No. 23-1022

In the Supreme Court of the United States

NANCY MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, notwithstanding the appeal waiver in her plea agreement, is entitled to an appeal challenging the factual bases for her guilty plea.

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OPINIONS BELOW

The revised order and judgment of the court of appeals (Pet. App. 1a-10a) is unreported. The withdrawn order and judgment of the court of appeals (Pet. App. 13a-22a) is not published in the Federal Reporter but is available at 2023 WL 4858015.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2023. A petition for rehearing was denied on November 15, 2023 (Pet. App. 11a-12a). On January 22, 2024, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including March 14, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted on one count of bank fraud, in violation of 18 U.S.C. 1344(2), and one count of aiding or assisting in the filing of a false tax document, in violation of 26 U.S.C. 7206(2). Judgment 1. She was sentenced to 48 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court of appeals dismissed petitioner's appeal. Pet. App. 10a.

1. Petitioner was the bookkeeper, business manager, and Chief Operating Officer for two physician groups, Mid-Kansas Wound Specialists and Emergency Services, P.A. D. Ct. Doc. 31, at 2 (May 24, 2022); Sent. Tr. 31, 38. For over a decade, petitioner used her position of trust to embezzle millions of dollars from her employers. Sent. Tr. 42, 69, 74; Presentence Investigation Report (PSR) ¶¶ 36-60, 181-182. From 2012 to 2017 in particular, petitioner embezzled over $3.1 million dollars and used the funds for her personal expenses, including her personal travel and investments. D. Ct. Doc. 31, at 2. As part of the scheme, petitioner wrote checks from her employers' business accounts to be deposited in her personal account. *Ibid.*; Plea Tr. 6, 24. She also made false accounting entries, disguised the nature of the payments, and transferred funds between her two employers to cover up her scheme. D. Ct. Doc. 31, at 2; Plea Tr. 26.

In addition, from 2013 to 2016, petitioner filed false income tax returns with the IRS, omitting thousands of dollars she received each year in additional income in the form of embezzlement proceeds. D. Ct. Doc. 31, at 2; PSR ¶ 63. In 2015, for instance, petitioner omitted $850,687 in reportable income from her tax return,

which resulted in a $277,173 loss to the IRS. D. Ct. Doc. 31, at 2.

2. A federal grand jury indicted petitioner on one count of bank fraud, in violation of 18 U.S.C. 1344(2), and four counts of aiding or assisting in the filing of a false tax document, in violation of 26 U.S.C. 7206(2). D. Ct. Doc. 1, at 1-3 (Mar. 23, 2021).

Petitioner and the government entered into a plea agreement in which petitioner agreed to plead guilty to the bank-fraud count and one of the tax-document counts. D. Ct. Doc. 31, at 1. In exchange, the government agreed to dismiss the remaining counts, to not file additional charges against petitioner arising out of the conduct alleged in the indictment, to support an acceptance-of-responsibility adjustment of three offense levels in the calculation of petitioner's guidelines range, and to recommend a sentence at the low end of the applicable range. *Id.* at 3.

In the plea agreement, petitioner admitted that she "knowingly committ[ed] the offenses" and "to being guilty of the offenses." D. Ct. Doc. 31, at 1. In a section titled "Factual Basis for the Guilty Plea," petitioner additionally admitted, with respect to the bank-fraud count, that she "used fraudulent pretenses to obtain money from the banks used by the victims," and with respect to the tax-document count, that she was "aware of the income" that "was required to be reported" and that she "willfully failed to report that income." *Id.* at 2; see *id.* at 11 (petitioner acknowledging that she "has read the Plea Agreement, understands it, and agrees it is true and accurate"). The agreement also contained a "Waiver of Appeal" section in which petitioner agreed that she "knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection

with this prosecution, her conviction, or the components of the sentence to be imposed." *Id.* at 9.

The district court held a change-of-plea hearing under Federal Rule of Criminal Procedure 11(b). The court first summarized the provisions of the plea agreement with petitioner and specifically ascertained that she understood the appeal-waiver provision. Plea Tr. 10-19. Turning to factual basis for the plea, the court asked petitioner a series of questions, including whether she "knew at the time in question that what [she] w[as] doing was illegal." *Id.* at 20-21. Petitioner initially responded "yes," but then added: "My concern is the memory issue, I mean at the time I did it, I didn't know it was illegal but I can't be misleading." *Id.* at 21. The court recessed to allow petitioner to confer with her attorney, who first attempted to ascertain whether the court was asking whether petitioner knew that her conduct was "unlawful." *Id.* at 21-22. In response to that discussion, the prosecutor stated that petitioner's specific knowledge of the illegality or unlawfulness of her conduct was not necessary to sustain the charges, so long as petitioner agreed that she had acted intentionally; petitioner's counsel indicated that she agreed with that characterization of the applicable mens rea. *Id.* at 23.

