No. 19-8709

IN THE

Supreme Court of the United States

GREGORY GREER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL has a nationwide membership, with many thousands of direct members and up to 40,000 members with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

In furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL often

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief, "in whole or in part," and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Pursuant to Supreme Court Rule 37.3(a), counsel of record for all parties received notice of *amicus curiae*'s intent to file and both parties have consented to the filing of this brief.

appears as *amicus curiae* in cases involving appellate review standards for criminal cases and constitutional criminal protections. These issues are squarely presented by this case. Given NACDL's expertise in matters of criminal law, NACDL submits that its views will be of "considerable help" to the Court. Sup. Ct. R. 37.1.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this case, the Eleventh Circuit, applying plain error review, reaffirmed Petitioner's conviction under section 18 U.S.C. 922(g) for being a felon in possession of a firearm. This decision followed an intervening change in law resulting from the Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which required that the government prove the defendant's knowledge of his felony status. *Id.* at 2200. Although the government had not introduced evidence of this element at Petitioner's trial, the Eleventh Circuit nonetheless affirmed Petitioner's conviction—which it did by going beyond the trial evidence. *United States v. Greer*, 798 F. App'x 483, 486 (11th Cir. 2020). *Amicus* writes separately here to contextualize how this approach is at odds with the purpose of plain error review, to say nothing of bedrock principles of constitutional law.

Plain error exists so courts of review can consider non-objected-to trial errors that are so severe as to undermine the judicial system's integrity. Allowing the government to introduce new evidence to prove a case it never sought to prove at trial is inconsistent with this fundamental purpose. Further, plain error review has long been understood to be limited to the trial evidence.

That is why courts repeatedly have prevented criminal defendants from introducing new evidence in order to prove the court's plain error. Fairness dictates that this be a two-way street. If the government is not held to this same standard and may prop up inadequately proven convictions on appeal with new evidence never put before the trial court, then the resulting inequity in the plain error rule would be intolerable.

Moreover, if the decision below constitutes a valid application of plain error review, then this wholly unprecedented form of plain error review raises profound constitutional concerns under both the Fifth and the Sixth Amendments. It is at odds with a defendant's Fifth Amendment due process rights because it allows the government to introduce new evidence on appeal, despite that the defendant was, at trial, without incentive or opportunity to investigate or refute that evidence. It also violates the Sixth Amendment by allowing judges to make a decision of guilt on an element of the crime—a decision the Sixth Amendment reserves for the jury alone.

Amicus respectfully submits that this should be a straightforward case. The Eleventh Circuit's ruling is at odds with basic principles of appellate practice and constitutional law. It should be reversed, and the Court should make clear that, even following an intervening change in law, the government's evidence on plain error review must be limited to the evidence presented to the jury at trial.

ARGUMENT

I. Allowing The Government To Introduce New Evidence On Plain Error Review Is Inconsistent With That Review's Purpose.

Plain error review allows courts of review to evaluate issues not objected-to at trial that impact "substantial rights." Fed. R. Crim. P. 52(b). This review requires proof not only of an actual error that is plain and obvious, but also proof that the error both affected the defendant's substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732–35 (1993) (citation omitted).

This final requirement—that the error seriously affect the fairness, integrity or public reputation of judicial proceedings—is critical. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018); *Olano*, 507 U.S. at 736–37. It includes circumstances which "shock the conscience," *Rosales-Mireles*, 138 S. Ct. at 1906, or in which "a miscarriage of justice would otherwise result," *Olano*, 507 U.S. 725, 736 (1993) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). But it also goes beyond this to include other errors—such as an insufficient indictment or insufficient evidence—made below. *Rosales-Mireles*, 138 S. Ct. at 1906–07 (collecting cases where the Court "repeatedly has reversed judgments for plain error").

