *See infra* Section IV.E.
11. *See infra* Part I.
12. *See infra* Section II.A.
13. *See infra* Section II.B–D.
14. *See infra* Part III.
15. *See infra* Section IV.A.
16. *See infra* Section IV.B.
17. *See infra* Section IV.C.
18. *See infra* Section IV.D.
19. *See infra* Section IV.E.
20. *Class*, 138 S. Ct. at 802; *see* 40 U.S.C. § 5104(e)(1) (2012) ("An individual . . . may not carry on or have readily accessible . . . on the Grounds or in any of the Capitol Buildings a firearm . . . .").

Second Amendment and the absence of fair notice that weapons were banned in the parking lot denied him due process.[21] The district court rejected both claims and denied Class's motion to dismiss the indictment.[22]

After the district court's ruling, Class pleaded guilty to the charges against him and entered into a written plea.[23] The plea agreement included five categories of expressly waived rights and three categories of claims that were not waived,[24] but it failed to mention the right to appeal the constitutionality of the statute of conviction.[25] Additionally, the plea agreement stated: "No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements . . . be made unless committed to writing and signed . . . ."[26] The district court reviewed the terms of the plea agreement with Class to ensure the validity of the plea, accepted his guilty plea, and sentenced him to twenty-four days of imprisonment with twelve months of supervised release.[27]

Soon thereafter, Class appealed his conviction to the United States Court of Appeals for the District of Columbia Circuit and repeated his Second Amendment and Due Process Clause claims.[28] The D.C. Circuit held that "Class could not raise his constitutional claims because, by pleading guilty, he had waived them."[29] In its decision, the D.C. Circuit noted that instead of reserving the right to appeal his conviction by entering a conditional guilty plea, Class entered an unconditional plea.[30] The court listed

21. *Class*, 138 S. Ct. at 802; *see* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

22. *Class*, 138 S. Ct. at 802.

23. *Id.*

24. *Id.* The expressly waived categories of rights included:

> (1) all defenses based upon the statute of limitations; (2) several specified trial rights; (3) the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range; (4) most collateral attacks on the conviction and sentence; and (5) various rights to request or receive information concerning the investigation and prosecution of [Class's] criminal case.

Id. The expressly enumerated claims that Class could raise on appeal included "claims based upon (1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) certain statutes providing for sentence reductions." *Id.*

25. *Id.*

26. *Id.*

27. *Id.* During the Rule 11 plea inquiry, the district court judge asked Class: "Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that?" United States v. Class, No. 15-3015, 2016 WL 10950032, at *2 (D.C. Cir. July 5, 2016). Class responded, "Yes." *Id.*

28. *Class*, 138 S. Ct. at 802.

29. *Id.* at 803.

30. United States v. Class, No. 15-3015, 2016 WL 10950032, at *1 (D.C. Cir. July 5, 2016); *see* FED. R. CRIM. P. 11(a)(2) (providing the option for defendants to enter into a conditional

two exceptions to the general rule that an unconditional guilty plea constitutes a waiver of all constitutional claims: "'the defendant's claimed right not to be haled into court at all,' and a claim 'that the court below lacked subject-matter jurisdiction over the case.'"[31] The D.C. Circuit, without any explanation, stated that neither of the exceptions applied to Class's claims.[32] The United States Supreme Court subsequently granted Class's petition for certiorari to decide "whether in pleading guilty a criminal defendant inherently waives the right to challenge the constitutionality of his statute of conviction."[33]

II. LEGAL BACKGROUND

The acceptance of guilty pleas is prevalent in the criminal justice system.[34] Their popularity is likely due to the "mutuality of advantage" that both defendants and the government enjoy by entering into a plea agreement.[35] Defendants have the advantage of reducing their probable sentence, while the government has the advantage of conserving judicial and prosecutorial resources.[36] A guilty plea, however, constitutes a waiver of some important constitutional rights.[37] Yet, a guilty plea does not waive *all* rights; there are certain fundamental rights that "exist beyond the confines of the trial" that, if violated, render the defendant's plea and conviction invalid.[38] Section II.A discusses early common law recognition that a guilty plea is not a waiver of all claims on appeal. Section II.B examines the Supreme Court's shift toward shielding guilty pleas as demonstrated in a trilogy of cases—*Brady v. United States*,[39] *McMann v. Richardson*,[40] and *Parker v. North Carolina*[41] ("the *Brady* trilogy")—and the reaffirmation of the general rule that a voluntarily and intelligently entered guilty plea constitutes a waiver of all claims on appeal. Section II.C examines the exceptions the

guilty plea and reserve "the right to have an appellate court review an adverse determination of a specified pretrial motion").

31. *Class*, 2016 WL 10950032, at *2 (quoting United States v. Delgado-Garcia, 374 F.3d 1337, 1341 (D.C. Cir. 2004)).

32. *Id.*

33. *Class*, 138 S. Ct. at 803.

34. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (noting that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

35. Brady v. United States, 397 U.S. 742, 752 (1970).

36. *Id.*

37. *See Class*, 138 S. Ct. at 805 (noting that a guilty plea waives the privilege against self-incrimination, the right to trial by jury, and the right to confront accusers (citing McCarthy v. United States, 394 U.S. 459, 466 (1969))).

38. *Id.* (quoting and citing Mitchell v. United States, 526 U.S. 314, 324 (1999)); *see infra* Section II.A–C.

39. 397 U.S. 742 (1970).

40. 397 U.S. 759 (1970).

41. 397 U.S. 790 (1970).

Supreme Court subsequently carved out of the general rule in *Blackledge v. Perry*[42] and *Menna v. New York*.[43] Lastly, Section II.D explores the circuit split that resulted from the inconsistent development of the law in the federal circuits in applying the aforementioned exceptions.

A. Early Common Law Recognition That a Guilty Plea Is Not a Waiver of All Claims

A guilty plea entails a judgment of conviction that precludes subsequent litigation, as would any other judgment absent a plea of guilty. Cases addressing the preclusive effect of guilty pleas date as far back as the 1800s.[44] In *Commonwealth v. Hinds*,[45] one of the first cases to discuss the preclusive effect of guilty pleas, the Supreme Judicial Court of Massachusetts addressed whether a guilty plea has a preclusive effect on a defendant's claim that the indictment failed to state a crime.[46] The court held that the guilty plea was not a confession of any crime because the facts admitted in the indictment failed to allege any conduct proscribed by law.[47] The defendant's conviction was discharged despite entering a guilty plea because he pleaded guilty to something that did not constitute a crime.[48]

The principle that a guilty plea is not a waiver of all claims on appeal has been reiterated countless times since it appeared in *Hinds*. Shortly after *Hinds*, in *Carper v. State*,[49] the Supreme Court of Ohio was faced with deciding whether a guilty plea precludes a defendant's claim that the indictment failed to state an offense.[50] The court went beyond *Hinds* and held that despite pleading guilty, a defendant may object to the court's or grand jury's jurisdiction over the subject matter of the claim in addition to asserting that the indictment defectively failed to state an offense.[51] In *Klawanski v. People*,[52] the Supreme Court of Illinois faced the same issue presented in *Hinds* and reached the same conclusion: If the indictment fails to allege a crime, a guilty plea does not constitute a confession to a crime because, by

42. 417 U.S. 21 (1974).

43. 423 U.S. 61 (1975) (per curiam).

44. *See* Commonwealth v. Hinds, 101 Mass. 209 (1869) (discussing the preclusive effect of guilty pleas in the late 1800s); Carper v. State, 27 Ohio St. 572 (1875) (discussing the right to objection, in certain circumstances, for defendants who pleaded guilty); United States v. Bayaud, 16 F. 376, 382 (C.C.S.D.N.Y. 1883) (noting that post-guilty plea defendants may still claim that the indictment failed to allege the acts intended to be proved).

45. 101 Mass. 209 (1869).

46. *Id.* at 209–10.

47. *Id.* at 211.

48. *Id.* at 210.

49. 27 Ohio St. 572 (1875).

50. *Id.* at 575.

51. *Id.*

52. 218 Ill. 481 (1905).

pleading guilty, the defendant merely admits to what is alleged in the indictment.[53]

Although there is a lack of Supreme Court precedent on the preclusive effect of guilty pleas at this point in history, the federal circuits began to recognize the general rule that a guilty plea is not a waiver of all claims on appeal shortly after the aforementioned state cases. In *Hocking Valley Railway Co. v. United States*,[54] the United States Court of Appeals for the Sixth Circuit addressed whether a defendant may claim that the indictment failed to state an offense after entering a plea of nolo contendere.[55] The court, recognizing *Hinds* and *Carper* as support for its decision, held that a plea of nolo contendere should not bar such a claim because it is settled law that a defendant may bring such a claim after pleading guilty.[56] The court refused to make a distinction between a plea of nolo contendere and an outright guilty plea for purposes of the asserted claim and reasoned that a plea of nolo contendere did not bar the defendant's claim because a guilty plea does not foreclose the claim.[57] Years after the Sixth Circuit's holding, the United States Court of Appeals for the Second Circuit went beyond *Hocking Valley Railway Co.* in *United States v. Ury*[58] and directly held that the defendant's guilty plea did not preclude him from claiming that both the indictment failed to state an offense and the statute was unconstitutional.[59] These cases illustrate the principle that a guilty plea is not a waiver of all claims on appeal is rooted in early guilty plea jurisprudence.

When the Supreme Court was finally confronted with a defendant's post-guilty plea Fifth Amendment challenge to the statute of conviction in *Haynes v. United States*,[60] the Court accepted the same principle that appeared in *Hinds* nearly 100 years prior. The Court held that the guilty plea did not waive Haynes' constitutional claim of privilege against self-

53. *Id.* at 484 ("By a plea of guilty the accused simply confesses that he is guilty in manner and form as charged in the indictment, and if the indictment charges no criminal offense, or is otherwise fatally defective, it may be subsequently attacked on that ground.").

54. 210 F. 735 (6th Cir. 1914).

55. *Id.* at 738. A plea of nolo contendere is a plea of no contest "by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat [them] as if [they] were guilty." North Carolina v. Alford, 400 U.S. 25, 35 (1970).

