No. 19-8709

In the Supreme Court of the United States

GREGORY GREER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
BENJAMIN W. SNYDER
Assistant to the Solicitor General
JOSHUA K. HANDELL
DAVID M. LIEBERMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a court of appeals may, on plain-error review, affirm a conviction for possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), on the ground that the entire record demonstrates that the defendant was not prejudiced by the application of later-overruled circuit precedent under which the government was not required to charge or prove knowledge of felon status.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

No. 19-8709

GREGORY GREER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 116-122) is not published in the Federal Reporter but is reprinted at 798 Fed. Appx. 483. A prior opinion of the court of appeals (J.A. 113-115) is not published in the Federal Reporter but is reprinted at 753 Fed. Appx. 886.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2020. The petition for a writ of certiorari was filed on June 8, 2020 (Monday), and was granted on January 8, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The pertinent statutory provisions and rule are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). J.A. 20. The court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. J.A. 22-23. The court of appeals affirmed. J.A. 113-115. This Court subsequently vacated the court of appeals' judgment and remanded for further consideration in light of *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). See 140 S. Ct. 41. The court of appeals again affirmed. J.A. 116-122.

A. Petitioner's Offense

In August 2017, officers on the vice unit of the Sheriff's Office were conducting an investigation into prostitution and possible human trafficking at a hotel in Jacksonville, Florida. 2/21/18 Trial Tr. (Tr.) 2-95 to 2-96, 2-157, 2-200. While officers were in the process of arresting a woman who had been detained as part of that investigation, petitioner knocked on the door of the hotel room in which the arrest was occurring and asked to speak with the woman. Tr. 2-95, 2-105. Even after officers told him that he would not be allowed to speak with her, he persisted in attempting to make contact. Tr. 2-105 to 2-106.

Concerned that petitioner "was possibly the pimp" in the prostitution operation that they were investigating, Tr. 2-106, the officers interviewed petitioner in the hallway outside the room. See Tr. 2-106 to 2-107; J.A. 31-33, 118. Petitioner appeared cooperative and calm, but the interviewing officer noticed him repeatedly reaching toward the beltline on his back. See J.A. 31-33. After asking petitioner several times to keep his hands in

front of himself, the officer eventually told petitioner "I'm just going to pat you down and make sure you don't have any weapons real quick." J.A. 33. Petitioner said "'Okay,'" and acted as though he were going to comply—but then "took off running straight down the hallway," forcing another officer out of his way and going through a door leading to an exit stairwell. J.A. 34-35.

Petitioner was "grabbing for his waist as he r[an] towards the door," and the officers pursued him into the stairwell. J.A. 35. As petitioner ran down the stairs with the officers behind him, one of the officers "heard a thunk or a thud * * * on the landing." J.A. 47; see J.A. 118. Another officer, somewhat behind the others, subsequently discovered a Colt .45-caliber pistol lying on the landing. J.A. 118. The officers continued their pursuit, and when they eventually apprehended petitioner, "he had an empty nylon holster clipped inside the right side of his waistband that fit the .45 caliber pistol recovered from the landing." *Ibid.* Subsequent investigation revealed that the pistol had been reported stolen two years earlier. J.A. 60.

B. District Court Proceedings

1. Under 18 U.S.C. 922(g), it is "unlawful for any person" who falls within one of several enumerated categories to "possess in or affecting commerce[ ] any firearm or ammunition." The categories of persons prohibited from possessing firearms and ammunition include felons, specifically "any person * * * who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). Section 924(a)(2) further provides that "[w]hoever knowingly violates" Section 922(g) or various neighboring firearm pro-

hibitions "shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. 924(a)(2).

A federal grand jury indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), based on petitioner's possession of the pistol recovered from the hotel. Indictment 1-2. The indictment alleged that at the time of his arrest, petitioner had five prior convictions for felony offenses and, "having been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year," "did knowingly possess, in and affecting interstate commerce, a firearm, that is, a Colt .45 caliber pistol." *Ibid.*

2. At trial, petitioner sought to cast doubt on whether the pistol found in the stairwell during the chase had ever been in his possession. See, *e.g.*, J.A. 64 (motion for judgment of acquittal). But he did not dispute that such possession would have been unlawful, and he stipulated that he had previously been "convicted in a court of a crime punishable by imprisonment for a term of more than one year, that is, a felony offense" and that he had "not received a pardon, ha[d] not applied for clemency, and ha[d] not been authorized to own, possess, or use firearms." J.A. 16. The district court admitted the stipulation into evidence and, at petitioner's request, redacted the descriptions of petitioner's five prior felonies from the indictment before submitting it to the jury. See J.A. 70, 118.

