No. _____

IN THE

Supreme Court of the United States

RICKIE MARKIECE ATKINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether North Carolina breaking or entering, which criminalizes, among other things, the breaking or entering into "any other structure designed to house or secure within it any activity or property" is categorically broader than the enumerated offense of burglary in the Armed Career Criminal Act.

II. Whether a guilty plea to violating 18 U.S.C. § 922(g) and the resulting sentence must be vacated in light of *Rehaif* v. *United States*, 139 S. Ct. 2191 (June 21, 2019), where all involved—the District Court, the Government, defense counsel, and Mr. Atkinson himself—believed that, under binding Circuit precedent, a conviction under that statute did not require the Government to prove beyond a reasonable doubt that Mr. Atkinson *actually knew* he had been convicted of a crime punishable by a term of imprisonment of more than a year.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, No. 17-4589, *United States* v. *Atkinson* (opinion entered Jan. 14, 2019; order denying rehearing or rehearing en banc entered Mar. 12, 2019)

United States District Court for the Eastern District of North Carolina, No. 5:16-CR-250-D-1, *United States* v. *Atkinson* (Sept. 15, 2017)

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Petitioner Rickie Markiece Atkinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is unreported, but is available at 759 F. App'x 174 (4th Cir. 2019). Pet. App. 1a-6a. The District Court's judgment is available at Pet. App. 7a-13a. The Fourth Circuit's order denying the petition for rehearing and rehearing en banc is available at Pet. App. 19a.

JURISDICTION

The Fourth Circuit issued its judgment on Jan. 14, 2019. Pet. App.1a. A timely petition for rehearing and rehearing en banc was denied on March 12, 2019. Pet. App. 19a. On June 5, 2019, the Chief Justice extended the time for filing a petition for writ of certiorari to and including August 9, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

North Carolina General Statutes § 14-54 provides, in relevant part:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.
> * * *
> (c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

18 U.S.C. § 922(g) provides, in relevant part:

> It shall be unlawful for any person—
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year
> * * * to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2) provides:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)(2)(B) provides:

> [T]he term "violent felony" means 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 present a serious potential risk of physical injury to another

INTRODUCTION

For a single felon-in-possession offense, which normally carries a maximum penalty of ten years of imprisonment, Mr. Atkinson was sentenced to *twenty* years. That sentence was possible only because the District Court wrongly concluded that North Carolina breaking or entering is a violent felony under the ACCA. That error caused Mr. Atkinson to be subject to a mandatory minimum sentence of fifteen years. If he had not been labeled an armed career criminal, he would not have been subject to any mandatory minimum, his maximum term would have been ten years, and his advisory guideline range would have been forty-six to fifty-seven months.

The Armed Career Criminal Act has been a frequent subject of this Court's review. In 2015, it invalidated the Act's residual clause, *Johnson* v. *United States*, 135 S. Ct. 2551, and it has decided four cases involving generic burglary in the last three years: *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *United States* v. *Stitt* and *United States* v. *Sims*, 139 S. Ct. 399 (2018); and *Quarles* v. *United States*, 139 S. Ct. 1872 (2019). In those cases, the Court has repeatedly confirmed that generic burglary does not include burglary into vehicles or structures that have not "been adapted or * * * customarily used for overnight accommodation." *Stitt*, 139 S. Ct. at 403, 407. The Fourth Circuit's decision conflicts with those precedents and affects a large number of defendants who, like Mr. Atkinson, are deemed to be armed career criminals only because of prior convictions for North Carolina breaking or entering.

The petition should be granted for another reason: At the time Mr. Atkinson pleaded guilty, all involved—the District Court, the Government, defense counsel,

and Mr. Atkinson himself—believed that, under binding Circuit precedent, a conviction under 18 U.S.C. § 922(g) did not require the Government to prove that Mr. Atkinson *actually knew* he had been convicted of a crime punishable by a term of imprisonment of more than a year. Since then, and since the Fourth Circuit denied rehearing, this Court decided *Rehaif* v. *United States*, 139 S. Ct. 2191 (June 21, 2019), which explained that binding Circuit precedent had been wrong all along.