56. *Hocking Valley Ry. Co.*, 210 F. at 739 ("It seems to be the settled rule that, even after explicit plea of guilty, defendant may urge, in the reviewing court, such an objection." (citing Carper v. State, 27 Ohio St. 572 (1875); Commonwealth v. Hinds, 101 Mass. 209 (1869))).

57. *Id.* at 738–39 ("[W]e are satisfied that the plea of nolo contendere should not be construed as a waiver of a right which the plea of guilty does not waive.").

58. 106 F.2d 28 (2d Cir. 1939).

59. *Id.* at 28 ("The questions presented put in issue whether the statute is constitutional and whether the information charged a crime. The plea of guilty did not foreclose the appellant from the review he now seeks." (citing *Hocking Valley Ry. Co.*, 210 F. at 738–39)).

60. 390 U.S. 85 (1968).

incrimination.[61] The Court did not provide any explanation for allowing the constitutional claim, only noting that it is assumed that a guilty plea would not bar a constitutional claim on appeal.[62]

B. The Brady *Trilogy: The Supreme Court's Shift Toward Shielding Guilty Pleas*

In 1970, the Supreme Court departed from the long-recognized view of guilty pleas and shifted toward "insulating all guilty pleas from subsequent attack"[63] in the series of cases known as the *Brady* trilogy.[64] In each of these cases, the Court grounded its reasoning in the presumed validity of voluntarily and intelligently entered guilty pleas.[65] In all three cases, the Court held that a post-guilty plea defendant may only challenge the voluntary and intelligent nature of a guilty plea because an otherwise valid guilty plea bars all claims on appeal.[66]

Both *Brady v. United States* and *Parker v. North Carolina* examined charges brought under the Federal Kidnapping Act,[67] which at the time allowed a death sentence if a jury recommended such punishment.[68] Two years prior to *Brady* and *Parker*, the death penalty provision of the Federal Kidnapping Act was ruled unconstitutional in *United States v. Jackson*[69] because the death penalty discouraged defendants from asserting their Fifth Amendment privilege against self-incrimination to not plead guilty and from asserting their Sixth Amendment right to a trial by jury.[70] Defendants charged under the Act could avoid the death penalty by pleading guilty because only a jury, not a judge, could sentence the defendant to death.[71]

In *Brady*, the petitioner faced the death penalty and pleaded guilty under the Federal Kidnapping Act at issue in *Jackson*.[72] In light of the Court's recent invalidation of the death penalty provision, Robert Brady claimed his pre-*Jackson* guilty plea was involuntary because it was coerced by the risk

61. *Id.* at 87 n.2.

62. *Id.* ("Petitioner's plea of guilty did not, of course, waive his previous claim of the constitutional privilege.").

63. McMann v. Richardson, 397 U.S. 759, 775 (1970) (Brennan, J., dissenting).

64. Tollett v. Henderson, 411 U.S. 258, 262, 265 (1973) (referring to *Brady v. United States*, 397 U.S. 742 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970) as the *Brady* trilogy).

65. *Brady*, 397 U.S. at 747.

66. *Id.*

67. 18 U.S.C. § 1201(a) (2012).

68. *Brady*, 397 U.S. at 743.

69. 390 U.S. 570 (1968).

70. *Id.* at 581.

71. *Id.* (noting that the death penalty was "applicable only to those defendants who assert the right to contest their guilt before a jury").

72. *Brady*, 397 U.S. at 743.

of receiving the death penalty.[73] The Court emphasized the general rule that voluntarily and intelligently entered guilty pleas are valid.[74] The Court found that even if Brady only pleaded guilty to avoid the death penalty, the plea was voluntary nonetheless because a desire to avoid the death penalty does not prove that the plea was a coerced and involuntary act.[75] Additionally, the Court noted that the plea was intelligent because he was advised by a competent attorney under the then-existing law.[76] Having established Brady's guilty plea met the validity requirements of the general rule, the Court held that his plea was still valid in light of *Jackson* because a valid guilty plea made in consideration of the then-applicable law is not impugned by a defendant not expecting a change in the law.[77] Thus, newly established law does not affect the validity of a voluntarily and intelligently entered guilty plea.[78] *Brady* effectively established that the only way to disturb a judgment of conviction entered pursuant to a guilty plea is to successfully claim that the guilty plea was involuntarily or unintelligently entered.[79] The Court's justification lies in its characterization of a guilty plea as not merely admitting past conduct, but also as consenting to judgment of conviction without a trial.[80]

In *Parker*, Charles Parker faced the death penalty and pleaded guilty under a North Carolina first-degree burglary statute.[81] The North Carolina statutory framework was equivalent to the death penalty provision invalidated by the Court in *Jackson*.[82] Parker, like Brady, claimed his plea was involuntary in light of the *Jackson* decision because it was induced by the risk of receiving the death penalty.[83] The Court conceded that under *Jackson*, it may have been unconstitutional to impose the death penalty under the North Carolina statutory framework at the time of Parker's plea.[84] The Court, however, reiterated the principle from *Brady* that an otherwise valid plea is not coerced and involuntary simply because a defendant wanted to avoid the possibility of the death penalty.[85] Finding Parker's case indistinguishable from Brady's case on this issue, the Court held that Parker's plea

73. *Id.* at 745–46.

74. *Id.* at 747.

75. *Id.* at 750.

76. *Id.* at 756.

77. *Id.* at 757 ("The fact that Brady did not anticipate *United States v. Jackson* . . . does not impugn the truth or reliability of his plea.").

78. *Id.*

79. *Id.* at 748.

80. *Id.*

81. Parker v. North Carolina, 397 U.S. 790, 792–93 (1970); *see* N.C. GEN. STAT. § 15-162.1 (1965) (repealed 1971).

82. *Parker*, 397 U.S. at 794–95.

83. *Id.*

84. *Id.*

85. *Id.* at 795; *see supra* text accompanying notes 73–75.

could not be attacked because it was voluntarily and intelligently entered under the then-existing law.[86]

In the last case of the *Brady* trilogy, the Court reinforced its protection of guilty pleas in *McMann v. Richardson*, which involved three defendants who confessed and ultimately pleaded guilty to several criminal offenses in New York.[87] On appeal, each of the defendants claimed their guilty pleas were the result of coerced confessions and, therefore, were involuntary and invalid.[88] The defendants relied on the Court's decision in *Jackson v. Denno*,[89] which held that the New York procedure for determining voluntariness of a confession—the procedure that would have applied to the *McMann* defendants if they decided to go to trial—was unconstitutional.[90] The New York procedure required trial judges, when a defendant offered a confession and a prima facie case of voluntariness had been established, to submit the issue of voluntariness of a confession to the jury without the judge independently resolving factual issues and determining whether the confession was voluntary.[91] In *Denno*, the Court held that the procedure was unconstitutional because it did not afford a reliable determination of voluntariness and did not protect a defendant's right to be free of conviction upon a coerced confession.[92]

The decision in *Denno* was applied retroactively to defendants convicted at trial under the New York Procedures in place prior to *Denno*, which granted such defendants an additional hearing on the voluntariness of their confession.[93] The *McMann* defendants argued that they were likewise entitled to challenge the voluntariness of their confession because their coerced confession caused them to plead guilty prior to *Denno*.[94] In rejecting the defendants' claims, the Court drew a distinction between coerced confessions that result in conviction after trial and those that result in a guilty plea.[95] A conviction after trial in which a coerced confession is introduced as evidence rests in part on the coerced confession, which the Court asserted is an unconstitutional basis for conviction.[96] When defendants plead guilty, however, they are convicted based on their admission that they

86. *Id.* (noting that the Court "see[s] nothing to distinguish Parker's case from Brady's" with regard to this issue).

87. McMann v. Richardson, 397 U.S. 759, 761–64 (1970).

88. *Id.*

89. 378 U.S. 368 (1964).

90. *McMann*, 397 U.S. at 765 (noting that prior to *Denno*, "constitutionally acceptable procedures were unavailable to a defendant to test the voluntariness of his confession").

91. *Id.* at 772.

92. *Id.*

93. *Id.* at 773.

94. *Id.*

95. *Id.*

96. *Id.*

committed the crime charged in the indictment—any prior coerced confession is not the basis for the conviction and has never been used as evidence in trial.[97] The Court held that regardless of the holding reached in *Denno*, the validity of a guilty plea still turns on the voluntary and intelligent nature of the plea.[98] The validity of a defendant's plea remains unaffected even if the counseled advice would have been different after *Denno*.[99]

The Court reaffirmed its *Brady* trilogy holdings when it addressed whether a guilty plea bars a claim of unconstitutional jury selection on appeal in *Tollett v. Henderson*.[100] In *Tollett*, the defendant was indicted by a grand jury for first-degree murder.[101] On the advice of his attorney, the defendant pleaded guilty and was sentenced to ninety-nine years of imprisonment.[102] The defendant later petitioned for habeas corpus, claiming for the first time that his grand jury was unconstitutionally selected because of the systematic exclusion of Black Americans from the jury panel.[103] The Court found the *Brady* trilogy was controlling because, like each of the defendants in the *Brady* trilogy, the defendant in *Tollett* alleged a deprivation of a constitutional right that occurred prior to entry of the guilty plea.[104] In the *Brady* trilogy, the issue was not the merits of the constitutional claims, but whether the pleas were voluntarily and intelligently entered with the advice of competent counsel.[105] Because the guilty pleas in the *Brady* trilogy foreclosed inquiry into the antecedent constitutional violations, the Court found that the guilty plea in *Tollett* likewise foreclosed inquiry into the grand jury selection claim.[106] The Court held that when a defendant admits guilt of the crime charged, they cannot thereafter raise claims concerning the deprivation of constitutional rights that occurred prior to the guilty plea—a defendant may only attack the voluntary and intelligent nature of the plea.[107] Tollett's claim that the grand jury that indicted him was unconstitutionally selected was thus barred because it occurred prior to the entry of his guilty

97. *Id.* ("He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at trial, and may never be offered in evidence.").

