Update to the 2017 Supplement and the Casebook

Federal Criminal Law and Its Enforcement
6th ed. (West 2015)

By Norman Abrams, Sara Sun Beale, and Susan R. Klein

TABLE OF CONTENTS

Chapter 11: Firearm Enforcement and Regulation

Insert before *Caetano v. Massachusetts* on p. 58 of the 2017 Supplement and p. 773 of the casebook:

Another decision following up on and applying the doctrine of *Johnson v. United States*, *supra*, to a statutory phrase somewhat similar to that declared unconstitutional in *Johnson* is *Sessions v. Dimaya*, reproduced below.

Sessions v. Dimaya

138 S.Ct. 1204 (2018)

Justice KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, and an opinion with respect to Parts II and IV–A, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

Three Terms ago, in *Johnson v. United States*, this Court held that part of a federal law's definition of "violent felony" was impermissibly vague. See 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). The question in this case is whether a similarly worded clause in a statute's definition of "crime of violence" suffers from the same constitutional defect. Adhering to our analysis in *Johnson*, we hold that it does.

I

The Immigration and Nationality Act (INA) renders deportable any alien convicted of an "aggravated felony" after entering the United States. 8 U.S.C. § 1227(a)(2)(A)(iii). Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country. See §§ 1229b(a)(3), (b)(1)(C). Accordingly, removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here.

The INA defines "aggravated felony" by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. § 1101(a)(43); see *Luna Torres v. Lynch*, 578 U.S. ——, ——, 136 S.Ct. 1619, 1623, 194 L.Ed.2d 737 (2016). According to one item on that long list, an aggravated felony includes "a crime of violence (as defined in section 16 of title 18 ...) for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F). The specified statute, 18 U.S.C. § 16, provides the federal criminal code's definition of "crime of violence." Its two parts, often known as the elements clause and the residual clause, cover:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Section 16(b), the residual clause, is the part of the statute at issue in this case.

To decide whether a person's conviction "falls within the ambit" of that clause, courts use a distinctive form of what we have called the categorical approach. *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). The question, we have explained, is not whether "the particular facts" underlying a conviction posed the substantial

risk that § 16(b) demands. *Ibid*. Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers.[1] The § 16(b) inquiry instead turns on the "nature of the offense" generally speaking. *Ibid*. (referring to § 16(b)'s "by its nature" language). More precisely, § 16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk. *James v. United States*, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007); see *infra*, at 1213 - 1214.

In the case before us, Immigration Judges employed that analysis to conclude that respondent James Dimaya is deportable as an aggravated felon. A native of the Philippines, Dimaya has resided lawfully in the United States since 1992. But he has not always acted lawfully during that time. Twice, Dimaya was convicted of first-degree burglary under California law. See Cal. Penal Code Ann. §§ 459, 460(a). Following his second offense, the Government initiated a removal proceeding against him. Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a "crime of violence" under § 16(b). "[B]y its nature," the Board reasoned, the offense "carries a substantial risk of the use of force." App. to Pet. for Cert. 46a. Dimaya sought review in the Court of Appeals for the Ninth Circuit.

While his appeal was pending, this Court held unconstitutional part of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). ACCA prescribes a 15–year mandatory minimum sentence if a person convicted of being a felon in possession of a firearm has three prior convictions for a "violent felony." § 924(e)(1). The definition of that statutory term goes as follows:

> "any crime punishable by imprisonment for a term exceeding one year ... that—
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added).

The italicized portion of that definition (like the similar language of § 16(b)) came to be known as the statute's residual clause. In *Johnson v. United States*, the Court declared that clause "void for vagueness" under the Fifth Amendment's Due Process Clause. 576 U.S., at ——-———, 135 S.Ct., at 2561–2563.

Relying on *Johnson*, the Ninth Circuit held that § 16(b), as incorporated into the INA, was also unconstitutionally vague, and accordingly ruled in Dimaya's favor. See *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (2015). Two other Circuits reached the same conclusion, but a third distinguished ACCA's residual clause from § 16's. We granted certiorari to resolve the conflict. *Lynch v. Dimaya*, 579 U.S. ——, 137 S.Ct. 31, 195 L.Ed.2d 902 (2016).

II

"The prohibition of vagueness in criminal statutes," our decision in *Johnson* explained, is an "essential" of due process, required by both "ordinary notions of fair play and the settled rules of law." 576 U.S., at ——, 135 S.Ct., at 2557 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have "fair notice" of the conduct a statute proscribes. *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. See *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Cf. *id.*, at 358, n. 7, 103 S.Ct. 1855 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department" (internal quotation marks omitted)).

[1] The analysis thus differs from the form of categorical approach used to determine whether a prior conviction is for a particular listed offense (say, murder or arson). In that context, courts ask what the elements of a given crime always require—in effect, what is legally necessary for a conviction. See, *e.g.*, *Descamps v. United States*, 570 U.S. 254, 260–261, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013); *Moncrieffe v. Holder*, 569 U.S. 184, 190–191, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)

The Government argues that a less searching form of the void-for-vagueness doctrine applies here than in *Johnson* because this is not a criminal case. See Brief for Petitioner 13–15. As the Government notes, this Court has stated that "[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment": In particular, the Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The removal of an alien is a civil matter. See *Arizona v. United States*, 567 U.S. 387, 396, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). Hence, the Government claims, the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order. See Brief for Petitioner 25–26.

But this Court's precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. In *Jordan v. De George*, we considered whether a provision of immigration law making an alien deportable if convicted of a "crime involving moral turpitude" was "sufficiently definite." 341 U.S. 223, 229, 71 S.Ct. 703, 95 L.Ed. 886 (1951). That provision, we noted, "is not a criminal statute" (as § 16(b) actually is). *Id.*, at 231, 71 S.Ct. 703; *supra*, at 1210 – 1211. Still, we chose to test (and ultimately uphold) it "under the established criteria of the 'void for vagueness' doctrine" applicable to criminal laws. 341 U.S., at 231, 71 S.Ct. 703. That approach was demanded, we explained, "in view of the grave nature of deportation," *ibid.*—a "drastic measure," often amounting to lifelong "banishment or exile," *ibid.* (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948)).

Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is "a particularly severe penalty," which may be of greater concern to a convicted alien than "any potential jail sentence." *Jae Lee v. United States*, 582 U.S. ——, ——, 137 S.Ct. 1958, 1968, 198 L.Ed.2d 476 (2017) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 365, 368, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)). And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more "intimately related to the criminal process." *Chaidez v. United States*, 568 U.S. 342, 352, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) (quoting *Padilla*, 559 U.S., at 365, 130 S.Ct. 1473). What follows, as *Jordan* recognized, is the use of the same standard in the two settings.

For that reason, the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one *Johnson* employed. To salvage § 16's residual clause, even for use in immigration hearings, the Government must instead persuade us that it is materially clearer than its now-invalidated ACCA counterpart. That is the issue we next address, as guided by *Johnson* 's analysis.