That decision reveals a structural error in Mr. Atkinson's conviction that was not apparent at the time his guilty plea was entered or his appeal was decided. But now, allowing his conviction to stand would contravene *Rehaif*.

The petition should be granted.

STATEMENT

1. The Armed Career Criminal Act imposes a dramatically increased punishment for persons convicted of being a felon in possession of a firearm if they have three or more previous convictions for "violent felonies." 18 U.S.C. § 924(e). Although violations of 18 U.S.C. § 922(g) are normally subject to a statutory maximum penalty of ten years of imprisonment, ACCA provides that armed career criminals must be sentenced to a term of not fewer than fifteen years and a significantly increased offense level and criminal history category if they have the requisite prior convictions. Those convictions include 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.

18 U.S.C. § 924(e)(2)(B). These provisions are known as the "force clause," the "enumerated-offense clause," and the "residual clause." This Court struck down the residual clause as unconstitutionally vague in *Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015).

2. In February 2017, Rickie Atkinson pleaded guilty, pursuant to a written plea agreement, to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Pet. App. 20a-47a. His plea agreement reserved his right "to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing and/or from a sentence that exceeds 120 months' imprisonment." CAJA142. At the time of the plea, neither the Assistant United States Attorney nor the District Court asserted either that the Government needed to prove—or that it could prove—that at the time he possessed a firearm, Mr. Atkinson knew he had been convicted of a crime punishable by more than a year of imprisonment.

The presentence report concluded that Mr. Atkinson was an armed career criminal because of four prior convictions for North Carolina breaking or entering. CAJA166. North Carolina defines "breaking or entering" as "any person who breaks or enters any building with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54(a). It defines "building" as "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a

dwelling house, and any other structure designed to house or secure within it any activity or property." *Id.* § 14-54(c).

Mr. Atkinson objected, but the District Court overruled the objection, calculating the advisory guideline range to be 180 to 188 months. The court upwardly departed under U.S.S.G. § 4A1.3(a) for inadequacy of criminal history category to an advisory guideline range of 210 to 262 months. The District Court announced a sentence of 240 months, to be followed by a five-year term of supervised release. CAJA129-CAJA130; Pet. App. 7a-13a.

3. Mr. Atkinson appealed. After briefing was completed, this Court granted certiorari in a pair of cases, *United States* v. *Sims*, No. 17-766, and *United States* v. *Stitt*, No. 17-765, to consider the definition of generic burglary under the Armed Career Criminal Act. Mr. Atkinson's case was held in abeyance.

4. This Court issued its decision in *Sims* and *Stitt* in December 2018, holding that generic burglary "includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation," *United States* v. *Stitt*, 139 S. Ct. 399, 403 (2018). The Court confirmed that each statute must be evaluated on its own merits and, if its elements are broader than those of generic burglary, it does not qualify as generic burglary under the Act. *Id.* at 403-404. The Court reaffirmed its holding in *Taylor* v. *United States*, 495 U.S. 575, 599 (1990), that Missouri breaking and entering falls outside the Act because it includes breaking and entering into "*any* boat or vessel or railroad car" and thus includes "ordinary boats and vessels often at sea (and railroad cars often filled with cargo,

not people)." *Id.* at 407. And it reaffirmed its holding in *Mathis*, 136 S. Ct. at 2257, that an Iowa statute including breaking into vehicles or similar structures used "for the storage or safekeeping of anything of value" was broader than generic burglary. *Id.* The Court vacated and remanded Sims's sentence to explore his argument that Arkansas residential burglary is overbroad because it covers burglary of a vehicle where a homeless person occasionally sleeps. *Stitt*, 139 S. Ct. at 407-408.