By way of example, courts thus "should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant." *Olano*, 507 U.S. at 736 (citing *Wiborg v. United States*, 163 U.S. 632 (1896)). Courts also have found plain error to correct

situations where, for example, the government's wrongful disclosure of information resulted in a longer sentence for the defendant, *United States v. King-Gore*, 875 F.3d 1141, 1143 (D.C. Cir. 2017), where the trial court relied on "clearly erroneous" information, *United States v. Wilson*, 614 F.3d 219, 226 (6th Cir. 2010), or where the government introduced evidence the defendant did not have the opportunity to rebut, *United States v. Alexander*, 517 F.3d 887, 889 (6th Cir. 2008).

In short, plain error review exists to right momentous wrongs. But that is not the case here. Allowing the government to introduce new evidence on plain error review deprives defendants of their rights. Moreover, the government, even if barred from introducing its new evidence of knowledge to an appellate court, always can retry this case. As such, permitting the government to introduce new evidence on plain error review creates an error, and corrects none—and certainly not one "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. Quite the opposite, requiring the government to hold a new trial and prove to a jury every element of the charged offense is what fairness, integrity, and justice actually demand.

That the government introduced new evidence following an intervening change in law does not change this result. A clarification of the law does not discharge the government of its burden to prove every element of the charge to a jury, and to do so beyond a reasonable doubt. Allowing the government to circumvent these strictures by introducing new evidence at plain error review would be squarely at odds with that review's

purpose: to fix those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.*

Indeed, if there were any circumstance where introducing supplemental evidence on plain error review were appropriate, it would be if a *defendant*—not the government—had new evidence showing that a conviction was unjust. Yet, even when defendants have sought relief via plain error review, its function as a safety valve has only gone so far. That is because plain error review traditionally has been limited to evidence presented on the record. *See* Fed. R. App. P. 10(a); 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3956.1, Westlaw (5th ed. database updated Oct. 2020). As such, there are countless cases where, on appeal, the defendant was not allowed to introduce new evidence outside the record as part of a plain error argument before a court of review. *See, e.g.*, *United States v. González-Rodríguez*, 859 F.3d 134, 137 n.1 (1st Cir. 2017); *United States v. Moreno*, 857 F.3d 723, 727 (5th Cir. 2017); *United States v. Carroll*, 750 F.3d 700, 707 (7th Cir. 2014); *United States v. Kennedy*, 890 F.2d 1056, 1058 n.4 (9th Cir. 1989).

So at minimum, both sides must be held to the same standard. This is true even when—and particularly when—one side is the government. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 177 (1951) (Douglas, J., concurring) ("When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones

as suits the convenience of its officers is to start down the totalitarian path."); *cf. Bowman v. Korte*, 962 F.3d 995, 996 (7th Cir. 2020) (finding the district court abused its discretion in granting prison guards' leave to file a belated second motion for summary judgment, noting that "[t]he Federal Reporter is replete with examples of prisoners losing cases because they missed litigation deadlines and courts extended little forgiveness. Much less common are cases where correctional officers experience the same outcome. But fairness is a two-way street.").

For these reasons, the Court should reject the argument that plain error review allows the government to introduce new evidence against a criminal defendant, even following a legal change. Doing so would be incompatible with the reason our system of justice allows for plain error review, and with the numerous situations where criminal defendants have been foreclosed from doing the same.

II. The Constitution Demands The Government Not Be Permitted To Introduce New Evidence Against A Defendant On Plain Error Review.

Allowing the government to introduce new evidence on plain error review not only runs counter to the rationale for permitting plain error review, it runs afoul of the Fifth and the Sixth Amendments. These provisions of the Constitution protect criminal defendants' fundamental rights to due process and to trial by an impartial jury. It thus is critical that the Court not embrace an approach that might dilute the criminal law in such a manner "that leaves people in

doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. 358, 364 (1970).

A. Allowing The Government To Introduce New Evidence On Plain Error Review Violates Defendants' Due Process And Jury Rights.