III

Johnson is a straightforward decision, with equally straightforward application here. Its principal section begins as follows: "Two features of [ACCA's] residual clause conspire to make it unconstitutionally vague." 576 U.S., at ——, 135 S.Ct., at 2557. The opinion then identifies each of those features and explains how their joinder produced "hopeless indeterminacy," inconsistent with due process. *Id.*, at ——, 135 S.Ct., at 2558. And with that reasoning, *Johnson* effectively resolved the case now before us. For § 16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way. Consider those two, just as *Johnson* described them:

"In the first place," *Johnson* explained, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a hypothesis about the crime's "ordinary case." *Id.*, at ——, 135 S.Ct., at 2557. Under the clause, a court focused on neither the "real-world facts" nor the bare "statutory elements" of an offense. *Ibid.* Instead, a court was supposed to "imagine" an "idealized ordinary case of the crime"—or otherwise put, the court had to identify the "kind of conduct the 'ordinary case' of a crime involves." *Ibid.* But how, *Johnson* asked, should a court figure that out? By using a "statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Ibid.* (internal quotation marks omitted). ACCA provided no guidance, rendering judicial accounts of the "ordinary case" wholly "speculative." *Ibid. Johnson* gave as its prime example the crime of attempted burglary. One judge, contemplating the "ordinary case," would imagine

the "violent encounter" apt to ensue when a "would-be burglar [was] spotted by a police officer [or] private security guard." *Id.,* at ———-———, 135 S.Ct., at 2558. Another judge would conclude that "any confrontation" was more "likely to consist of [an observer's] yelling 'Who's there?' ... and the burglar's running away." *Id.,* at ——, 135 S.Ct., at 2558. But how could either judge really know? "The residual clause," *Johnson* summarized, "offer[ed] no reliable way" to discern what the ordinary version of any offense looked like. *Ibid.* And without that, no one could tell how much risk the offense generally posed.

Compounding that first uncertainty, *Johnson* continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any given crime a "violent felony." See *ibid.* The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like "serious potential risk" (as in ACCA's residual clause) or "substantial risk" (as in § 16's). The problem came from layering such a standard on top of the requisite "ordinary case" inquiry. As the Court explained:

> "[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree[.] The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual ... facts." *Id.,* at ——, 135 S.Ct., at 2561 (some internal quotation marks, citations, and alterations omitted).

So much less predictability, in fact, that ACCA's residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause" violates the guarantee of due process. *Id.,* at ——, 135 S.Ct., at 2558.

Section 16's residual clause violates that promise in just the same way. To begin where *Johnson* did, § 16(b) also calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk. The Government explicitly acknowledges that point here. See Brief for Petitioner 11 ("Section 16(b), like [ACCA's] residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense"). And indeed, the Government's briefing in *Johnson* warned us about that likeness, observing that § 16(b) would be "equally susceptible to [an] objection" that focused on the problems of positing a crime's ordinary case. Supp. Brief for Respondent, O.T. 2014, No. 13–7120, pp. 22–23. Nothing in § 16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in *Johnson* : How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct? See *Johnson,* 576 U.S., at ——, 135 S.Ct., at 2557; *supra,* at 1213 - 1214; *post,* at 1231 – 1232 (GORSUCH, J., concurring in part and concurring in judgment). And we can as well reiterate *Johnson* 's example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See *post,* at 1231 - 1232 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the "ordinary case" remains, as *Johnson* described it, an excessively "speculative," essentially inscrutable thing. 576 U.S., at ——, 135 S.Ct., at 2558; accord *post,* at 1256 (THOMAS, J., dissenting).

And § 16(b) also possesses the second fatal feature of ACCA's residual clause: uncertainty about the level of risk that makes a crime "violent." In ACCA, that threshold was "serious potential risk"; in § 16(b), it is "substantial risk." See *supra,* at 1211, 1212. But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason. As THE CHIEF JUSTICE's valiant attempt to do so shows, that would be slicing the baloney mighty thin. See *post,* at 1244 – 1245 (dissenting opinion). And indeed, *Johnson* as much as equated the two phrases: Return to the block quote above, and note how *Johnson*—as though anticipating this case—refers to them interchangeably, as alike examples of imprecise "qualitative standard[s]." See *supra,* at 1214; 576 U.S., at ——, 135 S.Ct., at 2561. Once again, the point is not that such a non-numeric standard is alone problematic: In *Johnson* 's words, "we do not doubt" the constitutionality of applying § 16(b)'s "substantial risk [standard] to real-world conduct." *Id.,* at ——, 135 S.Ct., at 2561 (internal quotation marks omitted). The difficulty comes, in § 16's residual clause just as in ACCA's, from applying such a standard to "a judge-imagined abstraction"—*i.e.,* "an idealized ordinary case of the crime." *Id.,* at ——, ——, 135 S.Ct., at 2558, 2561. It is then that the standard ceases to work in a way consistent with due process.

In sum, § 16(b) has the same "[t]wo features" that "conspire[d] to make [ACCA's residual clause] unconstitutionally vague." *Id.*, at ——, 135 S.Ct., at 2557. It too "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents" some not-well-specified-yet-sufficiently-large degree of risk. *Id.*, at ——, 135 S.Ct., at 2556–2557. The result is that § 16(b) produces, just as ACCA's residual clause did, "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*, at ——, 135 S.Ct., at 2558.

IV

The Government and dissents offer two fundamentally different accounts of how § 16(b) can escape unscathed from our decision in *Johnson*. Justice THOMAS accepts that the ordinary-case inquiry makes § 16(b) "impossible to apply." *Post*, at 1256. His solution is to overthrow our historic understanding of the statute: We should now read § 16(b), he says, to ask about the risk posed by a particular defendant's particular conduct. In contrast, the Government, joined by THE CHIEF JUSTICE, accepts that § 16(b), as long interpreted, demands a categorical approach, rather than a case-specific one. They argue only that "distinctive textual features" of § 16's residual clause make applying it "more predictable" than its ACCA counterpart. Brief for Petitioner 28, 29. We disagree with both arguments.

…

Note

Dimaya held as impermissibly vague the phrase "crime of violence" as defined in 18 U.S.C. § 16 which under the relevant INA statutory scheme was a basis for the deportation from the United States of an alien who had been convicted of such a crime. "Crime of violence" is also defined in 18 U.S.C. § 924 (c)(3), in a manner substantially identical to the definition in § 16, and the phrase is used for varying purposes several times in § 924. What is the effect of the *Dimaya* decision on the government's ability to use § 924 in its firearms enforcement efforts? Note that as it is used in § 924(c)(1)(A), crime of violence appears to be restricted to crimes for which the person may be prosecuted in a federal court.