5. The panel issued an unpublished per curiam opinion affirming Mr. Atkinson's sentence without referencing *Taylor*, *Mathis*, *Sims*, or *Stitt* at all. Pet. App. 1a-6a. It rejected Mr. Atkinson's argument without explanation, holding only that "North Carolina Breaking and Entering's 'building' element sweeps no broader than generic burglary's 'building' element" and that Mr. Atkinson was properly designated as an armed career criminal. Pet. App. 3a.

Mr. Atkinson filed a petition for rehearing and rehearing en banc, explaining the panel decision's conflict with *Taylor* and *Mathis*, but the court declined to order rehearing. Pet. App. 19a.

6. After the Fourth Circuit denied Mr. Atkinson's petition for rehearing, this Court decided *Rehaif* v. *United States*, 139 S. Ct. 2191 (June 21, 2019). In *Rehaif*, this Court reversed longstanding circuit precedent regarding the scope of section 922(g). Under the Fourth Circuit's prior precedent, the Government could obtain a conviction under that statute by proving that the defendant knowingly possessed a firearm, even if he did not know that he qualified as a person prohibited from possessing a firearm. *United States* v. *Langley*, 62 F.3d 602 (4th Cir. 1995). *Rehaif*

reversed that precedent, concluding that it wrongly interpreted the statute's *mens rea* requirement. Now, under *Rehaif*, the Government "must show that the defendant knew he possessed a firearm *and also* that he knew he had the relevant status when he possessed it." 139 S. Ct. at 2194 (emphasis added).

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION CONTRAVENES *TAYLOR*, *MATHIS*, AND *STITT*

To determine whether a prior conviction is a violent felony under the ACCA, this Court applies the categorical approach. *Quarles* v. *United States*, 139 S. Ct. 1872 (2019). Under the categorical approach, the court "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248; *see also Descamps* v. *United States*, 570 U.S. 254, 265 (2013) (applying the categorical approach to hold that state offense is overbroad and noting that defendant's actual conduct "makes no difference"). A prior state conviction is a proper ACCA predicate only if it has the same elements, or is defined more narrowly than, the generic federal crime. *Descamps*, 570 U.S. at 261. If, by contrast, the prior offense "sweeps more broadly than the generic crime," *id.*, the prior offense cannot serve as a predicate "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." *Mathis*, 136 S. Ct. at 2248.

Generic burglary is defined as the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 598 (1990); *Mathis*, 136 S. Ct. at 2248. However, generic burglary's "building or other structure" element does not encompass every enclosure. For example, a Missouri breaking and entering statute that criminalized, among other things, breaking and entering "*any* boat or vessel, or railroad car," including "ordinary boats and vessels often at sea (and railroad cars often filled with cargo, not people)" is fatally overbroad. *Stitt*, 139 S. Ct. 399, 407 (2018) (citing *Taylor*, 495 U.S. at 599). So too a statute that includes breaking into vehicles or similar structures used "for the storage or safekeeping of anything of value." *Id.* (citing *Mathis*, 136 S. Ct. at 2250). Although the Court concluded that burglary of "a structure or vehicle that has been adapted or is customarily used for overnight accommodation" qualifies, it vacated and remanded a sentence to the lower courts to explore the defendant's argument that a burglary statute is overbroad if it covers burglary of a vehicle where a homeless person occasionally sleeps. *Id.* at 403-404, 407-408.

That line makes sense. In *Taylor*, this Court explained that Congress "singled out burglary * * * because of its inherent potential for harm to persons," explaining that entering a building to commit a crime "often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." 495 U.S. at 588. The Court explained that "the offender's own awareness of this possibility may mean that he is prepared to use

violence if necessary to carry out his plans or to escape." *Id.* The Court reiterated this analysis in *Stitt*, 139 S. Ct. at 406, and explained that burglary of structures or vehicles adapted or customarily used for overnight accommodation "more clearly focus upon circumstances where burglary is likely to present a serious risk of violence." *Id.* at 407. That concern is not present in a vehicle or structure designed to house within it property without people. And it is not present where the vehicle or structure is not "customarily used for overnight accommodation."