98. *Id.* at 772.

99. *Id.* at 773.

100. 411 U.S. 258, 266 (1973).

101. *Id.* at 259.

102. *Id.*

103. *Id.*

104. *Id.* at 265. In *Tollett*, the defendant claimed the grand jury that indicted him before he pleaded guilty was unconstitutionally selected. In *McMann*, each of the defendants claimed their prior confessions were coerced. Lastly, in *Brady* and *Parker*, the defendants claimed the death penalty provisions of their statutes of conviction placed an impermissible burden on their constitutional rights. *Id.*

105. *Id.* at 266.

106. *Id.* The Court reiterated "the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.* at 267.

107. *Id.* at 267.

plea.[108] The Court's holding in *Tollett*, therefore, bolstered and reaffirmed the *Brady* trilogy's theme of barring post-guilty plea constitutional challenges.

C. The Menna-Blackledge *Doctrine: Exceptions to the General Rule*

After *Tollett*, the Supreme Court shifted away from its practice of foreclosing post-guilty plea claims. The Court carved out two exceptions to the general rule that guilty pleas constitute a waiver of all claims on appeal in *Blackledge v. Perry*[109] and *Menna v. New York*.[110] The *Blackledge-Menna* Court held that claims involving "the right not to be haled into court at all"[111] and the state's power to constitutionally prosecute the charge are not waived by a guilty plea.[112] If the state lacks the power to constitutionally prosecute a defendant, the Court reasoned, the initiation of proceedings against them denies the defendant due process of law.[113] These exceptions are recognized by and imported into Rule 11 of the Federal Rules of Criminal Procedure.[114]

In *Blackledge*, the Court addressed whether a defendant's guilty plea barred their due process and double jeopardy claims.[115] In holding that the guilty plea was not a waiver of those claims, the Court ruled that the case at bar was distinct from *Tollett* and the *Brady* trilogy.[116] The Court stated that although the claims in *Tollett* and the *Brady* trilogy were "of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him."[117] Additionally, unlike *Tollett*, the defendant did not complain about a deprivation of constitutional rights that occurred prior to the guilty plea, but rather asserted "the right not to be haled into court at all upon the felony charge."[118] Thus, a de-

108. *Id.* at 269.

109. 417 U.S. 21 (1974).

110. 423 U.S. 61 (1975) (per curiam).

111. *Blackledge*, 417 U.S. at 30.

112. *Menna*, 423 U.S. at 63 n.2.

113. *Blackledge*, 417 U.S. at 30–31.

114. *See* FED. R. CRIM. P. 11(a) advisory committee's notes to 1983 amendments (explaining that Rule 11(a)(2) has "no application" to situations like those in *Blackledge* and *Menna* where claims may be raised after a guilty plea, and that Rule 11(a)(2) "should not be interpreted as either broadening or narrowing the Menna-Blackledge doctrine or as establishing procedures for its application"). Rule 11(a)(2) allows a defendant to "enter a conditional plea of guilty . . . reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." FED. R. CRIM. P. 11(a)(2).

115. *Blackledge*, 417 U.S. at 23.

116. *Id.* at 30.

117. *Id.* (explaining the defendants in *McMann* "could . . . have been brought to trial without the use of the . . . coerced confessions" and "a tainted indictment," like the one in *Tollett*, "could have been 'cured' through a new indictment by a properly selected grand jury").

118. *Id.*

fendant has a right to claim that the state lacked the power to constitutionally prosecute them because a guilty plea is invalid and meaningless if the state was without such power.[119]

In *Menna*, the Supreme Court decided whether a guilty plea waived a defendant's right to appeal based on a double jeopardy claim.[120] In holding that Steve Menna's claim was not barred, the Court noted neither *Tollett*, *Brady*, or *McMann* "stand for the proposition that counseled guilty pleas inevitably waive all antecedent constitutional violations."[121] Rather, the point was that a valid guilty plea is an admission of factual guilt that removes the issue of factual guilt from the case.[122] Because the claim in *Menna* was that the State may not convict the defendant "no matter how validly his factual guilt is established," the guilty plea did not bar the claim.[123] Even if everything admitted in the indictment is true, the guilty plea is invalid if the state lacks the constitutional power to convict the defendant upon the charge in the indictment.[124]

The *Menna-Blackledge* doctrine remained untouched by the Supreme Court for almost fifteen years until *United States v. Broce*.[125] In *Broce*, the Court addressed another double jeopardy claim, which each defendant made after they pleaded guilty to indictments for two separate conspiracies.[126] Though the Court acknowledged the *Menna-Blackledge* exception to the rule prohibiting a collateral attack on a guilty plea, it reasoned that the exception had no application to the case at bar.[127] The Court emphasized that *Menna* added an important qualification to the exception; the rule only applies when, "*judged on its face*," the government may not constitutionally prosecute the charge.[128] The Court reasoned that the *Menna-Blackledge* doctrine was inapplicable because unlike the defendants in *Blackledge* and *Menna*, the *Broce* defendants could not prove their claim without contra-

119. *Id.* at 30–31 (noting "[t]he very initiation of the proceedings against [the defendant] in the Superior Court thus operated to deny him due process of law").

120. Menna v. New York, 423 U.S. 61 (1975) (per curiam).

121. *Id.* at 62 n.2 (noting in *Tollett*, the Court emphasized that "waiver was not the basic ingredient of [*McMann* and *Brady*]").

122. *Id.* ("The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case."). The Court also noted, "[i]n most cases, factual guilt is a sufficient basis for the State's imposition of punishment," so a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt." *Id.*

123. *Id.* The Court specified that it "[did] not hold that a double jeopardy claim may never be waived. [The Court] simply [held] that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.*

124. *Id.*

125. 488 U.S. 563 (1989).

126. *Id.* at 565.

127. *Id.* at 574.

128. *Id.* at 575. (citing Menna v. New York, 423 U.S. 61, 63 n.2 (1975) (per curiam) (emphasis added)).

dicting their indictments and venturing beyond the existing record.[129] *Broce* thus expressly narrowed the *Menna-Blackledge* exception by recognizing that *Menna* impliedly required that the claim must be proved by relying on the existing record.[130]

D. Development of the Law in the Federal Circuits and the Circuit Split

Following *Blackledge*, *Menna*, and *Broce*, an inconsistent application of the law resulted in a federal circuit split. The United States Court of Appeals for the Sixth, Fifth, and Eighth Circuit differ from the United States Court of Appeals for the D.C. and Tenth Circuit in their application of *Broce*'s holding to the *Menna-Blackledge* doctrine.[131] More significantly, absent any guidance from the Supreme Court since *Broce*, most circuits have developed an analysis distinct from that of the Supreme Court for determining whether a guilty plea bars a certain claim on appeal. In the United States Court of Appeals for the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuit, an important distinction is made between jurisdictional and non-jurisdictional claims.[132] Of these circuits, all but the Third, Ninth, and Eleventh Circuit further distinguish between facial and as-applied constitutional challenges in determining whether a claim is jurisdictional, but not all of the circuits are in agreement on that issue.[133]

1. The Inconsistent Application of Broce

The Sixth, Fifth, and Eighth Circuit have relied on the *Menna-Blackledge* doctrine either without mentioning *Broce* or have treated *Broce*'s holding as equivalent to the *Menna-Blackledge* doctrine. For example, in *United States v. Skinner*,[134] the Sixth Circuit cited *Blackledge* as its sole support for holding that a guilty plea did not bar the defendant's claim that the statute of conviction was unconstitutionally vague.[135] Likewise, in *United States v. Knowles*,[136] the Fifth Circuit held that a claim that

129. *Id.* at 575–76 (explaining "[i]n *Blackledge*, the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all," and in *Menna*, "the indictment was facially duplicative of the earlier offense . . . so that the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense").

130. *Id.*

131. *See infra* Section II.D.1.

132. *See infra* Section II.D.2.

133. *See infra* Section II.D.3.

134. 25 F.3d 1314 (6th Cir. 1994).

135. *Id.* at 1317 ("[F]ollowing a guilty plea, a defendant [can] raise on appeal that he was prosecuted under an unconstitutional statute." (citing Blackledge v. Perry, 417 U.S. 21 (1974))).

136. 29 F.3d 947 (5th Cir. 1994).

the statute of conviction was unconstitutional was not barred pursuant to *Menna*.[137] In *United States v. Seay*,[138] the Eighth Circuit acknowledged *Broce*'s existence in its analysis but treated *Broce* as equivalent to the *Menna-Blackledge* doctrine by only citing to *Broce* in conjunction with *Blackledge* and *Menna*.[139] Each of these circuits did not consider the limitation that *Broce* placed on the *Menna-Blackledge* doctrine in their analyses.[140]

In contrast, the D.C. and Tenth Circuit expressly base their holdings on the limitation that *Broce* placed on the *Menna-Blackledge* doctrine. In *United States v. Delgado-Garcia*,[141] the D.C. Circuit held that the *Menna-Blackledge* exception did not apply to Jose Delgado-Garcia's claim.[142] Citing *Broce*, the court determined that there was no *facial* constitutional defect in the indictment.[143] The claim was thus barred because an assessment of Delgado-Garcia's claim would have required the court to look beyond the facts in the indictment.[144] The Tenth Circuit used *Broce* to establish a much more narrow view of the *Menna-Blackledge* doctrine in *United States v. De Vaughn*.[145] In *De Vaughn*, the court explained that *Blackledge* and *Menna* created exceptions for two types of claims: "claims that the Due Process Clause prevents the state from bringing a greater charge and claims that an indictment is 'facially duplicative of [an] earlier offense.'"[146] Based on this interpretation of *Broce*, the court held that a claim that the statute of conviction is unconstitutional does not fall within the *Menna-Blackledge* exception and is foreclosed by a guilty plea.[147]

2. Jurisdictional and Non-Jurisdictional Claims

The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuit distinguish between jurisdictional and non-

137. *Id.* at 952 ("[It is well-established] that a guilty plea does not waive the right of the defendant to challenge the constitutionality of the statute under which he is convicted." (citing Menna v. New York, 423 U.S. 61, 62–63 n.2 (1975) (per curiam)).