Chapter 16: Obstruction of Justice

Insert after paragraph discussing potential obstruction of charge against President Trump on p. 75 of the 2017 Supplement and p. 1204 of the casebook:

U.S. Special Counsel, Robert Mueller is now investigating not only the possibility of Russian collusion in President Trump's campaign during the 2016 Presidential election, but also this alleged act of obstruction. The Department of Justice's Office of Legal Counsel has twice (in 1973 and again in 2000) concluded that a sitting president is immune from criminal prosecution because prosecution would "impermissibly interfere with the President's ability to carry out his" constitutional duties. Though it appears to us that the DOJ memoranda are binding on Mr. Mueller, even if he concludes that he has authority to bring charges he may defer to Congress to determine whether to initiate impeachment proceedings. See DOJ Order No. 3915-2017; Brook Dooley, et al., White Collar Crime and Securities Enforcement—2017 in Review, Bloomberg BNA White Collar Crime Report, June 8, 2018.

Insert on p. 78 of the 2017 Supplement and p. 1214 of the casebook, as new note 8:

8. Extension of *Aguilar*'s nexus provision to the Omnibus Clause of the IRS obstruction statue. A lightly edited version of the Supreme Court's latest decision requiring a nexus between the defendant's conduct and a particular proceeding, and knowledge that a particular proceeding was pending, is reproduced below. In this case the Court was interpreting the Omnibus Clause contained in a statute prohibiting the obstruction of the Internal Revenue Code, 26 U.S.C. § 7212(a).

Marinello v. United States

138 S.Ct. 1101 (2018)

Justice BREYER delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined [omitted].

A clause in § 7212(a) of the Internal Revenue Code makes it a felony "corruptly or by force" to "endeavo[r] to obstruct or imped[e] the due administration of this title." 26 U.S.C. § 7212(a). The question here concerns the breadth of that statutory phrase. Does it cover virtually all governmental efforts to collect taxes? Or does it have a narrower scope? In our view, "due administration of [the Tax Code]" does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns. Rather, the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit.

I

The Internal Revenue Code provision at issue, § 7212(a), has two substantive clauses. The first clause, which we shall call the "Officer Clause," forbids

> "corruptly or by force or threats of force (including any threatening letter or communication) endeavor[ing] to intimidate or impede any *officer or employee* of the United States acting in an official capacity under [the Internal Revenue Code]." *Ibid.* (emphasis added).

The second clause, which we shall call the "Omnibus Clause," forbids

> "corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, *the due administration* of [the Internal Revenue Code]." *Ibid.* (emphasis added).

As we said at the outset, we here consider the scope of the Omnibus Clause.

Between 2004 and 2009, the Internal Revenue Service (IRS) opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello, the petitioner here. In 2012 the Government indicted Marinello, charging him with violations of several criminal tax statutes including the Omnibus Clause. In respect to the Omnibus Clause the Government claimed that Marinello had engaged in at least one of eight different specified activities, including "failing to maintain corporate books and records," "failing to provide" his tax accountant "with complete and accurate" tax "information," "destroying ... business records," "hiding income," and "paying employees ... with cash." 839 F.3d 209, 213 (C.A.2 2016).

Before the jury retired to consider the charges, the judge instructed it that, to convict Marinello of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so "corruptly," meaning "with the intent to secure an unlawful advantage or benefit, either for [himself] or for another." App. in No. 15–2224(CA2), p. 432. The judge, however, did not instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. The jury subsequently convicted Marinello on all counts.

Marinello appealed to the Court of Appeals for the Second Circuit. He argued, among other things, that a violation of the Omnibus Clause requires the Government to show that the defendant had tried to interfere with a "pending IRS proceeding," such as a particular investigation. Brief for Appellant in No. 15–2224, pp. 23–25. The appeals court disagreed. It held that a defendant need not possess " 'an awareness of a particular [IRS] action or investigation.' " 839 F.3d, at 221 (quoting *United States v. Wood*, 384 Fed.Appx. 698, 704 (C.A.2 2010); alteration in original). The full Court of Appeals rejected Marinello's petition for rehearing, two judges dissenting. 855 F.3d 455 (C.A.2 2017).

Marinello then petitioned for certiorari, asking us to decide whether the Omnibus Clause requires the Government to prove the defendant was aware of "a pending IRS action or proceeding, such as an investigation or audit," when he "engaged in the purportedly obstructive conduct." Pet. for Cert. i. In light of a division of opinion among the Circuits on this point, we granted the petition. [citations omitted].

II

In *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995), we interpreted a similarly worded criminal statute. That statute made it a felony "corruptly or by threats or force, or by any threatening letter or communication, [to] influenc[e], obstruc[t], or imped[e], or endeavo[r] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503(a). The statute concerned not (as here) "the due administration of" *the Internal Revenue Code* but rather "the due administration of *justice*."

In interpreting that statute we pointed to earlier cases in which courts had held that the Government must prove "an intent to influence judicial or grand jury proceedings." *Aguilar, supra*, at 599, 115 S.Ct. 2357 (citing *United States v. Brown*, 688 F.2d 596, 598 (C.A.9 1982)). We noted that some courts had imposed a " 'nexus' requirement": that the defendant's "act must have a relationship in time, causation, or logic with the judicial proceedings." *Aguilar, supra*, at 599, 115 S.Ct. 2357 (citing *United States v. Wood*, 6 F.3d 692, 696 (C.A.10 1993), and *United States v. Walasek*, 527 F.2d 676, 679, and n. 12 (C.A.3 1975)). And we adopted the same requirement.

We set forth two important reasons for doing so. We wrote that we "have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.' " *Aguilar, supra*, at 600, 115 S.Ct. 2357 (quoting *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931); citation omitted). Both reasons apply here with similar strength.

As to Congress' intent, the literal language of the statute is neutral. The statutory words "obstruct or impede" are broad. They can refer to anything that "block[s]," "make[s] difficult," or "hinder[s]." Black's Law Dictionary 1246 (10th ed. 2014) (obstruct); Webster's New International Dictionary (Webster's) 1248 (2d ed. 1954) (impede); *id.*, at 1682 (obstruct); accord,

5 Oxford English Dictionary 80 (1933) (impede); 7 *id.*, at 36 (obstruct). But the verbs "obstruct" and "impede" suggest an object—the taxpayer must hinder a particular person or thing. Here, the object is the "due administration of this title." The word "administration" can be read literally to refer to every "[a]ct or process of administering" including every act of "managing" or "conduct[ing]" any "office," or "performing the executive duties of" any "institution, business, or the like." Webster's 34. But the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business. Cf. *Aguilar, supra*, at 600–601, 115 S.Ct. 2357 (concluding false statements made to an investigating agent, rather than a grand jury, do not support a conviction for obstruction of justice).