After the recess, petitioner, through counsel, asked the district court and the prosecutor to continue to go through the factual basis for her pleas. Plea Tr. 23. The prosecutor summarized the evidence against petitioner on both charges. *Id.* at 25-27. As to the bank-fraud charge, the prosecutor stated that petitioner had carried out her embezzlement scheme by "us[ing] fraudulent pretenses to obtain money from the banks used by the victims." *Id.* at 26. As to the tax charge, the prosecutor

stated that petitioner's tax returns were "materially false" because they "omitt[ed] income that was required to be reported." *Id.* at 27; see *ibid.* (referring to missing "reportable income"). The prosecutor also stated that petitioner was "aware of the income" and "willfully failed to report that income." *Ibid.*

Petitioner expressly and repeatedly agreed that the prosecutor's summary of the facts was "true." Plea Tr. 27-28. Petitioner also agreed that her conduct was "intentional," not "by accident," and confirmed that she understood what that meant. *Ibid.* Based on those representations and the rest of the colloquy, the district court determined that petitioner's guilty plea was voluntarily and knowingly made and that a factual basis existed for each of the charges. *Id.* at 32.

3. Notwithstanding her guilty plea and appeal waiver, petitioner filed an appeal challenging her convictions. Petitioner argued that her plea to the bank-fraud count lacked a necessary factual basis because she did not make false statements to convince the banks to honor the checks she wrote from her employers' business accounts, and that her plea to the tax-document count lacked a factual basis because she was not aware of the obligation to report the proceeds of her embezzlement as income. C.A. Docketing Statement 6-7. The government moved to dismiss the appeal based on petitioner's appeal waiver.

In an unpublished order, the court of appeals dismissed the appeal. Pet. App. 1a-10a. As subsequently amended following a petition for rehearing, see *id.* at 11a, the order found that petitioner's factual-basis claim fell within the scope of her appeal waiver, the language of which precluded appeal of "any matter in connection with * * * her conviction." *Id.* at 7a (citation omitted).

The court declined to rely on "out-of-circuit authority holding that 'even valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea.'" *Ibid.* (quoting *United States* v. *McCoy*, 895 F.3d 358, 364 (4th Cir.), cert. denied, 139 S. Ct. 494 (2018)).

The court of appeals also determined that petitioner's claim that an "allegedly insufficient factual basis for her plea renders her appeal waiver involuntary" did not warrant relief. Pet. App. 8a. The court accepted the existence of authority "supporting such a claim" of involuntariness. *Ibid.* (citing *McCarthy* v. *United States*, 394 U.S. 459, 466-467 (1969), and *United States* v. *Balde*, 943 F.3d 73, 95 (2d Cir. 2019)). But the court's "review of the Rule 11 advisement" in this case "confirm[ed] that the district court satisfied the requirement that it determine that there was a factual basis for the plea" under Rule 11(b)(3). *Ibid.* And because petitioner did not move to withdraw her plea before the district court based on an inadequate factual basis for either count, the court of appeals determined that her voluntariness claim could be reviewed for plain error only. *Ibid.* Observing that petitioner did not attempt to argue plain error on appeal, the court "decline[d] to address the validity of the plea agreement, which [petitioner] argue[d] was unknowing and involuntary because her plea lacked a sufficient factual basis." *Id.* at 8a-9a.

ARGUMENT

Petitioner contends (Pet. 7-20) that the court of appeals erred in applying the appeal waiver in her plea agreement to her claim that her guilty plea lacked a factual basis. The court of appeals correctly resolved her claim, and the unpublished order below does not implicate any conflict in the courts of appeals regarding the circumstances in which an appeal waiver may preclude

a factual-basis challenge. This Court recently denied review in a case presenting a similar question. See *Ashraf* v. *United States*, 144 S. Ct. 1006 (2024) (No. 23-537). It should follow the same course here.

1. a. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as the waiver is knowing and voluntary. See, *e.g.*, *Ricketts* v. *Adamson*, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double-jeopardy defense); *Town of Newton* v. *Rumery*, 480 U.S. 386, 389, 397-398 (1987) (waiver of right to file action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. *Ibid.*

In accord with those principles, the courts of appeals have uniformly enforced knowing and voluntary waivers of the right to appeal or collaterally attack a sentence.[1] As the lower courts have recognized, such

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

waivers benefit defendants by providing them with "an additional bargaining chip in negotiations with the prosecution." *United States* v. *Teeter*, 257 F.3d 14, 22 (1st Cir. 2001); see *United States* v. *Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001). And appeal waivers correspondingly benefit the government (and the courts) by enhancing the finality of judgments and discouraging meritless appeals. See *United States* v. *Andis*, 333 F.3d 886, 889 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); *Teeter*, 257 F.3d at 22.