138. 620 F.3d 919 (8th Cir. 2010).

139. *Id.* at 921, 923 ("[Seay] alleges that the indictment should never have been brought at all because the government 'may not constitutionally prosecute' him. If Seay is correct, then he should never have been 'haled into court' at all . . . . Such challenges to the court's jurisdiction may be pursued despite a defendant's guilty plea." (first quoting *Menna*, 423 U.S. at 62 n.2; then quoting *Blackledge*, 417 U.S. at 30; then citing United States v. Broce, 488 U.S. 563, 575 (1989))).

140. *See supra* text accompanying notes 129–130.

141. 374 F.3d 1337 (D.C. Cir. 2004).

142. *Id.* at 1343.

143. *Id.*

144. *Id.*

145. 694 F.3d 1141 (10th Cir. 2012).

146. *Id.* at 1152 (quoting *Broce*, 488 U.S. at 575).

147. *Id.* at 1154 ("Neither *Blackledge* nor *Menna* involved claims that a criminal statute violated the Constitution. Rather, the defendants in those cases alleged that bringing *any* charges, even charges based on valid statutes, violated due process or double jeopardy.").

jurisdictional claims when assessing the validity of a claim on appeal. "The term 'jurisdictional' refers to a court's statutory or constitutional authority to hale the defendant into court."[148] Supreme Court jurisprudence, however, makes no reference to the jurisdictional nature of a post-guilty plea claim.[149] The general rule in the above-mentioned circuits is that a guilty plea waives the right to appeal all non-jurisdictional issues, including constitutional claims.[150] Thus, a defendant who pleads guilty may only bring jurisdictional claims on appeal.[151]

To illustrate, in *Skinner*, Rodney Skinner pleaded guilty to possession and distribution of obscene matter and later appealed, claiming that the statute of conviction was unconstitutionally vague.[152] After reiterating the general rule that a guilty plea waives all non-jurisdictional defects, the Sixth Circuit asserted that a vagueness challenge is a jurisdictional defect because it challenges the government's authority to constitutionally prosecute a defendant under the statute.[153] As a result, Skinner's guilty plea did not foreclose his vagueness challenge.[154]

In *United States v. Whited*,[155] Ruth Whited pleaded guilty to embezzling money from a healthcare provider.[156] On appeal, the defendant claimed the indictment was insufficient, the court lacked subject matter jurisdiction, and the statute of conviction was unconstitutional as-applied to her.[157] The Third Circuit concluded that each of Whited's claims challenged the court's jurisdiction and were not barred because she could not be constitutionally prosecuted if any of her claims were true.[158]

In *United States v. Brown*,[159] Bud Ray Brown pleaded guilty to attempted escape from a county jail and appealed, claiming lack of jurisdiction on the basis that he was not in federal custody at the time of the attempt.[160] After stating the general rule that a guilty plea does not bar

148. United States v. Phillips, 645 F.3d 859, 862 (7th Cir. 2011) ("A jurisdictional issue is one that stands in the way of conviction—even when factual guilt is validly established—and prevents a court from entering any judgment in the case . . . .").

149. *See De Vaughn*, 694 F.3d at 1152 (recognizing the Supreme Court does not "speak in terms of jurisdiction"); *see also supra* Section II.A–C (discussing Supreme Court cases that demonstrate the Court does not base its decisions on the jurisdictional nature of claims).

150. *Phillips*, 645 F.3d at 862 ("As a general rule, a defendant who pleads guilty waives his right to appeal all non-jurisdictional issues.").

151. *Id.*

152. United States v. Skinner, 25 F.3d 1314, 1315 (6th Cir. 1994).

153. *Id.* at 1317 ("Although a guilty plea waives all non-jurisdictional defects . . . a vagueness challenge is a jurisdictional defect.").

154. *Id.*

155. 311 F.3d 259 (3d Cir. 2002).

156. *Id.* at 260.

157. *Id.* at 262.

158. *Id.*

159. 875 F.3d 1235 (9th Cir. 2017).

160. *Id.* at 1237, 1238.

jurisdictional claims, the Ninth Circuit reasoned that Brown's claim was not barred because a claim involving the legal status of custody challenges the government's jurisdiction.[161]

Likewise, in *United States v. Saac*,[162] four defendants pleaded guilty to knowingly conspiring to operate and intentionally "operating and embarking in a semi-submersible vessel without nationality, with the intent to evade detection in violation of 18 U.S.C. § 2285(a) and (b)."[163] The defendants claimed that their statute of conviction was unconstitutional.[164] The Eleventh Circuit concluded that the defendants' challenge was a jurisdictional issue not waived upon pleading guilty because even if the defendants were factually guilty, the government would lack the power to prosecute them if the statute of conviction was unconstitutional.[165]

3. Facial and As-Applied Constitutional Challenges

Apart from the Third, Ninth, and Eleventh Circuit, the federal circuits that speak in terms of jurisdiction further distinguish between facial and as-applied constitutional challenges to determine whether a claim is waived on appeal. Supreme Court jurisprudence, however, does not make any such distinction.[166] The general rule in this group of circuits is that a guilty plea waives the right to bring an as-applied constitutional challenge because it is a non-jurisdictional claim, but a defendant can bring a facial constitutional challenge because it is jurisdictional.[167]

In *United States v. Phillips*,[168] Michael Phillips pleaded guilty to illegal removal and disposal of asbestos.[169] For the first time on appeal, the defendant claimed that the statute was unconstitutionally vague as applied to him.[170] The Seventh Circuit began its analysis with the general rule that a post-guilty plea defendant waives the right to appeal all non-jurisdictional claims and then stated that an as-applied challenge is not jurisdictional.[171] The court reasoned that a facially vague statute is jurisdictional because it is

161. *Id.* at 1238–39 ("Brown's claim involving the legal status of his custody challenges the government's power to bring the indictment 'at the time the plea was entered on the basis of the existing record.'" (quoting United States v. Broce, 488 U.S. 563, 575 (1989))).

162. 632 F.3d 1203 (11th Cir. 2011).

163. *Id.* at 1207.

164. *Id.*

165. *Id.* at 1208.

166. *See supra* Section II.A–C (discussing Supreme Court cases that illustrate the lack of a distinction between facial and as-applied challenges).

167. United States v. Phillips, 645 F.3d 859, 863 (7th Cir. 2011) ("[W]hile a facial vagueness challenge is jurisdictional, an as-applied vagueness challenge is non-jurisdictional and waived unless specifically reserved for appeal in a conditional plea agreement.").

168. 645 F.3d 859 (7th Cir. 2011).

169. *Id.* at 860.

170. *Id.* at 861.

171. *Id.* at 862–63.

vague in every application, which prevents a court from entering judgment and obtaining a conviction under the statute.[172] By contrast, an as-applied challenge only disputes the court's ability to enter judgment and obtain a conviction in the single case before it.[173] Even if the as-applied challenge is successful, a court is not left without the power to bring other defendants into court under the statute.[174] Thus, Phillips's guilty plea barred him from bringing an as-applied challenge on appeal.[175]

In *United States v. Seay*,[176] Andrew Seay pleaded guilty to possession of a firearm while unlawfully using a controlled substance.[177] The defendant appealed, claiming that the statute of conviction was facially unconstitutional.[178] The Eighth Circuit determined that a facial challenge is a jurisdictional claim because a court would not have the power to bring a defendant into court under the statute.[179] Pursuant to the court's holding, Seay was permitted to bring his facial challenge. The analyses and general holdings of the Fifth, Sixth, and Tenth Circuit are consistent with the above holdings in *Phillips* and *Seay*, each maintaining that a facial constitutional challenge is a jurisdictional defect not barred by a guilty plea.[180] Together, these circuits compose the majority rule in the federal circuits.

The D.C. Circuit and the Second Circuit, however, disagree with the other federal circuits about the general rule that a facial constitutional challenge is not waived because it is a jurisdictional challenge. In *United States v. Baucum*,[181] Patrick Baucum pleaded guilty to distribution of cocaine within 1,000 feet of a school and then raised for the first time on appeal a facial challenge to the constitutionality of the criminal statute.[182] The D.C. Circuit recognized that several federal courts have treated facial constitutional claims as jurisdictional.[183] The court reasoned that even if the power

172. *Id.* at 863.

173. *Id.* ("[A] statute that is vague only as-applied to the defendant may still be constitutional as-applied to others, and it thus does not strip the court of its power to enter a judgment under the statute.").

174. *Id.*

175. *Id.*

176. 620 F.3d 919 (8th Cir. 2010).

177. *Id.* at 920.

178. *Id.* at 922.

179. *Id.* at 923 (noting a facial challenge is a claim the government cannot constitutionally prosecute the defendant under the statute).

180. *See* United States v. De Vaughn, 694 F.3d 1141, 1154 (10th Cir. 2012) (reasoning that the defendant's as-applied First Amendment challenge was barred by his guilty plea); United States v. Urquilla-Avalos, 144 F. App'x 447, 447–48 (5th Cir. 2005) (asserting that a guilty plea waives all non-jurisdictional defects and bars an as-applied constitutional challenge, but does not waive a facial constitutional challenge); United States v. Skinner, 25 F.3d 1314, 1317 (6th Cir. 1994) (holding that a facial vagueness challenge is a jurisdictional defect).

181. 80 F.3d 539 (D.C. Cir. 1996) (per curiam).

182. *Id.* at 540.