Here statutory context confirms that the text refers to specific, targeted acts of administration. The Omnibus Clause appears in the middle of a statutory sentence that refers specifically to efforts to "intimidate or impede *any officer or employee of the United States* acting in an official capacity." 26 U.S.C. § 7212(a) (emphasis added). The first part of the sentence also refers to "force or threats of force," which the statute elsewhere defines as "threats of bodily harm to the *officer or employee of the United States or to a member of his family*." *Ibid.* (emphasis added). The following subsection refers to the "forcibl[e] rescu[e]" of "any *property* after it shall have been seized under" the Internal Revenue Code. § 7212(b) (emphasis added). Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. And, in that context the Omnibus Clause logically serves as a "catchall" in respect to the obstructive conduct the subsection sets forth, not as a "catchall" for every violation that interferes with what the Government describes as the "continuous, ubiquitous, and universally known" administration of the Internal Revenue Code. Brief in Opposition 9.

* * *

Viewing the Omnibus Clause in the broader statutory context of the full Internal Revenue Code also counsels against adopting the Government's broad reading. That is because the Code creates numerous misdemeanors, ranging from willful failure to furnish a required statement to employees, § 7204, to failure to keep required records, § 7203, to misrepresenting the number of exemptions to which an employee is entitled on IRS Form W–4, § 7205, to failure to pay any tax owed, however small the amount, § 7203. To interpret the Omnibus Clause as applying to all Code administration would potentially transform many, if not all, of these misdemeanor provisions into felonies, making the specific provisions redundant, or perhaps the subject matter of plea bargaining. Some overlap in criminal provisions is, of course, inevitable. See, *e.g.*, *Sansone v. United States*, 380 U.S. 343, 349, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965) (affirming conviction for tax evasion despite overlap with other provisions). Indeed, as the dissent notes, *post*, at 1115 (opinion of THOMAS, J.), Marinello's preferred reading of § 7212 potentially overlaps with another provision of federal law that criminalizes the obstruction of the "due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States," 18 U.S.C. § 1505. But we have not found any case from this Court interpreting a statutory provision that would create overlap and redundancy to the degree that would result from the Government's broad reading of § 7212—particularly when it would " 'render superfluous other provisions in the same enactment.' " [Citations omitted].

A broad interpretation would also risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to "exercise" interpretive "restraint." See 515 U.S., at 600, 115 S.Ct. 2357; see also *Yates, supra*, at —— – ——, 135 S.Ct., at 1087–1088; *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–704, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005). Interpreted broadly, the provision could apply to a person who pays a babysitter $41 per week in cash without withholding taxes, see 26 C.F.R. § 31.3102–1(a)(2017); IRS, Publication 926, pp. 5–6 (2018), leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant. Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a).

The Government argues that the need to show the defendant's obstructive conduct was done "corruptly" will cure any overbreadth problem. But we do not see how. The Government asserts that "corruptly" means acting with "the specific intent to obtain an unlawful advantage" for the defendant or another. See Tr. of Oral Arg. 37; accord, 839 F.3d, at 218. Yet, practically speaking, we struggle to imagine a scenario where a taxpayer would "willfully" violate the Tax Code (the *mens rea* requirement of various tax crimes, including misdemeanors, see, *e.g.*, 26 U.S.C. §§ 7203, 7204, 7207) without intending someone to obtain an unlawful advantage. See *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) ("Willfulness ... requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty") A taxpayer may know with a fair degree of

certainty that her babysitter will not declare a cash payment as income—and, if so, a jury could readily find that the taxpayer acted to obtain an unlawful benefit for another. For the same reason, we find unconvincing the dissent's argument that the distinction between "willfully" and "corruptly"—at least as defined by the Government—reflects any meaningful difference in culpability. See *post,* at 1114 – 1115.

Neither can we rely upon prosecutorial discretion to narrow the statute's scope. True, the Government used the Omnibus Clause only sparingly during the first few decades after its enactment. But it used the clause more often after the early 1990's. Brief for Petitioner 9. And, at oral argument the Government told us that, where more punitive and less punitive criminal provisions both apply to a defendant's conduct, the Government will charge a violation of the more punitive provision as long as it can readily prove that violation at trial. Tr. of Oral Arg. 46–47, 55–57; see Office of the Attorney General, Department Charging and Sentencing Policy (May 10, 2017), online at http://www.justice.gov/opa/press-release/file/965896/download (as last visited Mar. 16, 2018).

Regardless, to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing "policemen, prosecutors, and juries to pursue their personal predilections," *Smith v. Goguen,* 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.' "[citations omitted]. And it is why "[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute." *Aguilar, supra,* at 600, 115 S.Ct. 2357.

III

In sum, we follow the approach we have taken in similar cases in interpreting § 7212(a)'s Omnibus Clause. To be sure, the language and history of the provision at issue here differ somewhat from that of other obstruction provisions we have considered in the past. See *Aguilar, supra* (interpreting a statute prohibiting the obstruction of "the due administration of justice"); *Arthur Andersen, supra* (interpreting a statute prohibiting the destruction of an object with intent to impair its integrity or availability for use in an official proceeding); *Yates, supra* (interpreting a statute prohibiting the destruction, concealment, or covering up of any "record, document, or tangible object with the intent to" obstruct the "investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States"). The Government and the dissent urge us to ignore these precedents because of those differences. The dissent points out, for example, that the predecessor to the obstruction statute we interpreted in *Aguilar,* 18 U.S.C. § 1503, prohibited influencing, intimidating, or impeding "any witness or officer in any court of the United States" or endeavoring "to obstruct or imped[e] the due administration of justice *therein.*" *Pettibone v. United States,* 148 U.S. 197, 202, 13 S.Ct. 542, 37 L.Ed. 419 (1893) (citing Rev. Stat. § 5399; emphasis added); see *post,* at 1115 – 1116. But Congress subsequently deleted the word "therein," leaving only a broadly worded prohibition against obstruction of "the due administration of justice." Act of June 25, 1948, § 1503, 62 Stat. 769–770. Congress then used that same amended formulation when it enacted § 7212, prohibiting the "obstruction of the due administration" of the Tax Code. Internal Revenue Code of 1954, 68A Stat. 855. Given this similarity, it is helpful to consider how we have interpreted § 1503 and other obstruction statutes in considering § 7212. The language of some and the underlying principles of all these cases are similar. We consequently find these precedents—though not controlling—highly instructive for use as a guide toward a proper resolution of the issue now before us. See *Smith v. City of Jackson,* 544 U.S. 228, 233, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005).

We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a "relationship in time, causation, or logic with the [administrative] proceeding." *Aguilar,* 515 U.S., at 599, 115 S.Ct. 2357 (citing *Wood,* 6 F.3d, at 696). By "particular administrative proceeding" we do not mean every act carried out by IRS employees in the course of their "continuous, ubiquitous, and universally known" administration of the Tax Code. Brief in Opposition 9. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include

routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns. The Government contends the processing of tax returns is part of the administration of the Internal Revenue Code and any corrupt effort to interfere with that task can therefore serve as the basis of an obstruction conviction. But the same could have been said of the defendant's effort to mislead the investigating agent in *Aguilar*. The agent's investigation was, at least in some broad sense, a part of the administration of justice. But we nevertheless held the defendant's conduct did not support an obstruction charge. 515 U.S., at 600, 115 S.Ct. 2357. In light of our decision in *Aguilar*, we find it appropriate to construe § 7212's Omnibus Clause more narrowly than the Government proposes. Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.