b. The decision below correctly enforced the appeal waiver in petitioner's plea agreement. The courts of appeals have generally recognized that a defendant may be found to have waived his right to appeal a conviction or sentence "as long as his decision is knowing, intelligent, and voluntary." *United States* v. *Brown*, 892 F.3d 385, 394 (D.C. Cir. 2018) (citation omitted); see *Garza* v. *Idaho*, 139 S. Ct. 738, 745 (2019). The issue sought to be raised on appeal must also be within the waiver's scope. See *Garza*, 139 S. Ct. at 744. The court of appeals determined that those requirements were met in this case. Pet. App. 7a-8a.

A "plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel," is voluntarily made unless it was "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Brady* v. *United States*, 397 U.S. 742, 755 (1970) (citation omitted). Here, the relevant waiver was memorialized in a written plea agreement signed by petitioner, who was represented

by counsel. D. Ct. Doc. 31, at 9, 11. The district court also reviewed the terms of the appeal waiver with petitioner during the change-of-plea hearing and confirmed that she understood and continued to agree to that provision. Plea Tr. 19.

In addition, the court of appeals found that the particular argument petitioner attempted to raise on appeal—the contention that her guilty plea to the two charges lacked a factual basis—fell within the waiver's scope (*i.e.*, the provision's language). See Pet. App. 7a. The court then went on to consider whether, notwithstanding petitioner's waiver of her factual-basis claim, the claim undermined the knowing and voluntary nature of her plea. See *id.* at 7a-9a. Specifically, the court acknowledged petitioner's argument that "the allegedly insufficient factual basis for her plea renders her appeal waiver involuntary." *Id.* at 8a. It then reviewed the record of the change-of-plea hearing and "confirm[ed] that the district court satisfied the [Rule 11] requirement that it determine that there was a factual basis for the plea." *Ibid.*

And beyond even that, the court of appeals accepted the possibility that petitioner could have challenged the factual basis for—and voluntariness of—her plea by seeking to withdraw the plea based on an assertion of its inadequacy. Pet. App. 8a. But petitioner had not tried to withdraw her plea in the district court, and the court of appeals therefore recognized that her factual-basis claim could be reviewed only for plain error. *Ibid.* In the absence of any argument by petitioner that she

satisfied the requirements of plain error review, the court reasonably declined to grant relief. *Id.* at 9a.[2]

2. Petitioner is mistaken in contending (Pet. 7-14) that the courts of appeals have reached conflicting conclusions about the circumstances in which an appeal waiver can preclude a defendant's claim that her guilty plea lacked a factual basis under Rule 11(b)(3).

The petition asserts (Pet. 7) that the decision below conflicts with the precedent of the First, Second, Fourth, Fifth, and Eleventh Circuits, each of which has indicated that an appeal waiver can be overcome in circumstances where the lack of a factual basis rendered the plea not knowing or voluntary. See *United States* v. *Goodman*, 971 F.3d 16, 19 (1st Cir. 2020); *United States* v. *Balde*, 943 F.3d 73, 95 (2d Cir. 2019); *United States* v. *McCoy*, 895 F.3d 358, 364 (4th Cir.), cert. denied, 139 S. Ct. 494 (2018); *United States* v. *Trejo*, 610 F.3d 308, 312-313 (5th Cir. 2010); *United States* v. *Puentes-Hurtado*, 794 F.3d 1278, 1284-1285 (11th Cir. 2015).

But the court of appeals remained open to that possibility in this case as well. In the decision below, the court considered petitioner's argument that "the allegedly

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[2] Indeed, it is far from clear that petitioner's current claim would be reviewable even without an appeal waiver. In essence, petitioner is now claiming that she did not actually commit the crime—a claim in direct opposition to the premise of her plea. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States* v. *Broce*, 488 U.S. 563, 569 (1989). And one of the "legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," *ibid.*, is the defendant's "admission of guilt of a substantive criminal offense as charged in [the] indictment," *Libretti* v. *United States*, 516 U.S. 29, 38 (1995). A defendant cannot admit guilt of that offense and then immediately turn around and contest guilt on appeal.

insufficient factual basis for her plea renders her appeal waiver involuntary," but found that challenge foreclosed by the record and the plain-error standard of review. See Pet. App. 8a. That approach mirrored the Fourth Circuit's resolution of the factual-basis claim in the decision on which petitioner primarily relies in asserting the existence of a conflict (Pet. 7-9, 17-18). See *McCoy*, 895 F.3d at 364 (noting that because the defendant did not seek to withdraw his guilty plea in the district court, his factual-basis challenge was subject to plain-error review on appeal); see also *Trejo*, 610 F.3d at 313 (5th Cir.) (same). And even assuming petitioner is correct (Pet. 12) that the Ninth and D.C. Circuits consider factual-basis claims "sometimes" rather than always, the nonprecedential Tenth Circuit decision below does not implicate any such difference in approach.