183. *Id.* at 542.

to bring a defendant into court upon a charge does involve an issue of jurisdiction, "it does not follow that any facial constitutional challenge is also jurisdictional."[184] The court ultimately concluded that facial constitutional challenges to *presumptively valid* statutes are non-jurisdictional and barred by a guilty plea if the claims are raised for the first time on appeal.[185] The court justified its holding with policy considerations of judicial efficiency and finality of convictions.[186]

Similarly, in *United States v. Drew*,[187] Wilbert Drew pleaded guilty to possession of a firearm and claimed for the first time on appeal that the statute of conviction was facially unconstitutional.[188] Relying on *Baucum*, the D.C. Circuit held that Drew's facial challenge was barred because he failed to raise the challenge in the lower court.[189] The Second Circuit took lead from the D.C. Circuit in *United States v. Feliciano*[190] and held that pursuant to *Baucum*, the defendants waived their facial constitutional challenges by failing to raise them in the court below.[191]

The Third, Ninth, and Eleventh Circuit, by contrast, do not make any meaningful distinction between facial and as-applied challenges. In *United States v. Manna*,[192] Dahelak Manna pleaded guilty and brought an as-applied challenge to his statute of conviction.[193] The Third Circuit noted, without emphasis, the as-applied nature of his claim and determined that his guilty plea did not bar his as-applied challenge.[194] Permitting an as-applied challenge in this context is contrary to the general rule among the federal circuits that an as-applied challenge is waived by a guilty plea because it is a non-jurisdictional claim.[195] Similarly, in *United States v. Sandsness*,[196] Michael Sandsness pleaded guilty to selling drug paraphernalia in interstate commerce.[197] On appeal, Sandsness brought both facial and as-applied

184. *Id.* at 543.

185. *Id.* at 540.

186. *Id.* at 544.

187. 200 F.3d 871 (D.C. Cir. 2000).

188. *Id.* at 874.

189. *Id.* at 876.

190. 223 F.3d 102 (2d Cir. 2000).

191. *Id.* at 125 ("There is no reason why [the defendant's] constitutional challenges could not have been raised below, where he had ample opportunity to raise them and where the district court would have had the opportunity to address them.").

192. 92 F. App'x 880 (3d Cir. 2004).

193. *Id.* at 884.

194. *Id.* at 886, 886 n.6 ("Manna's guilty plea does not foreclose his constitutional challenge because the issue of a statute's constitutionality 'goes to the jurisdiction of the district court.'" (quoting United States v. Bishop, 66 F.3d 569, 572 n.1 (3d Cir. 1995))); *see also* United States v. Whited, 311 F.3d 259, 262 (3d Cir. 2002) (concluding that a guilty plea did not bar the defendant's claims without stamping any significance on the as-applied nature of one of the claims).

195. *See supra* note 167 and accompanying text.

196. 988 F.2d 970 (9th Cir. 1992).

197. *Id.* at 970.

challenges to the statute of conviction.[198] Before reaching the merits of his claims, the Ninth Circuit determined the guilty plea did not bar either of Sandsness's claims because both facial and as-applied constitutional challenges are jurisdictional and thus not waived by a guilty plea.[199] Lastly, in *Saac*, four defendants brought a facial challenge to their statute of conviction.[200] The Eleventh Circuit concluded that the defendants' claim was not barred because it was a jurisdictional challenge without any mention of whether it was a facial or as-applied challenge.[201]

The above discussion about the post-*Broce* development in the federal circuits illustrates that the law regarding the preclusive effect of guilty pleas is far from settled. Although there is some uniformity among the circuits that consistently hold that a guilty plea is a waiver of all non-jurisdictional claims,[202] there is still much variation in how the circuits apply *Broce*, interpret the breadth of the *Menna-Blackledge* exception, and distinguish between facial and as-applied challenges.

III. THE COURT'S REASONING

In *Class v. United States*, the Supreme Court directly addressed "whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal."[203] Writing for the majority, Justice Breyer stated a guilty plea does not bar a claim that the statute is unconstitutional because it challenges the government's power to constitutionally prosecute the defendant.[204] The Court began by noting that in *Haynes v. United States*, it held that a guilty plea does not bar a constitutional claim, and that subsequent Supreme Court decisions have offered a rationale for *Haynes*'s holding that applies to Class's claims.[205]

The Court first discussed its holdings in *Blackledge* and *Menna* to illustrate that not all constitutional claims are barred by a guilty plea.[206] The Court explained that the constitutional claim in *Blackledge* was not precluded because it implicated the power of the state to prosecute the defend-

198. *Id.*

199. *Id.* at 971 ("While a guilty plea waives all nonjurisdictional defects and fact issues, it does not bar constitutional challenges.").

200. United States v. Saac, 632 F.3d 1203, 1207 (11th Cir. 2011).

201. *Id.* at 1208; *see supra* notes 162–165 and accompanying text.

202. *See supra* Section II.D.2.

203. 138 S. Ct. 798, 803 (2018).

204. *Id.* at 805 (citing United States v. Broce, 488 U.S. 563, 575 (1989)).

205. *Id.* at 803; *see also supra* notes 60–62 and accompanying text (discussing the Supreme Court's holding in *Haynes*).

206. *Class*, 138 S. Ct. at 803–04.

ant and asserted the right not to be brought into court upon the charge.[207] Observing that *Menna* repeated the holding and reasoning in *Blackledge*, the Court restated its holding in *Menna*: A guilty plea does not waive a claim that, "*judged on its face*," the state cannot constitutionally prosecute the charge.[208] The Court described the claim in *Menna* as a claim that the state may not constitutionally convict the defendant even if factual guilt is validly established.[209]

After discussing the *Menna-Blackledge* doctrine, the Court found support for those holdings in early guilty plea jurisprudence.[210] According to the Court, the holdings in *Menna* and *Blackledge* "reflect an understanding of the nature of guilty pleas which, in broad outline, stretches back nearly 150 years."[211] The Court pointed to several early state and federal cases that held that a guilty plea did not waive constitutional claims or defective indictment claims.[212]

The Court noted it had "reaffirmed" and "refined [the] scope" of the *Menna-Blackledge* doctrine in *Broce*.[213] The Court explained that the *Broce* Court repeated the holdings of *Blackledge* and *Menna* but added that a guilty plea waives a claim that cannot be proven without relying on the existing record and without contradicting the indictment.[214] The Court distinguished Class's claims from the claim in *Broce*.[215] Unlike *Broce*, Class's constitutional claims did not contradict the indictment or plea agreement.[216] The Court asserted that Class's Second Amendment and due process claims were consistent with his admission of the allegations in the indictment and could be resolved without looking at evidence beyond the existing record.[217]

Additionally, the Court distinguished Class's claims from the unconstitutional grand jury selection claim the Court faced in *Tollett v. Henderson*, reasoning that Class's claims did not allege constitutional deprivations

207. *Id.* at 803 (noting the right accepted by the Court is the right not to be haled into court at all upon the charge because "[t]he very initiation of the proceedings" against the defendant "operated to deprive him due process of law" (citing Blackledge v. Perry, 417 U.S. 21, 30–31 (1974))).

208. *Id.* at 803–04 (citing Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam)).

209. *Id.* at 804 (citing *Menna*, 423 U.S. at 62 n.2).

210. *Id.*

211. *Id.* (noting in 1869, the Supreme Judicial Court of Massachusetts held that "if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged" (quoting Commonwealth v. Hinds, 101 Mass. 209, 210 (1869))).

212. *Id.*; *see supra* Section II.A (discussing the early guilty plea cases mentioned by the Court in this part of the opinion).

213. *Class*, 138 S. Ct. at 804.

214. *Id.* (citing United States v. Broce, 488 U.S. 563, 576 (1974)).

215. *Id.*

216. *Id.*

217. *Id.* (quoting *Broce*, 488 U.S. at 575).

that occurred prior to entering his guilty plea.[218] The Court explained that unlike the claim in *Tollett*, Class's claims could not be "'cured' through a new indictment by a properly selected grand jury."[219] The grand jury selection claim in *Tollett* was irrelevant to the validity of the conviction because the defendant's guilty plea admitted charges that constituted a crime.[220] Class's guilty plea, however, did not render his claims irrelevant because he asserted that the admitted conduct did not constitute a crime, which affected the validity of Class's conviction.[221] The Court ultimately held that a guilty plea did not bar Class's claims because it was not prohibited by his plea agreement, and, like those made in *Blackledge* and *Menna*, Class's claims challenged the government's power to constitutionally prosecute him.[222]

The Court rejected each of the three arguments that the government raised in support of its position that Class's guilty plea barred his claims on appeal.[223] First, the Court rejected the government's contention that Class "inherently relinquished his constitutional claims" by pleading guilty, determining that Class's claims fell under the *Menna-Blackledge* doctrine.[224] Second, the Court rejected the argument that Rule 11(a)(2)[225] precludes a defendant from bringing a claim that he failed to reserve in writing because "the Rule itself does not say whether it sets forth the *exclusive* procedure for a defendant to preserve a constitutional claim."[226] Moreover, the Court recognized that the Rule is not applicable to claims that fall under the *Menna-Blackledge* doctrine because the advisory committee notes expressly declare Rule 11(a)(2) inapplicable to claims raised under the *Menna-Blackledge* doctrine.[227] Lastly, the Court rejected the claim that Class expressly waived his right to appeal when Class agreed to the district court judge's verbal statement that he was giving up his right to appeal his conviction.[228] The Court reasoned that the statement was made to ensure that Class understood the terms of his plea agreement and did not expressly refer to a waiver of the right to appeal at issue.[229]

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218. *Id.* at 804–05 (quoting Blackledge v. Perry, 417 U.S. 21, 30 (1974)).

219. *Id.* at 805 (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 805–06 ("[L]ike the defendants in *Blackledge* and *Menna*, [Class] seeks to raise a claim which, 'judged on its face' based upon the existing record, would extinguish the government's power to 'constitutionally prosecute' the defendant if the claim were successful." (quoting *Broce*, 488 U.S. at 575)).

225. FED. R. CRIM. P. 11(a)(2); *see supra* note 30 and accompanying text.

226. *Class*, 138 S. Ct. at 806.

227. *Id.*; *see* FED. R. CRIM. P. 11(a) advisory committee's notes to 1983 amendments (recognizing the Rule does not apply to claims that fall within the *Menna-Blackledge* doctrine).

228. *Class*, 138 S. Ct. at 807; *see supra* note 27 and accompanying text.