In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. See *Arthur Andersen*, 544 U.S., at 703, 707–708, 125 S.Ct. 2129 (requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their "use in an official proceeding"). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing.

For these reasons, the Second Circuit's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chapter 17: Plea Bargaining and Cooperation Agreements

Insert on p. 81 of the 2017 Supplement and p. 1297 of the casebook as new note 6:

6. Remedy when the federal government breaches a plea agreement. Recall that in *Santobello*, discussed in note 4 on casebook page 1296, the defendant preserved his claim that the government breached its plea agreement. The Supreme Court remanded the case back to the state courts to determine whether to grant specific performance of the agreement on the guilty plea (where the government would have to refrain from making a sentencing recommendation and the case should be heard by a different judge) , or whether to grant Mr. Santobello the opportunity to withdraw his plea of guilty. In *Santobello*, there was an executed plea agreement. In such a case, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 92 S.Ct. at 499.

However, we get quite a different result for an unexecuted plea agreement. In *Mabry v. Johnson*, 104 S.Ct. 2543 (1984), after respondent was convicted in Arkansas state court on charges of burglary, assault, and murder, his convictions were set aside and plea negotiations ensued. The prosecutor proposed to the respondent's attorney that in exchange for a guilty plea to a charge of accessory after a felony murder, the prosecutor would recommend a 21-year sentence to be served concurrently with the burglary and assault sentences. However, when the defense counsel returned the prosecutor's call the next day to accept, the prosecutor told counsel that a mistake had been made and he withdrew that offer. He proposed instead that the 21-year sentence be served consecutively, and the respondent ultimately accepted this deal. On habeas, the Court of Appeals held that "fairness" precluded the prosecution's withdrawal of the plea proposal once accepted by respondent. The Supreme Court disagreed.

Respondent had no right to have the first proposal specifically enforced, and he may not successfully attack his subsequent plea. Due Process is implicated only if the plea was not voluntarily and intelligently made, or if the prosecutor had breached its promise "with respect to an executed plea agreement." 104 S.Ct. at 2547. The respondent entered the executed plea agreement with full awareness that the prosecutor would recommend the 21-year consecutive sentence, so "it rested on no 'unfulfilled promise' and fully satisfied the test for voluntariness and intelligence. *Id*. at 2438. Whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing the initial offer is irrelevant, as "the Due Process Clause is not a code of ethics for prosecutors."

The latest word from the Court on the remedy for the government breach of an executed plea agreement is below.

Kernan v. Cuero

138 S.Ct. 4 (2017)

PER CURIAM.

The Antiterrorism and Effective Death Penalty Act of 1996 provides that a federal court may grant habeas relief to a state prisoner based on a claim adjudicated by a state court on the merits if the resulting decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In this case, a California court permitted the State to amend a criminal complaint to which the respondent, Michael Cuero, had pleaded guilty. That guilty plea would have led to a maximum sentence of 14 years and 4 months. The court acknowledged that permitting the amendment would lead to a higher sentence, and it consequently permitted Cuero to withdraw his guilty plea. Cuero then pleaded guilty to the amended complaint and was sentenced to a term with a minimum of 25 years.

A panel of the Court of Appeals for the Ninth Circuit subsequently held that the California court had made a mistake of federal law. In its view, the law entitled Cuero to specific performance of the lower 14–year, 4–month sentence that he would have received had the complaint not been amended.

The question here is whether the state-court decision "involved an unreasonable application o[f] clearly established Federal law, as determined by the Supreme Court of the United States." *Ibid*. Did our prior decisions (1) clearly *require* the state court to impose the lower sentence that the parties originally expected; or (2) instead permit the State's sentence-raising amendment where the defendant was allowed to withdraw his guilty plea? Because no decision from this Court clearly establishes that a state court must choose the first alternative, we reverse the Ninth Circuit's decision.

I

On October 27, 2005, the State of California charged Michael Cuero with two felonies and a misdemeanor. App. to Pet. for Cert. 26a–33a. Its complaint alleged that on October 14, 2005, Cuero drove his car into, and seriously injured, Jeffrey Feldman, who was standing outside of his parked pickup truck. *Id.*, at 27a–28a. The complaint further alleged that Cuero was then on parole, that he was driving without a license, that he was driving under the influence of methamphetamine, and that he had in his possession a loaded 9–millimeter semiautomatic pistol. *Ibid.*

Cuero initially pleaded "not guilty." But on December 8, he changed his plea. A form entitled "PLEA OF GUILTY/NO CONTEST—FELONY" signed by Cuero, the prosecutor, and the trial court memorialized the terms of Cuero's guilty plea. See *id.*, at 77a–85a. On that form, Cuero pleaded guilty to the two felony counts. *Ibid.*; see Cal. Veh. Code Ann. § 23153(a) (West 2017) (causing bodily injury while driving under the influence of a drug); Cal. Penal Code Ann. § 12021(a)(1) (West 2005) (unlawful possession of a firearm). He also admitted that he had previously served four separate prison terms, including a term for residential burglary, which qualifies as a predicate offense under California's "three strikes" law. Cal. Penal Code Ann. § 667(a)(1) (West 2017); see *Ewing v. California*, 538 U.S. 11, 15–17, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). Finally, Cuero acknowledged on this guilty-plea form that he understood that he "may receive this maximum punishment as a result of my plea: 14 years, 4 months in State Prison, $10,000 fine and 4 years parole." App. to Pet. for Cert. 80a.

Following a hearing, the state trial court accepted the plea and granted California's motion to dismiss the remaining misdemeanor charge. The court then scheduled the sentencing hearing for January 11, 2006.

Before the hearing took place, however, the prosecution determined that another of Cuero's four prior convictions qualified as a "strike" and that the signed guilty-plea form had erroneously listed only one strike. See Cal. Penal Code Ann. § 245(a)(1) (assault with a deadly weapon). This second strike meant that Cuero faced not a maximum punishment of just over 14 years (172 months), but a *minimum* punishment of 25 years. §§ 667(e)(2)(A)(ii), 1170.12(c)(2)(A)(ii).

The State asked the trial court for permission to amend the criminal complaint accordingly. It pointed to Cal. Penal Code § 969.5(a), which provides:

> "Whenever it shall be discovered that a pending complaint to which a plea of guilty has been made under Section 859a does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, the complaint may be forthwith amended to charge the prior conviction or convictions and the amendments may and shall be made upon order of the court."