Following *Mathis* and *Taylor* and *Stitt*, North Carolina breaking or entering is categorically overbroad. Begin with the text. Breaking or entering is committed when the perpetrator "breaks or enters any building with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54(a). The term "building" includes "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and *any other structure designed to house or secure within it any activity or property*." *Id.* § 14-54(c) (emphasis added).

By its terms, the italicized language could include a food truck (kitchen activity), an ambulance (medical activity), a tractor trailer (property storage), a bloodmobile (blood donation activity), an armored truck (money storage), and a mobile pet groomer (grooming activity), as well as a house boat or old non-functioning car used as occasional shelter or storage. Each of these involves property storage and/or is not "customarily used for overnight accommodation." *See Stitt*, 139 S. Ct. at 403.

North Carolina cases confirm this fatal overbreadth. Breaking into a storage trailer for tools and equipment on a construction site qualifies. *State* v. *Bost*, 286 S.E.2d 632, 634 (N.C. Ct. App. 1982). So does breaking into a permanent, locked storage facility used to transport musical equipment. *State* v. *Batts*, 617 S.E.2d 724 at *2-*3 (N.C. Ct. App. 2005). And so does breaking into a travel trailer made "an area of repose." *State* v. *Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993). None of these structures or vehicles present the risk of a "violent confrontation" or "serious risk of violence" contemplated in *Taylor* and *Stitt*. These cases explain there is at least a "realistic probability * * * that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Because both North Carolina's breaking or entering statute and North Carolina cases interpreting that statute sweep broadly and including breaking or entering into structures containing property or used for temporary "repose," the statute does not categorically qualify as generic burglary under ACCA. *See Mathis*, 136 S. Ct. at 2250. The Fourth Circuit's decision contravenes *Taylor*, *Mathis*, and *Stitt*.

II. THIS ISSUE IS IMPORTANT AND RECURS FREQUENTLY

The effect of an ACCA designation is enormous: Instead of a ten year maximum term of imprisonment, the statutory penalties are fifteen years to *life*. The designation can also significantly increase a defendant's offense level and criminal history category, resulting in an increased advisory guideline range. *See* U.S.S.G.

§ 4B1.4 (applying "the greatest of" three possible offense levels and "the greatest of" three possible criminal history categories).

This issue is currently the subject of at least three pending petitions for certiorari, including this one. *Robinson* v. *United States*, 19-5196; *Street* v. *United States*, No. 18-9364. And the Fourth Circuit has at least six appeals pending raising this issue: *United States* v. *Dodge*, No. 18-4507; *United States* v. *Goins*, No. 17-6136; *United States* v. *Molette*, No. 18-4209; *United States* v. *Wright*, No. 18-4215; *United States* v. *Enyinnaya*, No. 18-4400; and *United States* v. *Marion*, No. 19-4106.

This Court's review is needed.

III. THIS CASE IS AN EXCELLENT VEHICLE TO DECIDE THE QUESTION PRESENTED

The issue is squarely presented in this case. If it were not for prior convictions for North Carolina breaking or entering, Mr. Atkinson would not be an armed career criminal and the sentence he received would have been in excess of the statutory maximum sentence and illegal. Mr. Atkinson expressly preserved the right to challenge his sentence in his plea agreement, and the issue has been fully presented to the lower courts in a sentencing memorandum and oral argument in the district court, as well as briefing on the merits and in a petition for rehearing en banc in the court of appeals. The issue is cleanly presented and the Court should grant the petition to set this issue to rights.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT THE PETITION, VACATE THE FOURTH CIRCUIT'S JUDGMENT, AND REMAND FOR RECONSIDERATION IN LIGHT OF *REHAIF* V. *UNITED STATES*

Certiorari should be granted for a more fundamental reason: Mr. Atkinson's plea violates constitutional due process under *Rehaif*. Because Mr. Atkinson did not correctly understand the elements of section 922(g) at the time of his guilty plea, his plea is "constitutionally invalid" and should be vacated. *Bousley* v. *United States*, 523 U.S. 614, 619 (1998).