229. *Id.*

In his dissent, Justice Alito, joined by Justice Thomas and Justice Kennedy, argued that the majority was incorrect because Rule 11 should have governed Class's claims and criticized the majority's decision for leaving the law in a disordered state.[230] Contrary to the majority's holding, Justice Alito determined that Rule 11 clearly states, with one exception, an unconditional guilty plea is a waiver of all non-jurisdictional claims.[231] Although not exactly stated in the Rule, Justice Alito reasoned that a waiver of all non-jurisdictional claims is implied by the text of the Rule and the advisory committee's notes state that an unconditional plea waives all non-jurisdictional defects.[232] The exception that Justice Alito referred to is the *Menna-Blackledge* doctrine.[233] Although Justice Alito recognized that Rule 11(a)(2) is not applicable to the *Menna-Blackledge* doctrine, he viewed *Blackledge* and *Menna* as "marked departures" from the Court's prior decisions.[234] Justice Alito criticized the holdings of *Blackledge* and *Menna* at length, claiming that the *Menna-Blackledge* doctrine "is vacuous, has no sound foundation, and produces nothing but confusion."[235]

Justice Alito declared that *Broce* "essentially repudiated" the theories offered in *Blackledge* and *Menna*.[236] According to Justice Alito, *Broce* explicitly disavowed *Menna*'s proposition that a guilty plea admits only factual guilt by explaining that an unconditional plea admits "all of the factual *and legal elements*" necessary to obtain a binding conviction.[237] Regarding *Blackledge*, Justice Alito reasoned that *Broce* rejected the idea that a right not to be tried survives a guilty plea by holding that the defendants' right to bring a double jeopardy claim was eliminated by their guilty pleas.[238]

Justice Alito asserted that instead of clarifying the law, the majority's opinion added confusion by reiterating unintelligible catchphrases from *Blackledge* without adding any clarity to their meaning.[239] Justice Alito also criticized the majority for repeating *Menna*'s proposition that only claims which contradict the allegations in the indictment are waived by a guilty plea.[240] Justice Alito claimed such a holding would allow defendants to raise "an uncertain assortment of claims never before thought to survive a

230. *Id.* at 807, 816 (Alito, J., dissenting).

231. *Id.* at 808.

232. *Id.* (citing FED. R. CRIM. P. 11(a) advisory committee's notes to 1983 amendments).

233. *Id.* at 809.

234. *Id.*

235. *Id.* at 816.

236. *Id.* at 813.

237. *Id.* (quoting United States v. Broce, 488 U.S. 563, 569 (1989)); *see Broce*, 488 U.S. at 570 ("By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.").

238. *Class*, 138 S. Ct. at 813 (Alito, J., dissenting).

239. *Id.* at 814.

240. *Id.*

guilty plea."[241] Finally, Justice Alito declared that the majority incorrectly sought support for its opinion in early guilty plea jurisprudence.[242] Justice Alito characterized *Haynes* as "irrelevant for present purposes" because the government did not argue that the defendant's plea barred his constitutional claim.[243] Likewise, Justice Alito stated that *Commonwealth v. Hinds* was unhelpful to the resolution of this case because it only reflects the idea that a post-guilty plea defendant can assert jurisdictional defects.[244] Justice Alito concluded his dissent by reiterating his belief that Rule 11 governed Class's case and noted he would have limited the *Menna-Blackledge* doctrine "to the particular types of claims involved in those cases."[245]

IV. ANALYSIS

In *Class v. United States*, the Supreme Court held that a guilty plea does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction because such a claim does not contradict a defendant's admissions and challenges the government's power to constitutionally prosecute them.[246] The Court's holding was ultimately correct because the *Menna-Blackledge* doctrine applied to Class's claims and its holding is consistent with *Broce*: Class's claims challenged the government's power to constitutionally convict him, his claims do not contradict the conduct admitted in his guilty plea, and it is not necessary to venture beyond the existing record to prove his claims.[247] The Court's holding is also compatible with the text of Rule 11 of the Federal Rules of Criminal Procedure because nothing in the Rule indicates that a constitutional challenge is waived if it is not reserved through a conditional plea.[248] Additionally, the holding was appropriate because Rule 11(a)(2)'s extension of the right to enter a conditional plea does not sufficiently protect the procedural right of post-guilty plea defendants to bring constitutional claims.[249] Further, the Court properly balanced the government's interest in the finality of guilty pleas and the conservation of judicial resources with defendants' interest in asserting certain values protected by the constitution and in being free from unjustified punishment.[250] The Court's reasoning was flawed, however, be-

241. *Id.*

242. *Id.* at 815.

243. *Id.* (explaining how allowing a constitutional claim when the government does not assert the plea as a bar does not provide any insight about what should happen when the government, like in *Class*, *does* argue the guilty plea bars the constitutional claim).

244. *Id.*

245. *Id.* at 816.

246. *Id.* at 804–05 (majority opinion).

247. *See infra* Section IV.A.

248. *See infra* Section IV.B.

249. *See infra* Section IV.C.

250. *See infra* Section IV.D.

cause the Court neglected to discuss the distinction between jurisdictional and non-jurisdictional claims and facial and as-applied constitutional challenges.[251] As a result, the Court failed to generally clarify the law and did not utilize this opportunity to promote uniformity in the federal circuits.[252]

A. The Court's Holding Is Correct Because the Menna-Blackledge *Doctrine Is Applicable to Class's Claim and Is Consistent with* Broce

The Court's conclusion that the *Menna-Blackledge* doctrine applies to a criminal defendant's constitutional challenge to their statute of conviction was correct.[253] Similar to the claims in *Blackledge* and *Menna*, Class's claim that his statute of conviction was unconstitutional challenges the government's authority to constitutionally prosecute him.[254] A guilty plea does not constitute a concession that the state may constitutionally proscribe conduct alleged in the indictment.[255] Rather, a guilty plea establishes factual guilt—that the defendant did, in fact, engage in the conduct alleged in the indictment.[256] If a statute is found unconstitutional, the state may not constitutionally prosecute the defendant because the admitted conduct is non-criminal, meaning the defendant essentially pleaded guilty to no crime at all.[257] The *Menna-Blackledge* doctrine thus applies to Class's claim because, if his claim is successful, the government cannot constitutionally prosecute Class for innocent conduct.

The Court's holding is also consistent with its holding in *Broce*.[258] *Broce* reaffirmed and placed limitations on the *Menna-Blackledge* doctrine by expressly requiring that defendants must be able to prove their claim by relying on the existing record and without contradicting the conduct alleged and admitted in the indictment.[259] The *Broce* Court found that the *Menna-*

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251. *See infra* Section IV.E.

252. *See infra* Section IV.E.

253. Class v. United States, 138 S. Ct. 798, 805 (2018).

254. *Id.*

255. Hannah Roberts, Comment, *Rethinking the Effects of a Guilty Plea on the Right to Challenge One's Statute of Conviction*, 26 AM U. J. GENDER SOC. POL'Y & L. 623, 631 (2017).

256. Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam).

257. *See* United States v. Seay, 620 F.3d 919, 923 (8th Cir. 2010) (holding that Seay's claim that the statute of conviction was facially unconstitutional under the Second Amendment was not barred by his guilty plea because, if correct, the government had no power to bring him into court at all); Journigan v. Duffy, 552 F.2d 283, 289 (9th Cir. 1977) (holding that Journigan's claim that the statute of conviction was unconstitutional was not barred by his guilty plea because such a claim "goes to the very authority of the state to hale him into court"); *see also* Roberts, *supra* note 255, at 631 ("If it is determined upon review that the state has no authority to punish that conduct, the defendant is essentially innocent of wrongdoing, regardless of the plea she entered.").

258. *See supra* notes 125–130 and accompanying text (discussing *Broce*'s holding).

259. *See* United States v. Broce, 488 U.S. 563, 574–75 (1988) (recognizing *Blackledge* and *Menna* established "[a]n exception to the rule barring collateral attack on a guilty plea" but finding the exception was not applicable to the case at bar); United States v. De Vaughn, 694 F.3d 1141,

Blackledge doctrine was not applicable because the defendants' claim could not be proved without contradicting the indictments and venturing beyond the existing record.[260] The *Broce* defendants pleaded guilty to two separate conspiracy indictments, then later claimed that only one conspiracy existed.[261] Such an assertion directly contradicts the charges in the indictment that the defendants admitted and necessarily involves relying on information other than the existing record. Unlike the claim in *Broce*, Class's claims that the statute of conviction was unconstitutional did not deny that he engaged in the alleged and admitted conduct.[262] Class maintained that he engaged in the alleged conduct and simply claimed that the government may not constitutionally convict him based on such conduct.[263] Class's claims, therefore, are distinct from the claim in *Broce* and are wholly consistent with the limitations that *Broce* placed on the *Menna-Blackledge* exception.

B. The Court's Holding Is Compatible with Rule 11

The Court's holding is compatible with Rule 11 as well. Although Rule 11(a)(2) allows defendants to preserve certain rights on appeal by entering a conditional plea,[264] nothing in the text of the Rule suggests that challenges to a statute's constitutionality are waived if not reserved by a conditional plea.[265] Moreover, Rule 11(b)(1),[266] which sets forth the factors

1151 (10th Cir. 2012) (noting the Supreme Court "imposed some limits on *Blackledge* and *Menna*" in *Broce*); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2028 (2000) ("Endeavoring to cabin the decisions in *Blackledge* and *Menna* without overruling them, the Court in *Broce* recognized a limited jurisdictional exception to the general rule against collateral challenges 'where on the face of the record the court had no power to enter the conviction or impose the sentence,' but found it inapplicable to claims of double jeopardy." (quoting *Broce*, 488 U.S. at 569)). *Contra* Class v. United States, 138 S. Ct. 798, 813 (2018) (Alito, J., dissenting) (claiming *Broce* "repudiated the theories offered" in *Blackledge* and *Menna*).

260. *Broce*, 488 U.S. at 575–76 (noting *Blackledge* and *Menna* were resolved without any need to venture beyond the existing record). In *Blackledge*, the concessions implicit in the defendant's guilty plea were irrelevant because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all. *Id.* In *Menna*, the indictment was facially duplicative of the earlier offense of which the defendant had been convicted and sentenced, so the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense. *Id.*

261. *Id.* at 565.