Cuero argued that the State's motion was untimely and prejudicial. But the trial court granted the motion. At the same time, the court permitted Cuero to withdraw his guilty plea in light of the change. It concluded that § 969.5(a) "guide[d]" its inquiry and was best read to reflect a legislative determination that criminal complaints should charge all prior felony convictions. App. to Pet. for Cert. 178a. The court added that the case was distinguishable from "a situation where the [State] might, after a guilty plea, seek to amend" a criminal complaint by adding "new charges" or facts that fundamentally alter the substance of the complaint. *Id.*, at 179a. But here, where only "alleged prior convictions" were at issue, the court could eliminate any prejudice to Cuero by allowing him to withdraw his initial guilty plea, thereby restoring both parties to the status quo prior to its entry. *Ibid.*

Soon thereafter, California amended the complaint. The complaint as amended charged Cuero with one felony, (causing bodily injury while driving under the influence of a drug under Cal. Veh. Code Ann. § 23153(a)), and it alleged two prior strikes. Cuero then withdrew his initial guilty plea and entered a new guilty plea to the amended complaint. On April 20, 2006, the trial court sentenced Cuero to the stipulated term of 25 years to life. His conviction and sentence were affirmed on direct appeal, and the California Supreme Court denied a state habeas petition.

Cuero then filed a petition for federal habeas relief in the United States District Court for the Southern District of California. The Federal District Court denied Cuero's petition, but the Court of Appeals for the Ninth Circuit reversed. *Cuero v. Cate*, 827 F.3d 879 (2016).

The Ninth Circuit panel hearing the appeal held that the state trial court had "acted contrary to clearly established Supreme Court law" by "refusing to enforce the original plea agreement" with its 172–month maximum sentence. *Id.*, at 888. It wrote that "[i]n this context, specific performance" of that plea agreement—*i.e.*, sentencing Cuero to no more than the roughly 14–year sentence reflected in the 2005 guilty-plea form—was "necessary to maintain the integrity and fairness of the criminal justice system." *Id.*, at 890, n. 14. The Ninth Circuit denied rehearing en banc over the dissent of seven judges. *Cuero v. Cate*, 850 F.3d 1019 (2017). The State then filed a petition for certiorari here.

* * *

III

The Ninth Circuit, in ordering specific performance of the 172–month sentence set forth on Cuero's original guilty-plea form, reasoned as follows. First, the court concluded that Cuero's guilty-plea form amounts to an enforceable plea agreement. 827 F.3d, at 884–885. Second, that plea agreement amounts to, and should be interpreted as, a contract under state contract law. *Id.*, at 883 (citing *Ricketts v. Adamson*, 483 U.S. 1, 5, n. 3, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987)). Third, California contract law would consider the State's motion to amend the complaint as a breach of contract. 827 F.3d, at 887–890. Fourth, "the remedy for breach must 'repair the harm caused by the breach.' " *Id.*, at 890 (quoting *People v. Toscano*, 124 Cal.App.4th 340, 20 Cal.Rptr.3d 923, 927, 124 Cal.App.4th 340 (2004)). Fifth, rescission failed to "'repair the harm.' " 827 F.3d, at 891. Sixth, consequently Cuero was entitled to specific performance, namely, a maximum prison term of 172 months (14 years and 4 months). *Ibid.* And, seventh, the state court's contrary decision was itself "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see 827 F.3d, at 888.

We shall assume purely for argument's sake that the State violated the Constitution when it moved to amend the complaint. But we still are unable to find in Supreme Court precedent that "clearly established federal law" demanding specific performance as a remedy. To the contrary, no "holdin[g] of this Court" requires the remedy of specific performance under the circumstances present here. *Harrington v. Richter*, 562 U.S. 86, 100, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

Two of our prior decisions address these issues. The first, *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), held that a defendant may not be bound to a plea agreement following a prosecutorial breach of an enforceable provision of such an agreement. *Id.*, at 262, 92 S.Ct. 495. As relevant here, however, Chief Justice Burger wrote in the opinion for the Court that the "ultimate relief to which petitioner is entitled" must be left "to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea" or, alternatively, that "the circumstances require granting the relief sought by petitioner, *i.e.*, the opportunity to withdraw his plea of guilty." *Id.*, at 262–263, 92 S.Ct. 495.

The Ninth Circuit cited a concurrence in *Santobello* by Justice Douglas, which added that "a court ought to accord a defendant's [remedial] preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." 827 F.3d, at 891, n. 14 (quoting *Santobello, supra*, at 267, 92 S.Ct. 495). Three other Justices agreed with Justice Douglas on this point, and because only seven Justices participated in the case, the Ninth Circuit suggested that a four-Justice majority in *Santobello* seemed to favor looking to the defendant's preferred remedy. 827 F.3d, at 891, n. 14 (citing *Santobello*, *supra*, at 268, and n., 92 S.Ct. 495 (Marshall, J., concurring in part and dissenting in part)). The Ninth Circuit also pointed in support to its own Circuit precedent, a criminal procedure treatise, a decision of the Washington Supreme Court, and a law review article [Citations omitted].

There are several problems with the Ninth Circuit's reasoning below. First, " 'fairminded jurists could disagree' " with the Ninth Circuit's reading of *Santobello*. *Richter, supra*, at 101, 131 S.Ct. 770 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). Moreover, in *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984), the Court wrote that "*Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea." *Id.*, at 510–511, n. 11, 104 S.Ct. 2543 (citing *Santobello*, 404 U.S., at 262–263, 92 S.Ct. 495; *id.*, at 268–269, 92 S.Ct. 495 (Marshall, J., concurring in part and dissenting in part)). The Court added that "permitting Santobello to replead was within the range of constitutionally appropriate remedies." 467 U.S., at 510, n. 11, 104 S.Ct. 2543. Where, as here, none of our prior decisions clearly entitles Cuero to the relief he seeks, the "state court's decision could not be 'contrary to' any holding from this Court." *Woods v. Donald*, 575 U.S. ——, ——, 135 S.Ct. 1372, 1377, 191 L.Ed.2d 464 (2015) (*per curiam*) (quoting *Lopez v. Smith*, 574 U.S. ——, ——, 135 S.Ct. 1, 3–4, 190 L.Ed.2d 1 (2014) (*per curiam*)). Finally, as we have repeatedly pointed out, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.' " *Glebe v. Frost*, 574 U.S. ——, ——, 135 S.Ct. 429, 430, 190 L.Ed.2d 317 (2014) (*per curiam*) (quoting 28 U.S.C. § 2254(d)(1)). Nor, of course, do state-court decisions, treatises, or law review articles.

For all these reasons, we conclude that the Ninth Circuit erred when it held that "federal law" as interpreted by this Court "clearly" establishes that specific performance is constitutionally required here. We decide no other issue in this case.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Insert on p. 82 of the 2017 Supplement and p. 1304 of the casebook as new Note 7:

Note 7. Waiver of right to direct appeal does not bar defendant from challenging the constitutionality of his statute of criminal conviction. In what will probably turn out to be no more than a minor roadblock in the wave of plea bargains, the Court interprets the plea bargain below against the interest of the drafter, the government.

Class v. United States

138 S.Ct. 798 (2018)

Justice BREYER delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, SOTOMAYOR, KAGA, and GORSUCH, JJ., joined. ALITO, J., filed a dissenting opinion, in which KNENNEDY and THOMAS, JJ., joined [omitted].