The Fifth Amendment guarantees that no person will be deprived of liberty "without due process of law," and the Sixth Amendment guarantees that all criminal defendants shall be tried "by an impartial jury." U.S. Const. amends. V, VI. Together, these protections require that criminal convictions rest upon a jury's determination that the defendant is guilty of "every element" of the charged crime "beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993)); *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000). Importantly, the prosecution "bears the burden of proving all elements of the offense charged"—the burden does not shift to the defendant. *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993) (internal citations omitted); *see In re Winship*, 397 U.S. at 364.

"[G]oing back at least as far as Blackstone, it has been a given that the jury – not appellate judges after the fact – must find 'the truth of every accusation[.]'" *United States v. Nasir*, 982 F.3d 144, 162 (3d Cir. 2020) (quoting 4 William Blackstone, *Commentaries* *343-44). Since then, the importance of leaving fact-finding to juries and not judges has, unsurprisingly, been recognized by this Court time and again. *See e.g.*, *Bollenbach v. United States*, 326 U.S. 607, 615 (1946) ("In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress

intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."); *Neder v. United States*, 527 U.S. 1, 39 (1999) (Scalia, J. dissenting) ("What could possibly be so bad about having *judges* decide that a jury would necessarily have found the defendant guilty? Nothing except the distrust of judges that underlies the jury-trial guarantee."). The critical fact-finding role played by a jury is of "such importance and occupies so firm a place in our history and jurisprudence" that it has long been recognized that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (citation omitted).

This case demands no less. The approach taken below—whereby the government introduced new evidence to the appellate court such that it might, in the first instance, prove an element of a crime that it did not prove to the jury—throws these foundational constitutional protections to the wind. It relieves the government of its obligation to carry its constitutional burden at trial and, in its place, substitutes the judge in the place of the jury. That, of course, is at odds with fundamental guarantees of due process and the jury right.

Moreover, the government's and the appellate court's actions were of particular concern because the government's new evidence was intended to show knowledge. Yet knowledge is something which should not be judged by appellate judges based on a "cold

record." *See United States v. Medley*, 972 F.3d 399, 414 (4th Cir.), *reh'g en banc granted*, 828 F. App'x 923 (4th Cir. 2020); *United States v. Houston*, 792 F.3d 663, 669 (6th Cir. 2015) ("[A]ppellate judges are better equipped to assess materiality than to evaluate states of mind based on a cold record."). As such, depriving a defendant's due process and jury rights in this particular instance is an even graver concern.

More fundamentally, however, the Constitution makes clear that protecting the rights of the accused is of paramount importance, and that the government's interests in securing a conviction are of secondary importance. For example, the government cannot indict a criminal defendant without a presentment or indictment of a grand jury, which acts as "protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343 (1974). Nor, as a general rule, can the government introduce evidence at trial if that evidence was wrongly procured. *See Elkins v. United States*, 364 U.S. 206, 216–17 (1960). And, importantly, "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt," a judge simply "may not direct a verdict for the State, no matter how overwhelming the evidence." *See Sullivan*, 508 U.S. at 277. That the rights of the accused triumph over government interests, when applied here, means that even when there is an intervening change in law that will inure to one party's benefit, it is the *defendant*—not the government—who should benefit from that change. *See generally Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases,

state or federal, pending on direct review or not yet final"); *see United States v. Retos*, 25 F.3d 1220, 1230 (3d Cir. 1994).

This is particularly so when the jury right—"the great bulwark" of liberty—is implicated. *Gaudin*, 515 U.S. at 510–11 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540–41 (4th ed. 1873)). The right to a jury is sacred, and something long-considered "fundamental to the American scheme of justice[.]" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 148–50 (1968)); *see* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870 (1994). The jury is no less important simply because there has been an intervening change in the law. Thus, the Constitution still demands that the government satisfy its burden to prove every element of the charge to a jury, and do so beyond a reasonable doubt.

B. Expanding The Scope Of Review Also Deprives The Defendant Of The Opportunity To Refute An Element Never Presented To The Jury.