After the close of evidence, the district court instructed the jury about the charged offense. As relevant here, the court instructed the jury that it could find petitioner guilty only if it found, "beyond a reasonable doubt," that "(1) [petitioner] knowingly possessed a

firearm in or affecting interstate or foreign commerce; and (2) before possessing the firearm, [petitioner] had been convicted of a felony—a crime punishable by imprisonment for more than one year." J.A. 18. Petitioner's counsel did not object to those instructions, nor did he propose additional instructions. See J.A. 69.

The jury found petitioner guilty. J.A. 19.

3. Following the jury verdict, the Probation Office prepared a presentence investigation report that, among other things, described petitioner's criminal history. The Probation Office, consistent with the indictment, found that at the time of the offense conduct, petitioner had at least five prior felony convictions—and further reported that petitioner had, in fact, served multiple actual terms of imprisonment of more than one year. See Sealed Joint Appendix (S.J.A.) 7-15.

- In 2001, petitioner was charged in the District of Columbia on one count of possessing cocaine with intent to distribute. S.J.A. 7. While on work release to a halfway house pending trial, petitioner ran out the back door of the facility and remained a fugitive for nearly a year. S.J.A. 12. He was apprehended in 2003 and subsequently convicted on one count of possessing cocaine with intent to distribute and one count of escape. S.J.A. 7, 11-12. He was sentenced to a suspended three-year term of imprisonment on the cocaine charge and a suspended two-year term on the escape charge. S.J.A. 7, 11.
- In 2004, while on probation for his cocaine and escape convictions, petitioner sold PCP to an undercover agent. S.J.A. 12-13. He was convicted of distribution and sentenced to 20 months in prison. *Ibid.* After completing that 20-month

prison term, petitioner served the previously imposed three-year term of imprisonment stemming from his cocaine conviction, S.J.A. 7, and a one-year term of imprisonment stemming from his earlier escape conviction, S.J.A. 11.

- In 2010, while on supervised release for his PCP conviction, petitioner was convicted in Florida for possessing a controlled substance, a felony. S.J.A. 14. He was sentenced to 90 days in jail and released to authorities in the District of Columbia for adjudication of his supervised-release violation. *Ibid.* His supervised release was revoked, and he was required to serve 11 months in prison. S.J.A. 12.
- In 2016, petitioner was convicted in Florida for aggravated fleeing or attempting to elude a law enforcement officer, a felony. S.J.A. 15. He was sentenced to one year of incarceration. *Ibid.*

Based on the above felony convictions and other offenses recited in the report, the Probation Office calculated a criminal history score of 14 and a criminal history category of VI. S.J.A. 15. Combined with petitioner's total offense level of 30, his criminal history would have yielded an advisory guidelines range of 168 months to 210 months of imprisonment; the Probation Office accordingly calculated a guidelines sentence at the statutory-maximum 120 months. S.J.A. 23.

Petitioner did not dispute any of the information about his prior convictions. J.A. 91. Instead, his attorney acknowledged that petitioner had received "lengthy sentences" in his D.C. criminal proceedings that "amount[ed] to almost six years," J.A. 96, but argued

that a sentence below the statutory-maximum guidelines sentence was nevertheless warranted purely as a matter of judicial discretion, see J.A. 98-99. The district court adopted the findings and conclusions in the presentence report and sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. J.A. 22-23.

C. Appellate Proceedings

1. The court of appeals affirmed petitioner's conviction, rejecting the lone argument he raised on appeal—a constitutional challenge to Section 922(g). J.A. 114; see J.A. 113-115.

Petitioner then filed a petition for a writ of certiorari. While that petition was pending, this Court decided *Rehaif* v. *United States*, *supra*. In *Rehaif*, the Court held that, to support a conviction for possession of a firearm by a prohibited person under 18 U.S.C. 922(g) and 924(a)(2), 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. The Court subsequently granted petitioner's petition for a writ of certiorari, vacated the judgment below, and remanded to the court of appeals "for further consideration in light of *Rehaif*." 140 S. Ct. at 41.

2. On remand, the court of appeals again affirmed petitioner's conviction. J.A. 116-122.

In the new proceedings before the court of appeals, petitioner argued that *Rehaif* required vacatur of his conviction because the indictment had not alleged, and the jury at his trial had not been instructed to find, that petitioner knew that he had a prior felony conviction at

the time he possessed a gun. J.A. 117. Petitioner further argued that the evidence at trial had not been sufficient to show such knowledge. Pet. C.A. Supp. Br. 3-5.