Although Mr. Atkinson did not previously raise a *Rehaif* claim in light of then-binding case law, the error is plain and requires correction. Federal Rule of Civil Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Mr. Atkinson is entitled to relief because his constitutional claim satisfies all four elements of the plain-error standard: There is (1) an error (2) that is plain, and (3) affects Mr. Atkinson's substantial rights; (4) the court should exercise its discretion to correct the error because it seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *See United States* v. *Olano*, 507 U.S. 725, 732-736 (1993).

Here, the error is plain at the time of appellate review. *See Henderson* v. *United States*, 568 U.S. 266, 271, 279 (2013). As discussed above, *Rehaif* reversed longstanding circuit precedent and established that, to obtain a section 922(g) conviction, the Government "must show that the defendant knew he possessed a firearm *and also* that he knew he had the relevant status when he possessed it." 139 S. Ct. at 2194 (emphasis added). Because Mr. Atkinson did not understand

these elements of a section 922(g) charge at the time of his guilty plea, his plea is "constitutionally invalid." *Bousley*, 523 U.S. at 619.

This Court addressed a similar situation in the wake of *Bailey* v. *United States*, 516 U.S. 137 (1995), which narrowed the "use" element of a section 924(c) offense. In *Bousley*, the Court held that a pre-*Bailey* guilty plea was "constitutionally invalid" because "the record reveals that neither [the defendant], nor his counsel, nor the [district] court correctly understood the essential elements of the crime with which he was charged." 523 U.S. at 619-620. The Court reasoned that the defendant must receive "real notice of the true nature of the charges against him," which the Court described as "the first and most universally recognized requirement of due process." *Id.* at 618 (citation omitted); *see also Henderson* v. *Morgan*, 426 U.S. 637, 645 n.13 (1976) (citing *Smith* v. *O'Grady*, 312 U.S. 329 (1941)) (a guilty plea "may be involuntary [in a constitutional sense] * * * because [the defendant] has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt").

The same is true here. Although *Rehaif* was decided after Mr. Atkinson's plea, a statutory interpretation decision from this Court "explains what the statute has meant continuously since the date [it] became law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). In other words, *Rehaif* did not change the law; it simply "decided what [sections 922(g) and 924(a)] had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Id.* Because the Fourth Circuit's erroneous decision in *Langley* was

binding when Mr. Atkinson pleaded guilty in 2017, everyone—Mr. Atkinson, his counsel, the Government, and the District Court—misunderstood the elements of a section 922(g) offense at the time of the plea. Mr. Atkinson's guilty plea thus violates due process and is "constitutionally invalid."

The plain error also affected Mr. Atkinson's substantial rights. This Court usually leaves such questions for the lower courts to resolve in the first instance on remand, as it did in *Rehaif*. 139 S. Ct. at 2200; *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (remanding for lower court to make harmless-error determination in the first instance); *Carella* v. *California*, 491 U.S. 263, 266-267 (1989) (same). It should do so here.

But if the Court were to consider the question, the answer is plain: A constitutionally invalid plea always affects substantial rights. This Court explained in *United States* v. *Dominguez Benitez* that "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed." 542 U.S. 74, 84 n.10 (2004) (citing *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)). It explained that, unlike a Rule 11 error, a plea that violates due process requires no separate showing of prejudice: "We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.*

In *Henderson* v. *Morgan*, for example, this Court invalidated a second-degree murder plea because the defendant was not informed about the relevant *mens rea*

requirement, that the assault had been "committed with a design to effect the death of the person killed." 426 U.S. at 645. The Court assumed "that the prosecutor had overwhelming evidence of guilt available." *Id.* at 644. But the Court still held that "nothing in this record"—not even the defendant's "admission * * * that he killed Mrs. Francisco"—could "serve as a substitute for either a finding after trial, or a voluntary admission, that [he] had the requisite intent." *Id.* at 646. The Court concluded that Morgan did not have "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* at 645.

The Court applied the same reasoning in *Bousley*, where it concluded a guilty plea was "unintelligent" and thus "constitutionally invalid" in light of the post-plea decision in *Bailey*, 523 U.S. at 618-619.