Petitioner emphasizes (Pet. 2-3, 6-7, 12) the court of appeals' remark, in rejecting her "scope-of-the-waiver argument," that the Fourth Circuit's *McCoy* decision "is not the law in this circuit." Pet. App. 7a. But the court stated that the *McCoy* holding "is not the law in this circuit *with regard to a scope-of-the-waiver argument*"—*i.e.*, an argument that the language of a broadly worded waiver provision does not encompass a factual-basis claim. *Ibid.* (emphasis added); see *ibid.* (relying on *United States* v. *Novosel*, 481 F.3d 1288, 1295 (10th Cir. 2007) (per curiam), for the point about the appeal waiver's language). Particularly given that the court went on to review petitioner's factual-basis claim, see *id.* at 7a-8a, it is far from clear that the decision below stakes out a position on any meaningful disagreement in the courts of appeals.

3. In any event, petitioner's case would be a poor vehicle for addressing the question presented. She offers

no meaningful response to the court of appeals' determination that her factual-basis claim is subject to plain-error review because she did not attempt to withdraw her guilty plea before the district court. See Pet. App. 8a-9a. Nor does she offer any ground to dispute the court of appeals' procedural ruling that she forfeited any entitlement to relief under that standard by failing to argue plain error on appeal. See *ibid.*

Nor could petitioner demonstrate Rule 11 error in this case, plain or otherwise. See *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (a plain error must be "clear or obvious, rather than subject to reasonable dispute") (citation omitted). Petitioner's argument (Pet. 4-5) that her plea to the bank-fraud offense lacked a factual basis because she did not make false statements to the banks lacks merit. Section 1344(2) criminalizes the knowing execution of a "scheme or artifice * * * to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344(2). Accordingly, a defendant must (1) intend to obtain any of the moneys or other property of a financial institution, and (2) the envisioned result—"*i. e.*, the obtaining of bank property"—must occur "'by means of'" false or fraudulent pretenses, representations, or promises. *Loughrin* v. *United States*, 573 U.S. 351, 355-356 (2014) (citations omitted). But there is no requirement that the defendant make a false statement to the bank itself; a false representation to the victim that serves as the means by which the bank property is obtained is sufficient. See *id.* at 356-357 (holding that intent to defraud the bank is not necessary); see also *id.* at 363-364 (explaining that "Section 1344(2)'s 'by means

of' language is satisfied when * * * the defendant's false statement is the mechanism naturally inducing a bank * * * to part with money in its control").

Here, petitioner admitted that she carried out an ongoing scheme to embezzle funds from her employers by writing checks on the entities' business accounts with the banks and diverting the funds to her personal use. D. Ct. Doc. 31, at 2; Plea Tr. 26. Her attorney has subsequently confirmed that petitioner wrote checks on her employers' accounts naming herself as the payee, thereby representing to the banks that she had authorization to receive those funds when she did not. See D. Ct. Doc. 241-1, at 3-4, 6 (Oct. 25, 2023). Petitioner accordingly admitted, both in the plea agreement and again at the change-of-plea hearing, that she "used fraudulent pretenses to obtain money from the banks used by the victims." D. Ct. Doc. 31, at 2; Plea Tr. 26-28; see PSR ¶ 73 (explaining that petitioner chose to rely on the factual basis in the plea agreement, rather than present an alternative statement regarding the offense conduct, for sentencing). "'A stipulated recitation of facts alone is sufficient to support a plea,'" and a "bare recitation," even with a "lack of detail," "will satisfy Rule 11 so long as it establishes the elements of the offense." *McCoy*, 895 F.3d at 365 (citation omitted). The district court did not err in finding petitioner's recitation sufficient to support her plea to the bank-fraud charge.

There is likewise no merit to petitioner's argument that her plea to the tax-document offense lacked a factual basis on the theory that she never "admitted" that she knew that she needed to report the embezzled proceeds as income and did not know that what she did was "'illegal.'" Pet. 5 (citation omitted). A false-tax-document conviction under Section 7206(2) requires that a defendant

act "[w]illfully." 26 U.S.C. 7206(2). That mens rea in turn requires the defendant's "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (citation omitted). And here, petitioner's factual recitation in her plea agreement unequivocally stated that she was "aware of the income" that "was required to be reported" on her federal tax return and that she "willfully failed to report that income." D. Ct. Doc. 31, at 2. Petitioner also agreed during the change-of-plea hearing that she was "aware of the income" that she failed to report, that she "willfully failed to report [it]," and that her conduct was intentional. Plea Tr. 27-28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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