Does a guilty plea bar a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution? In our view, a guilty plea by itself does not bar that appeal.

I

In September 2013, a federal grand jury indicted petitioner, Rodney Class, for possessing firearms in his locked jeep, which was parked in a lot on the grounds of the United States Capitol in Washington, D.C. See 40 U.S.C. § 5104(e)(1) ("An individual ... may not carry ... on the Grounds or in any of the Capitol Buildings a firearm"). Soon thereafter, Class, appearing *pro se*, asked the Federal District Court for the District of Columbia to dismiss the indictment. As relevant here, Class alleged that the statute, § 5104(e), violates the Second Amendment. App. in No. 15–3015 (CADC), pp. 32–33. He also raised a due process claim, arguing that he was denied fair notice that weapons were banned in the parking lot. *Id.*, at 39. Following a hearing, the District Court denied both claims. App. to Pet. for Cert. 9a.

Several months later, Class pleaded guilty to "Possession of a Firearm on U.S. Capitol Grounds, in violation of 40 U.S.C. § 5104(e)." App. 30. The Government agreed to drop related charges. *Id.*, at 31.

A written plea agreement set forth the terms of Class' guilty plea, including several categories of rights that he expressly agreed to waive. Those express waivers 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 his criminal case. *Id.*, at 38–42. At the same time, the plea agreement expressly enumerated categories of claims that Class could raise on appeal, including claims based upon (1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) certain statutes providing for sentence reductions. *Id.*, at 41. Finally, the plea agreement stated under the heading "Complete Agreement":

> "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...." *Id.*, at 45.

The agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional.

The District Court held a plea hearing during which it reviewed the terms of the plea agreement (with Class present and under oath) to ensure the validity of the plea. See Fed. Rule Crim. Proc. 11(b); *United States v. Ruiz*, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (defendant's guilty plea must be " 'voluntary' " and "related waivers" must be made " 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences' "). After providing Class with the required information and warnings, the District Court accepted his guilty plea. Class was sentenced to 24 days imprisonment followed by 12 months of supervised release.

Several days later, Class appealed his conviction to the Court of Appeals for the District of Columbia Circuit. Class was appointed an *amicus* to aid him in presenting his arguments. He repeated his constitutional claims, namely, that the statute violates the Second Amendment and the Due Process Clause because it fails to give fair notice of which areas fall within the Capitol Grounds where firearms are banned. The Court of Appeals held that Class could not raise his constitutional claims because, by pleading guilty, he had waived them. App. to Pet. for Cert. 1a–5a. Class filed a petition for certiorari in this Court asking us to decide whether in pleading guilty a criminal defendant inherently waives the right to challenge the constitutionality of his statute of conviction. We agreed to do so.

II

The question is whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. We hold that it does not. Class did not relinquish his right to appeal the District Court's constitutional determinations simply by pleading guilty. As we shall explain, this holding flows directly from this Court's prior decisions.

Fifty years ago this Court directly addressed a similar claim (a claim that the statute of conviction was unconstitutional). And the Court stated that a defendant's "plea of guilty did not ... waive his previous [constitutional] claim." *Haynes v. United States*, 390 U.S. 85, 87, n. 2, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968). Though Justice Harlan's opinion for the Court in *Haynes* offered little explanation for this statement, subsequent decisions offered a rationale that applies here.

In *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), North Carolina indicted and convicted Jimmy Seth Perry on a misdemeanor assault charge. When Perry exercised his right under a North Carolina statute to a *de novo* trial in a higher court, the State reindicted him, but this time the State charged a felony, which carried a heavier penalty, for the same conduct. Perry pleaded guilty. He then sought habeas relief on the grounds that the reindictment amounted to an unconstitutional vindictive prosecution. The State argued that Perry's guilty plea barred him from raising his constitutional challenge. But this Court held that it did not.

The Court noted that a guilty plea bars appeal of many claims, including some " 'antecedent constitutional violations' " related to events (say, grand jury proceedings) that had " 'occurred prior to the entry of the guilty plea.' " *Id.*, at 30, 94 S.Ct. 2098 (quoting *Tollett v. Henderson*, 411 U.S. 258, 266–267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973)). While *Tollett* claims

were "of constitutional dimension," the Court explained that "the nature of the underlying constitutional infirmity is markedly different" from a claim of vindictive prosecution, which implicates "the very power of the State" to prosecute the defendant. *Blackledge*, 417 U.S., at 30, 94 S.Ct. 2098. Accordingly, the Court wrote that "the right" Perry "asserts and that we today accept is the right not to be haled into court at all upon the felony charge" since "[t]he very initiation of the proceedings" against Perry "operated to deprive him due process of law." *Id.*, at 30–31, 94 S.Ct. 2098.

A year and a half later, in *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (*per curiam*), this Court repeated what it had said and held in *Blackledge*. After Menna served a 30–day jail term for refusing to testify before the grand jury on November 7, 1968, the State of New York charged him once again for (what Menna argued was) the same crime. Menna pleaded guilty, but subsequently appealed arguing that the new charge violated the Double Jeopardy Clause. U.S. Const., Amdt. 5. The lower courts held that Menna's constitutional claim had been "waived" by his guilty plea.

This Court reversed. Citing *Blackledge*, *supra*, at 30, 94 S.Ct. 2098 the Court 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." *Menna*, 423 U.S., at 63, and n. 2, 96 S.Ct. 241. Menna's claim amounted to a claim that "the State may not convict" him "no matter how validly his factual guilt is established." *Ibid.* Menna's "guilty plea, therefore, [did] not bar the claim." *Ibid.*

These holdings reflect an understanding of the nature of guilty pleas which, in broad outline, stretches back nearly 150 years. In 1869 Justice Ames wrote for the Supreme Judicial Court of Massachusetts:

> "The plea of guilty is, of course, a confession of all the facts charged in the indictment, and also of the evil intent imputed to the defendant. It is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion. But if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged." *Commonwealth v. Hinds*, 101 Mass. 209, 210.

* * *

In more recent years, we have reaffirmed the *Menna–Blackledge* doctrine and refined its scope. In *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), the defendants pleaded guilty to two separate indictments in a single proceeding which "on their face" described two separate bid-rigging conspiracies. *Id.*, at 576, 109 S.Ct. 757. They later sought to challenge their convictions on double jeopardy grounds, arguing that they had only admitted to one conspiracy. Citing *Blackledge* and *Menna*, this Court repeated that a guilty plea does not bar a claim on appeal "where on the face of the record the court had no power to enter the conviction or impose the sentence." 488 U.S., at 569, 109 S.Ct. 757. However, because the defendants could not "prove their claim by relying on those indictments and the existing record" and "without contradicting those indictments," this Court held that their claims were "foreclosed by the admissions inherent in their guilty pleas." *Id.*, at 576, 109 S.Ct. 757.