Allowing the government to introduce evidence beyond the trial record at plain error review further deprives a defendant of a meaningful opportunity to refute the government's evidence and present a complete defense. Whether rooted directly in the Due Process Clause or the Confrontation Clause, the Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting

California v. Trombetta, 467 U.S. 479, 485 (1984)) (internal citations omitted). This right to present a complete defense includes a right to confront the government's evidence and offer contrary proof. *See generally Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (explaining, in the context of the Confrontation Clause, the importance of defendants being able to confront the evidence against them). But because the government did not introduce evidence of the knowledge element at trial, Petitioner was not afforded an opportunity to refute it.

Worse, even if this evidence could have been refuted at trial, Petitioner, or any similarly situated defendant, lacked both the knowledge and an incentive to do so. Such lack of incentive to object occurs whenever the government does not have the burden to prove an element of the crime. *See Henderson v. United States*, 568 U.S. 266, 276–77 (2013) (discussing the lack of incentives for a defense attorney to fail to object at trial); *see also Medley*, 972 F.3d at 417 ("It would be unjust to conclude that the evidence supporting the knowledge-of-status element is 'essentially uncontroverted' when [the defendant] had no reason to contest that element during pre-trial, trial, or sentencing proceedings."); *United States v. Howell*, 958 F.3d 589, 596–97 (7th Cir. 2020) (limiting appellate review of a suppression motion to the pretrial record because the defendant "had little incentive at trial to focus on factual details pertinent to a pretrial motion that the district court resolved before trial even began").

It would, of course, be unreasonable to expect either party to predict future legal changes. But when such

legal changes occur, the Constitution demands that the rights of the accused prevail. Beyond the Constitutional implications, however, an alternative result also would be untenable. It would require defense counsel to anticipate and refute arguments the government does not even make. But, if the Eleventh Circuit's approach is affirmed, that is what the result would be. Allowing the government to introduce new evidence on plain error review following a legal change would thus pressure defense counsel to make every conceivable objection at trial—and later at sentencing if the record is not limited to trial—in order to meet their professional obligations to defend their client. *Rosales-Mireles*, 138 S. Ct. at 1910–11. Such a requirement would not only be inefficient, but any benefit from such a strategy would be "highly speculative." *Id.*

Moreover, because Petitioner previously lacked an incentive to develop arguments to refute the government's evidence, allowing the government to now introduce new evidence at plain error review risks distorting the full picture. That is because, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

Most importantly, however, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). Thus, the appropriate—and constitutional—result is to require the government to retry Petitioner's case and prove this

new element to the jury. Though this would add a cost, that cost is something the criminal justice system must bear. *See, e.g.*, *Ramos*, 140 S. Ct. at 1406 (noting that, although retrying certain defendants would "surely impose a cost," that is simply something that "new rules of criminal procedures usually do"); *United States v. Haymond*, 139 S. Ct. 2369, 2384 (2019) ("Yet like much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty."); *S. Union Co. v. United States*, 567 U.S. 343, 359–60 (2012) (rejecting the government's argument of "impractical[ity]" because "the rule the Government espouses is unconstitutional").

Our criminal justice system is built upon the long-recognized principle that it is "better to let the crime of a guilty person go unpunished than to condemn the innocent." *Coffin v. United States*, 156 U.S. 432, 454 (1895) (citation omitted). Among other things, this necessitates that the burden of prosecution fall squarely on the government, and that the defendant be given every opportunity to demonstrate that the government has fallen short of its burden of proof. The decision below, however, shifts a part of that burden to the criminal defendant by requiring them to refute evidence not previously introduced. It thus must be corrected. It is not too much to ask that the government prove each element of an offense beyond a reasonable doubt *to a jury*, even if doing so in a case such as this requires a retrial. It is constitutionally required.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Criminal Defense Lawyers urge

the Court to reverse the Eleventh Circuit's decision and make clear that, even following an intervening change in law, the government's evidence on plain error review must be limited to the evidence presented to the jury at the criminal trial.

Respectfully submitted,

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