262. *Class*, 138 S. Ct. at 805.

263. *Id.* at 805–06 ("[Class] seeks to raise a claim which, 'judged on its face' based upon the existing record, would extinguish the government's power to 'constitutionally prosecute' the defendant if the claim were successful." (quoting *Broce*, 488 U.S. at 575)).

264. FED. R. CRIM. P. 11(a)(2).

265. Brief for The National Association of Criminal Defense Lawyers et al. as Amici Curiae In Support of Petitioner at 20, Class v. United States, 138 S. Ct. 798 (2018) (No. 16-424) [hereinafter Brief for National Association of Criminal Defense Lawyers]; *see Class*, 138 S. Ct. at 806 (stating that "the Rule itself does not say whether it sets forth the *exclusive* procedure for a defendant to preserve a constitutional claim").

that courts must convey to defendants before they enter a guilty plea, does not clearly state that by accepting a guilty plea a defendant waives the right to challenge the constitutionality of the statute of conviction.[267] As a result, issues regarding the intelligent nature of guilty pleas could arise if Rule 11 was interpreted as barring claims that challenge the constitutionality of the statute of conviction.[268] Because Rule 11 does not require the court to explicitly notify defendants that their guilty plea waives the right to challenge the constitutionality of the statute, the plea may not be intelligently made for purposes of waiving that right.[269]

C. The Court's Holding Is Correct Because Rule 11(a)(2) Provides Inadequate Protection of Defendants' Procedural Rights

The opportunity for defendants to enter into conditional guilty pleas pursuant to Rule 11(a)(2) does not function as an effective way for defendants to preserve certain rights on appeal.[270] A defendant must overcome numerous hurdles to obtain a conditional plea. The Rule only allows defendants to enter into conditional guilty pleas with the consent of the court and the government.[271] A defendant, therefore, has the obstacle of obtaining consent from the prosecutor before a claim can be reserved for appeal.[272] Prosecutors have broad discretion and may withhold such consent for any reason or for no reason at all.[273] Further, courts are not obligated to accept guilty pleas.[274]

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266. FED. R. CRIM. P. 11(b)(1). The court, before accepting a guilty plea, must inform the defendant of and determine that the defendant understands a number of factors, including:

> (A) the government's right . . . to use against the defendant any statement that the defendant gives under oath; (B) the right to plead not guilty . . .; (C) the right to a jury trial; (D) the right to be represented by counsel . . .; (E) the right at trial to confront and cross-examine adverse witnesses . . .; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty . . .; (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence . . . .

Id.

267. *Id.*; Roberts, *supra* note 255, at 641.

268. Roberts, *supra* note 255, at 642.

269. *Id.*

270. Brief for National Association of Criminal Defense Lawyers, *supra* note 265, at 19. *Contra* Class v. United States, 138 S. Ct. 798, 808 (2018) (Alito, J., dissenting) (emphasizing Class and similarly situated defendants can enter into a conditional plea pursuant to Rule 11(a)(2)).

271. FED. R. CRIM. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty . . . reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.").

272. Brief for National Association of Criminal Defense Lawyers, *supra* note 265, at 20.

273. *Id.* (citing United States v. Fisher, 772 F.2d 371, 374 (7th Cir. 1985) (per curiam)).

274. *Id.* at 21 ("Even a 'blanket prohibition' on the entry of all conditional pleas may not 'constitute error in any given case.'" (quoting United States v. Davis, 900 F.2d 1524, 1527–28 (10th Cir. 1990))).

Prosecutors have numerous incentives for obtaining guilty pleas.[275] Guilty pleas can help prosecutors advance their careers by allowing prosecutors to handle more cases and boost their conviction rates.[276] Prosecutors also use plea bargains to conserve resources and to protect their conviction rates.[277] Prosecutors, therefore, often require specific waivers of certain rights before they will accept a plea agreement.[278]

In addition to these prosecutorial incentives, prosecutors have immense bargaining power in plea bargaining negotiations that allow them to easily obtain guilty pleas.[279] The broad and powerful prosecutorial discretion in making a plea bargain is used to persuade defendants into pleading guilty instead of facing severe sentences.[280] Prosecutors use the nature of the crime to leverage their position in plea bargaining negotiations.[281] Additionally, "[p]rosecutors have virtually unchecked discretion to charge more- or less-serious penalties for the same act."[282] Prosecutors can also penalize defendants for refusing plea offers by "adding enhancements or charges," which can add significant time to a defendant's sentence if convicted.[283] These prosecutorial incentives, combined with the immense bargaining power that prosecutors have in plea bargaining negotiations, can make it very difficult for defendants to obtain conditional pleas.[284] Essentially, "the prosecutors hold all the cards" in plea bargaining negotiations.[285]

275. F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 191 (2002).

276. *Id.* at 191–92.

277. Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 737–38 (2005).

278. *Id.*

279. Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 598 (2014) ("In the context of plea bargaining, power imbalances are built into the structure of the system." (citing Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 425 (2008)); Hessick III & Saujani, *supra* note 275, at 194.

280. Boaz Sangero, *Safety From Plea Bargains' Hazards*, 38 PACE L. REV. 301, 316 (2018).

281. Hessick III & Saujani, *supra* note 275, at 194 ("[T]he more horrible the crime, the longer the sentence, and the greater likelihood of a lesser included offense.").

282. Alkon, *supra* note 279, at 582 (citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 87 (2012)).

283. *Id.* The additional charges and enhancements simply have to be "at least arguably supported by evidence." *Id.* at 598.

284. *See id.* at 582–83 (noting that "prosecutors are rarely hesitant to wield [their] power" to convince defendants to plead guilty in order to avoid the risk of an even longer sentence).

285. *Id.* at 599.

D. The Court Properly Balanced the Competing Interests of the Parties

The Court's holding struck a proper balance between the competing interests of the government and defendants. The government has an interest in maintaining the finality of convictions[286] and conserving judicial and prosecutorial resources.[287] Guilty pleas ensure that courts operate efficiently by reducing the number of cases that go to trial and by reducing the time and resources that prosecutors would otherwise dedicate to trials.[288] By contrast, defendants have an interest in "asserting the values protected by the particular constitutional defense at issue,"[289] in limiting their probable sentence,[290] and in not being unjustly punished by the state.[291]

As demonstrated in Section IV.C., the plea-bargaining system favors the interests of prosecutors over the interests of defendants because of the disparity in bargaining power.[292] Because prosecutors often demand specific waivers of rights and claims[293] and threaten to penalize defendants with increased charges and sentencing if they do not plead guilty,[294] prosecutors have a coercive effect on defendants when they enter into plea agreements.[295] While this prosecutorial power certainly promotes efficiency and finality of convictions, it fails to promote defendants' interest in asserting constitutional values and in being free from unjust punishment.[296] This power imbalance thus benefits the interests of prosecutors to the detriment of defendants' interests.

By upholding the validity of Class's constitutional challenges in the face of a guilty plea,[297] the Court helped level the playing field in the plea-bargaining arena.[298] The Court, in so holding, effectively concluded that

286. McMann v. Richardson, 397 U.S. 759, 774 (1970).

287. Brady v. United States, 397 U.S. 742, 752 (1970).

288. Hessick III & Saujani, *supra* note 275, at 191 (asserting prosecutors are able to handle more cases and increase their conviction rate by obtaining guilty pleas).

289. Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1238 (1977).

290. *Brady*, 397 U.S. at 752.

291. Roberts, *supra* note 255, at 627 (stating defendants have an "interest in being free from punishment").

292. Alkon, *supra* note 279, at 598–99; *see supra* notes 279–285 and accompanying text.

293. Teeter, *supra* note 277, at 737–38 (citing United States v. Teeter, 257 F.3d 14, 22 n.4 (1st Cir. 2001)).

294. *See* Alkon, *supra* note 279, at 582.

295. Hessick III & Saujani, *supra* note 275, at 189 ("Scholars have also attacked plea bargaining on the ground the prosecutors wield too much power over defendants and coerce them into accepting plea agreements which might be unfair.").

296. *See supra* text accompanying notes 289–291.

297. Class v. United States, 138 S. Ct. 798, 807 (2018).

298. *See supra* notes 279–285 and accompanying text (describing the great bargaining power prosecutors wield in plea negotiations).

Class's interest in asserting his constitutional values and in potentially being free from punishment outweighed the government's interest in finality and conservation of resources.[299] The Court correctly granted the defendant's interest more weight in this context because the government has no interest in punishing constitutionally protected conduct.[300] Allowing statutes that criminalize protected conduct to go unchallenged "enables [the government] to circumvent the substantive protections provided by the constitution in favor of preserving an illegitimate [governmental] interest."[301] Although substantial, the state's interest in finality is irrelevant when the Constitution does not permit the state to proscribe certain conduct.[302] Because Class's claims alleged that his conviction violated constitutional protections, the Court rightly overrode the government's interest in finality.

It is true, as suggested by Justice Alito, that the Court's holding will place a burden on the government to defend the constitutionality of its statutes, which harms the government's interest in conserving resources.[303] However, just as the state's interest in finality must yield to the defendant's liberty interest,[304] the state must likewise bear the burden of defending a statute's constitutionality to ensure that the statute has not criminalized protected conduct.[305] Going forward, governmental resources may be less strained because nothing in the Court's holding suggests that a prosecutor may not obtain a waiver of the procedural right to bring a constitutional claim on appeal from defendants.[306] In fact, the Court's opinion may be read as indirectly implying that prosecutors may obtain a waiver of the right to challenge a statute's constitutionality because the Court importantly noted that Class's plea agreement did not include an explicit waiver of that right.[307]

E. The Court Failed to Promote Uniformity in the Federal Circuits

Several federal circuits have based their holdings regarding the rights of post-guilty plea defendants on the distinction between jurisdictional and

299. *Class*, 138 S. Ct. at 807.

300. Roberts, *supra* note 255, at 630 (citing Montgomery v. Louisiana, 136 S. Ct. 718, 731 (2016)).

301. *Id.* (citing *Montgomery*, 136 S. Ct. at 729–30, which noted convictions under an unconstitutional statute are unlawful).