[3] Unlike the claims in *Broce*, Class' constitutional claims here, as we understand them, do not contradict the terms of the indictment or the written plea agreement. They are consistent with Class' knowing, voluntary, and intelligent admission that he did what the indictment alleged. Those claims can be "resolved without any need to venture beyond that record." *Id.*, at 575, 109 S.Ct. 757.

Nor do Class' claims focus upon case-related constitutional defects that " 'occurred prior to the entry of the guilty plea.' " *Blackledge*, 417 U.S., at 30, 94 S.Ct. 2098. They could not, for example, "have been 'cured' through a new indictment by a properly selected grand jury." *Ibid.* (citing *Tollett*, 411 U.S., at 267, 93 S.Ct. 1602). Because the defendant has admitted the charges against him, a guilty plea makes the latter kind of constitutional claim "irrelevant to the constitutional validity of the conviction." *Haring v. Prosise*, 462 U.S. 306, 321, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983). But the cases to which we have referred make clear that a defendant's guilty plea does not make irrelevant the kind of constitutional claim Class seeks to make.

In sum, the claims at issue here do not fall within any of the categories of claims that Class' plea agreement forbids him to raise on direct appeal. They challenge the Government's power to criminalize Class' (admitted) conduct. They thereby call into question the Government's power to " 'constitutionally prosecute' " him. *Broce*, *supra*, at 575, 109 S.Ct. 757 (quoting *Menna*, *supra*, at 61–62, n. 2, 96 S.Ct. 241). A guilty plea does not bar a direct appeal in these circumstances.

III

We are not convinced by the three basic arguments that the Government and the dissent make in reply.

First, the Government contends that by entering a guilty plea, Class inherently relinquished his constitutional claims. The Government is correct that a guilty plea does implicitly waive some claims, including some constitutional claims. However, as we explained in Part II, *supra*, Class' valid guilty plea does not, by itself, bar direct appeal of his constitutional claims in these circumstances.

As an initial matter, a valid guilty plea "forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Ruiz*, 536 U.S., at 628–629, 122 S.Ct. 2450. While those "simultaneously" relinquished rights include the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers, *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), they do not include "a waiver of the privileges which exist beyond the confines of the trial." *Mitchell v. United States*, 526 U.S. 314, 324, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). Here, Class' statutory right directly to appeal his conviction "cannot in any way be characterized as part of the trial." *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

A valid guilty plea also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered. See, *e.g.*, *Haring*, *supra*, at 320, 103 S.Ct. 2368 (holding a valid guilty plea "results in the defendant's loss of any meaningful opportunity he might otherwise have had to challenge the admissibility of evidence obtained in violation of the Fourth Amendment"). Neither can the defendant later complain that the indicting grand jury was unconstitutionally selected. *Tollett*, *supra*, at 266, 93 S.Ct. 1602. But, as we have said, those kinds of claims are not at issue here.

Finally, a valid guilty plea relinquishes any claim that would contradict the "admissions necessarily made upon entry of a voluntary plea of guilty." *Broce*, *supra*, at 573–574, 109 S.Ct. 757. But the constitutional claim at issue here is consistent with Class' admission that he engaged in the conduct alleged in the indictment. Unlike the defendants in *Broce*, Class' challenge does not in any way deny that he engaged in the conduct to which he admitted. Instead, like the defendants in *Blackledge* and *Menna*, he 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. *Broce*, *supra*, at 575, 109 S.Ct. 757 (quoting *Menna*, 423 U.S., at 62–63, and n. 2, 96 S.Ct. 241).

Second, the Government and the dissent point to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, which governs "conditional" guilty pleas. 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."

The Government and the dissent argue that Rule 11(a)(2) means that "a defendant who pleads guilty *cannot* challenge his conviction on appeal on a forfeitable or waivable ground that he either failed to present to the district court or failed to reserve in writing." Brief for United States 23; see also *post*, at 808 – 809, 816 (opinion of ALITO, J.). They support this argument by pointing to the notes of the Advisory Committee that drafted the text of Rule 11(a)(2). See Advisory Committee's Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U.S.C.App., p. 911 (hereinafter Advisory Committee's Notes). In particular, the dissent points to the suggestion that an unconditional guilty plea constitutes a waiver of "nonjurisdictional defects," while the Government points to the drafters' statement that they intended the Rule's "conditional plea procedure ... to conserve prosecutorial and judicial resources and advance speedy trial objectives," while ensuring "much needed uniformity in the federal system on this matter." *Ibid.*; see *United States v. Vonn*, 535 U.S. 55, 64, n. 6, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002) (approving of Advisory Committee's Notes as relevant evidence of the drafters' intent). The Government adds that its interpretation of the Rule furthers these basic purposes. And, the argument goes, just as defendants must use Rule 11(a)(2)'s procedures to preserve, for instance, Fourth Amendment unlawful search-and-seizure claims, so must they use it to preserve the constitutional claims at issue here.

The problem with this argument is that, by its own terms, the Rule itself does not say whether it sets forth the *exclusive*

procedure for a defendant to preserve a constitutional claim following a guilty plea. At the same time, the drafters' notes acknowledge that the "Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty." Advisory Committee's Notes, at 912. The notes then specifically refer to the "*Menna–Blackledge* doctrine." *Ibid*. They add that the Rule "should not be interpreted as either broadening or narrowing [that] doctrine or as establishing procedures for its application." *Ibid.* And the notes state that Rule 11(a)(2) "has no application" to the "kinds of constitutional objections" that may be raised under that doctrine. *Ibid*. The applicability of the *Menna–Blackledge* doctrine is at issue in this case. Cf. *Broce*, 488 U.S., at 569, 109 S.Ct. 757 (acknowledging *Menna* and *Blackledge* as covering claims "where on the face of the record the court had no power to enter the conviction or impose the sentence"). We therefore hold that Rule 11(a)(2) cannot resolve this case.

Third, the Government argues that Class "expressly waived" his right to appeal his constitutional claim. Brief for ***807** United States 15. The Government concedes that the written plea agreement, which sets forth the "Complete Agreement" between Class and the Government, see App. 45–46, does not contain this waiver. *Id.*, at 48–49. Rather, the Government relies on the fact that during the Rule 11 plea colloquy, the District Court Judge stated that, under the written plea agreement, Class was "giving up [his] right to appeal [his] conviction." *Id*., at 76. And Class agreed.

We do not see why the District Court Judge's statement should bar Class' constitutional claims. It was made to ensure Class understood "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. Rule Crim. Proc. 11(b)(1)(N). It does not expressly refer to a waiver of the appeal right here at issue. And if it is interpreted as expressly including that appeal right, it was wrong, as the Government acknowledged at oral argument. See Tr. of Oral Arg. 35–36. Under these circumstances, Class' acquiescence neither expressly nor implicitly waived his right to appeal his constitutional claims.

* * *

For these reasons, we hold that Rodney Class may pursue his constitutional claims on direct appeal. The contrary judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.