Because petitioner had not objected at trial to the indictment or jury instructions and had not asked the district court to enter a judgment of acquittal based on any asserted lack of evidence that he knew he had previously been convicted of at least one felony, the court of appeals reviewed petitioner's claims solely for plain error. J.A. 117; see Fed. R. Crim. P. 52(b). The court explained that under the plain-error standard, petitioner had to "prove that an error occurred that was plain," and that "the error affected his substantial rights"—*i.e.*, establish "'a reasonable probability that, but for the error,' the outcome of his proceeding would have been different." J.A. 119-120 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 76 (2004)). The court additionally observed that, "because relief on plain-error review is in the discretion of the reviewing court, [petitioner] has the further burden to persuade [the court] that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 120 (quoting *United States* v. *Vonn*, 535 U.S. 55, 63 (2002)). Finally, the court explained that it would "assess the probability that [petitioner's] trial would have ended differently based on the entire record," observing that "'[i]t is simply not possible for an appellate court to assess the seriousness of [a] claimed error by any other means.'" *Ibid.* (quoting *United States* v. *Young*, 470 U.S. 1, 16 (1985)) (third set of brackets in original).

The court of appeals acknowledged that petitioner "ha[d] established errors made plain by *Rehaif*," but found that he could not satisfy the third or fourth, case-

specific, requirements for plain-error relief. J.A. 120-121. Specifically, the court observed that "[b]ecause the record establishes that [petitioner] knew of his status as a felon, he cannot prove that he was prejudiced by the errors or that they affected the fairness, integrity, or public reputation of his trial." J.A. 121. The court pointed first to trial evidence from which "the jury could have inferred * * * that [petitioner] knew he was a felon barred from possessing firearms"—namely, petitioner's "fidgeting, his flight from the police, and his disposal of the pistol." *Ibid.* The court also observed that, at the time of his possession, petitioner had "accrued five felony convictions." *Ibid.* And it cited "the undisputed facts in [petitioner's] presentence investigation report" showing that he had "served separate sentences of 36 months and of 20 months in prison." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly applied well-established principles of plain-error review to deny relief in this case. It is implausible that a requirement to prove petitioner's knowledge of one of his prior felony convictions would have made a difference to the outcome or fairness of these proceedings. Petitioner has never even asserted that he was unaware that he had at least one prior felony conviction, and the record undisputedly shows that he not only had at least five prior felony convictions, but moreover had served multiple prison terms of well over a year. His efforts to overturn the judgment require ignoring those aspects of his case, in favor of a blinkered trial-record-only approach to plain-error review that has no basis in this Court's precedents, is at odds with common sense, and would lead to unwarranted results in petitioner's case and the many others like it.

As this Court has long recognized, a defendant has no automatic right to appellate relief on a claim that he failed to raise in the trial court. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 731 (1993). A reviewing court has "discretion," however, "to correct errors that were forfeited because not timely raised." *Id.* at 731-732. The court may exercise that discretion only if a defendant establishes (1) that an error occurred; (2) that the error was plain; (3) that the proceedings had a reasonable probability of a different outcome in the error's absence; and (4) that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732 (brackets and citation omitted).

A reviewing court appropriately looks to the whole record—not simply a slice of it—in assessing whether a defendant has made the latter two case-specific showings. When determining whether an unpreserved error affected the outcome below, and even when performing the comparable prejudice analysis in the context of *preserved* error, this Court has not limited its consideration to only the record of the particular stage of the proceedings at which the error occurred. In *Neder* v. *United States*, 527 U.S. 1 (1999), for example, the Court found that the omission of an element from the jury instructions had not affected the outcome of the trial after considering not just the evidence introduced at trial, but also whether additional evidence *could have been* presented to the jury on the relevant issue. And in *United States* v. *Vonn*, 535 U.S. 55 (2002), the Court considered evidence from a sentencing hearing in assessing whether an unpreserved error during an earlier plea colloquy had prejudiced the defendant. *Id.* at 66-67.

This Court has taken a similarly holistic approach to the scope of review when evaluating whether an error

seriously affected the fairness, integrity, or public reputation of judicial proceedings. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 470 (1997); *United States* v. *Cotton*, 535 U.S. 625, 633 & n.3 (2002). That prerequisite for plain-error relief involves questions that a jury is never asked to consider, and no sound reason exists to answer them using only the record of proceedings at which the jury was present.

Constraining a reviewing court's plain-error analysis to the evidence presented at trial would be especially unwarranted in the many cases raising claims under *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). In most such cases, the defendant chose to enter a stipulation acknowledging his status as a felon in order to prevent the government from introducing additional evidence about his criminal history. Allowing defendants to now take advantage of limitations on the record that they themselves invited, and thereby obtain relief on a forfeited theory that would not plausibly have benefited them at trial, would undermine the fairness and integrity of judicial proceedings, not advance it.