302. *Id.* at 627 (citing *Montgomery*, 136 S. Ct. at 732).

303. *Class*, 138 S. Ct. at 814 (Alito, J., dissenting); Roberts, *supra* note 255, at 631.

304. *See supra* notes 300–302 and accompanying text (explaining the state's interest in finality is irrelevant if the state criminalizes constitutionally protected conduct).

305. Roberts, *supra* note 255, at 631–32 (citing United States v. Coin & Currency, 401 U.S. 715, 726 (1971)).

306. Brief for National Association of Criminal Defense Lawyers, *supra* note 265, at 21–22.

307. *Class*, 138 S. Ct. at 802 (majority opinion) ("The [plea] agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional.").

non-jurisdictional claims and as-applied and facial constitutional challenges, while other circuits have not.[308] The majority of federal circuits found this distinction meaningful when applying the *Menna-Blackledge* doctrine, holding that the *Menna-Blackledge* doctrine does not apply to as-applied constitutional challenges because it does not prohibit the government from obtaining convictions under the statute against other individuals.[309] In *Class*, however, the Court failed to explicitly base any part of its reasoning on whether Class's claims were as-applied or facial constitutional challenges.[310] As a result, the Court's decision did not resolve the federal circuits' inconsistent treatment of post-guilty plea appeals, nor did it provide any guidance that might shed light on the issue.[311] Inconsistency among the circuits is problematic because whether a criminal defendant may appeal after pleading guilty is contingent on the charging jurisdiction and the law followed therein.[312] This lack of uniformity is also contrary to one of the primary functions of the courts: "uniformity in the interpretation of substantive law."[313]

To put an end to the inconsistent application of the law in the federal circuits, the Court should have addressed the distinction between jurisdictional and non-jurisdictional claims and between facial and as-applied challenges.[314] Though few federal circuits have addressed the preclusive effect of guilty pleas since *Class*, it is clear that addressing those distinctions would have been helpful because post-*Class* cases in the Eleventh Circuit and the United States Court of Appeals for the Fourth Circuit continue to

308. *See supra* Section II.D.3 (discussing the distinction between as-applied and facial constitutional challenges in the federal circuits).

309. *See* United States v. Phillips, 645 F.3d 859, 863 (7th Cir. 2011) ("[A] statute that is vague [and, therefore, unconstitutional] only as-applied to the defendant may still be constitutional as-applied to others, and it thus does not strip the court of its power to enter a judgment under the statute or deprive the government of authority to seek a conviction under the statute. Stated otherwise, an as-applied challenge . . . will not leave the court without any power to hale a defendant into court under the statute").

310. *Class*, 138 S. Ct. at 803 (stating the issue as simply whether a guilty plea bars Class from "challenging the constitutionality of the statute of conviction" without making a distinction between as-applied or facial constitutional challenges).

311. *See supra* Section II.D (discussing the inconsistent application of the law in the federal circuits).

312. *See* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L. J. 315, 378 n.383 (2011) ("The argument for uniformity is, of course, well tread in the substantive law context. Many scholars argue that citizens of different jurisdictions should not be subjected to different interpretations of the same law.").

313. *Id.* at 378 (citing Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994)) (noting "one of the primary functions of courts is to ensure uniformity in the interpretation of substantive law" and "federal rules exist to ensure uniformity in procedure" (first citing Caminker, *supra*, at 38; then citing Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995)).

314. *See supra* Section II.D (illustrating the inconsistent application of the law to post-guilty plea claims in the federal circuits).

speak in terms of jurisdiction.[315] In *United States v. Thomas*,[316] the Eleventh Circuit added jurisdictional language into *Class*'s holding and categorized *Class* as sanctioning jurisdictional claims but barring non-jurisdictional claims.[317] In *United States v. St. Hubert*,[318] the Eleventh Circuit, citing *Class* as partial support, concluded that Michael St. Hubert's guilty plea did not waive his jurisdictional claim on appeal.[319] Likewise, in *United States v. Rush*,[320] the Fourth Circuit cited *Class* as support for its conclusion that Christopher Rush waived his right to challenge the court's rulings on his pretrial motions because such a claim is a non-jurisdictional defect.[321]

The federal circuits, with a history of applying the distinction between jurisdictional and non-jurisdictional claims, will likely continue to ground their analyses in the jurisdictional nature of claims because the *Class* Court failed to articulate a clear rule that would promote uniformity.[322] The Court had an opportunity to address the preclusive effect of guilty pleas for the first time in almost thirty years, yet failed to add clarity to this area of law, maintaining the long-held lack of uniformity.[323]

The Court should have issued an opinion aligned with the post-*Broce* majority framework in the federal circuits and adopted the distinction between jurisdictional and non-jurisdictional defects and as-applied and facial constitutional challenges.[324] The distinction provides a clear general rule

315. *See* United States v. Thomas, No. 17-12665, 2018 WL 3911770, at *3 (11th Cir. Aug. 15, 2018) (making a distinction between jurisdictional and non-jurisdictional claims).

316. No. 17-12665, 2018 WL 3911770 (11th Cir. Aug. 15, 2018).

317. *Id.* at *3–4 (asserting that *Class* reviewed the types of non-jurisdictional claims barred by a guilty plea and citing *Class* as support for its holding that Joseph Leroy Thomas's non-jurisdictional claims were barred).

318. 909 F.3d 335 (11th Cir. 2018).

319. *Id.* at 343–44 ("[W]hile the Supreme Court in *Class* did not speak in terms of jurisdiction or jurisdictional indictment defects, it suggested . . . that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot be waived by a defendant's guilty plea because that kind of claim challenges the district court's power to act." (citing Class v. United States, 138 S. Ct. 798, 805 (2018))). The court determined that *Class* thus supported the jurisdictional claim case law in the Eleventh Circuit. *Id.* at 344.

320. 740 F. App'x 281 (4th Cir. 2018) (per curiam).

321. *Id.* at 282 ("[B]ecause a valid guilty plea waives all prior, nonjurisdictional defects in a criminal proceeding, we conclude that Rush has waived his right to challenge the propriety of the court's rulings on his pretrial motions." (citing *Class*, 138 S. Ct. at 805)).

322. *See supra* notes 315–321 and accompanying text; *see also Class*, 138 S. Ct. at 807 (Alito, J., dissenting) (stating it is "unclear" how the rules listed by the majority fit together). Justice Alito also criticized the rule that a claim survives a guilty plea if it challenges the state's power to constitutionally prosecute the defendant as "no more intelligible now than it was when first incanted in *Blackledge*." *Id.* at 814.

323. *See Class*, 138 S. Ct. at 807 (Alito, J., dissenting) ("There is no justification for the muddle left by [the majority's] decision.").

324. *See supra* Section II.D.3 (discussing the distinction between as-applied and facial constitutional challenges).

for determining whether a defendant's claim is barred or falls within the *Menna-Blackledge* exception[325] and is consistent with the underlying logic of the doctrine.[326] As summarized by the Seventh Circuit: "[A]n as-applied challenge is a non-jurisdictional issue because, even if the challenge is successful, it will not leave the court without any power to hale a defendant into court under the statute."[327] A facial challenge is a jurisdictional defect because, if the challenge is successful, "it is by definition [unconstitutional] in every application, preventing a court from entering a judgment under the statute in any case and stripping the government of its ability to obtain a conviction against any defendant."[328] Thus, adopting a rule based on this distinction is consistent with the *Menna-Blackledge* doctrine because a claim that does "not leave a court without any power to bring a defendant into court under the statute" does not fall within the *Menna-Blackledge* exception.[329] Although as-applied and facial constitutional challenges were not clearly presented by Class's claims, the Court should have used this opportunity to provide as much guidance and clarity as possible in furtherance of promoting uniform law in the federal circuits.

V. CONCLUSION

In *Class v. United States*, the Supreme Court held that a guilty plea does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction because such a claim does not contradict the defendant's admissions and challenges the government's power to constitutionally prosecute the defendant.[330] The Court correctly applied the *Menna-Blackledge* exception to Class's claims because a claim that a statute is unconstitutional challenges the power of the government to constitutionally convict the defendant under that statute, and the Court's holding was consistent with *Broce* because Class's claims do not contradict the conduct admitted in his guilty plea.[331] Further, the holding was consistent with Rule 11 because Rule 11(a)(2) does not set forth the exclusive procedure for a post-guilty plea defendant to bring a claim on appeal.[332] The Court also properly protected defendants' important procedural rights because the option to enter a conditional plea pursuant to Rule 11(a)(2) is an insufficient protection given the immense bargaining power of prosecutors

325. *See* United States v. Phillips, 645 F.3d 859, 863 (7th Cir. 2011) (stating an as-applied challenge is a non-jurisdictional issue and is thus waived by entry of a guilty plea).

326. *See* Blackledge v. Perry, 417 U.S. 21, 30 (1974) (holding that a claim is not barred if it involves the defendant's claimed right not to be haled into court at all).

327. *Phillips*, 645 F.3d at 863.

328. *Id.*

329. *Id.*

330. Class v. United States, 138 S. Ct. 798, 804–05 (2018).

331. *See supra* Section IV.A.

332. *See supra* Section IV.B.

in plea negotiations.[333] Moreover, the Court properly balanced the competing interests at stake by effectively holding that the government has no interest in punishing constitutionally protected conduct.[334] The Court, however, failed to address the distinction between jurisdictional and non-jurisdictional claims and facial and as-applied challenges.[335] Accordingly, the Court did not articulate a rule that would promote clarity and uniformity in the federal circuits.[336] To clean the murky waters of guilty plea jurisprudence, the Court should have adopted the distinction between jurisdictional and non-jurisdictional defects and facial and as-applied challenges.[337] This lack of guidance from the Supreme Court may leave the waters cloudy for many years into the future.

333. *See supra* Section IV.C.
334. *See supra* Section IV.D.
335. *See supra* Section IV.E.
336. *See supra* Section IV.E.
337. *See supra* Section IV.E.