The error here is identical. In Mr. Atkinson's case, as in Mr. Bousely's and Mr. Morgan's, the defendant did not understand the true nature of the charge to which he pleaded guilty. A conviction obtained in these circumstances cannot be "saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Dominguez Benitez*, 542 U.S. at 84 n.10; *see also McCarthy* v. *United States*, 394 U.S. 459, 466 (1969) ("a guilty plea * * * cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.").

In other words, the error is structural: "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that

should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (citations omitted). Such errors are so intrinsically harmful they require "automatic reversal without any inquiry into prejudice." *Id.* at 1905.

Structural errors do not occur only with respect to those rights "designed to protect the defendant from erroneous conviction." *Weaver*, 137 S. Ct. at 1908. They also exist to vindicate "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* When a court denies a criminal defendant his "right to conduct his own defense" or the right to counsel of choice, for example, the error has infringed upon his autonomy interest regardless of the strength of the prosecution's evidence and regardless whether the error affected the ultimate outcome of the proceedings. *Id.* "Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error." *Id.* (citing *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). And for some types of structural error, such as denial of counsel to an indigent defendant or a judge's failure to give a reasonable-doubt instruction, harmless-error analysis is inapposite because "the error always results in fundamental unfairness," either to the defendant himself or "by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver*, 137 S. Ct. at 1908, 1911. Structural errors thus must be corrected even if

there exists "strong evidence of petitioner's guilt" and no "evidence or legal argument establishing prejudice." *Id.* at 1906.

The error here is structural because it violates a defendant's autonomy interest. Because Mr. Atkinson did not understand the true nature of a section 922(g) charge, he was unable "to make his own choices about the proper way to protect his own liberty." *Weaver*, 137 S. Ct. at 1908. The infringement of his autonomy is at least as severe as the infringement that occurs when a defendant is denied the right to represent himself or the right to counsel of his choice. After all, a plea obtained in this way is not "voluntary in a constitutional sense." *Henderson*, 426 U.S. at 645. It also results in fundamental unfairness because the conviction rested on a misunderstanding of law by all involved.

Having established the first three elements of plain error, this Court should exercise its discretion to address the error: Leaving in place a constitutionally involuntary plea that violates "the first and most universally recognized requirement of due process," *Bousley*, 523 U.S. at 618, would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. Remand is necessary so Mr. Atkinson can make a knowing, intelligent, and voluntary decision whether to plead guilty.

For cases pending on direct appeal, a defendant who raises and establishes a *Rehaif* error is entitled to "automatic reversal" of his conviction and remand for further proceedings. *Weaver*, 137 S. Ct. at 1905. Justice Alito's dissent in *Rehaif* recognized this implication of the majority's decision, explaining that "those for

whom direct review has not ended will likely be entitled to a new trial." 139 S. Ct. at 2213.

But even if a *Rehaif* error isnot structural, Mr. Atkinson can nonetheless satisfy his burden to show an effect on his substantial rights: Because the error here is constitutional, Mr. Atkinson need not show a reasonable probability that, but for the error, he would not have entered the plea. Instead, he need show only "a reasonable doubt that the constitutional error affected" the outcome. *Dominguez Benitez*, 542 U.S. at 81 n.7.

Mr. Atkinson meets that standard. The record lacks any indication that Mr. Atkinson knew the Government had to prove that he had actual knowledge of his status as a person prohibited from possessing a firearm under federal law. Likewise, it is devoid of proof that Mr. Atkinson "*actually knew*—not should have known or even strongly suspected but *actually knew*" that a prior conviction counted as a felony for purposes of the federal felon-in-possession ban. *Rehaif*, 139 S. Ct. at 2208 (Alito, J., dissenting). These circumstances establish at least a "reasonable doubt" whether Mr. Atkinson still would have pleaded guilty if he realized the possibility of advancing a *Rehaif* based knowledge defense.

This Court should grant the petition, vacate the Fourth Circuit's decision, and remand for further proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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