Petitioner's contrary arguments lack merit. He identifies no plain-error or harmless-error decision of this Court (and just one of any lower court) that has refused to consider evidence in the record on the ground that it was not introduced at trial. His suggestion that such consideration in fact violates a defendant's due-process or jury-trial right cannot be reconciled with this Court's own longstanding approach to appellate review, and disregards that plain-error relief is a matter of judicial discretion rather than constitutional entitlement. And his suggestion that materials from the sentencing record following a trial will be unreliable, or unduly prejudicial,

is both contrary to his recognition that the same materials may be considered in performing plain-error review of errors that arise during a guilty-plea proceeding, and belied by the mechanisms through which the accuracy of a defendant's criminal history has been verified.

The court of appeals correctly denied plain-error relief in this case. The trial record alone contained ample evidence from which the jury could have inferred that petitioner knew of his status as a felon. And the sentencing record shows an extensive and uncontested criminal history that undermines any attempt to establish the case-specific elements of the plain-error standard. The court below properly rejected petitioner's request for windfall relief, and this Court should do the same.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DENIED PLAIN-ERROR RELIEF ON PETITIONER'S UNPRESERVED CLAIM AFTER ASSESSING THE RECORD AS A WHOLE

Petitioner was not entitled to plain-error relief on his unpreserved claim of error in the omission from his proceedings of the knowledge-of-status requirement later announced in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). Petitioner does not dispute that his unpreserved claim must satisfy the requirements of plain-error review, including affirmative showings that the error may reasonably have affected the outcome and also that it undermined systemic integrity. He cannot make either of those showings. The record as a whole eliminates any reasonable possibility that petitioner, who has at least five felony convictions and actually spent more than a year in prison on multiple occasions, was in fact una-

ware that he had any qualifying convictions at all. Petitioner's efforts to censor the record by redacting the non-trial-record evidence unfavorable to him cannot be squared with either this Court's precedents or sound principles of judicial administration—particularly when the asserted deficiencies of the trial record were the result of his own strategic choice to stipulate to a prior conviction rather than allow detailed proof about his criminal history. This Court should affirm the judgment below and reconfirm that plain-error relief is limited to those defendants who can show case-specific harm without resorting to artificial record excisions.

A. Relief On An Unpreserved Claim Of Error Is A Matter Of Case-Specific Discretion

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). It is thus well-established that where a criminal defendant does not properly present his claim at the appropriate time, appellate "[c]ourts may for that reason refuse to consider [his] constitutional objection" on appeal even if it is clear that the objection has merit. *Yakus*, 321 U.S. at 444; see, *e.g.*, *Puckett* v. *United States*, 556 U.S. 129, 134 (2009). Indeed, the Court has found that "it could hardly be maintained that it is beyond legislative power to make" a rule "refus[ing] to consider" a meritorious, but unpreserved, "constitutional objection * * * inflexible in *all* cases." *Yakus*, 321 U.S. at 444-445 (emphasis added; citations omitted).

Congress has not chosen to adopt such an inflexible rule; instead, the Federal Rules of Criminal Procedure are calibrated to preserve a measure of judicial discretion to correct unpreserved errors when warranted under the circumstances. Specifically, Rule 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." Fed. R. Crim. P. 52(b). This Court has explained that a defendant seeking discretionary relief under that rule must make four showings—and that making those showings "is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

At the threshold, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *Olano*, 507 U.S. at 732) (brackets in original). An appellant satisfies the first two of those requirements by showing an error that is clear at the time of the appeal, *Henderson* v. *United States*, 568 U.S. 266, 269 (2013), and satisfies the third by showing "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different," *Dominguez Benitez*, 542 U.S. at 82 (brackets in original). When all three of those threshold requirements are satisfied, "the court of appeals has authority to order correction, but [it] is not required to do so." *Olano*, 507 U.S. at 735. Instead, a reviewing court "may * * * exercise its discretion to notice a forfeited error" only if the defendant makes a fourth showing—that "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (citation omitted; brackets in original). This criterion "is meant to be applied on a case-specific and

fact-intensive basis" rather than through the use of "'*per se*'" rules. *Puckett*, 556 U.S. at 142 (citation omitted).

By imposing those four requirements, Rule 52(b) strikes a "careful balanc[e]" between "our need to encourage all trial participants to seek a fair and accurate trial the first time around [and] our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). The rule "serves to induce the timely raising of claims and objections, which gives the district court"—the court that "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute"—"the opportunity to consider and resolve" the objections. *Puckett*, 556 U.S. at 134; see *United States* v. *Vonn*, 535 U.S. 55, 73 (2002) ("[T]he value of finality requires defense counsel to be on his toes, not just the judge."); see also, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (observing that the contemporaneous-objection rule "encourages the result that [trial] proceedings be as free of error as possible"). It also "reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *Dominguez Benitez*, 542 U.S. at 82. And it reduces opportunities for gamesmanship. See *Puckett*, 556 U.S. at 134; *Vonn*, 535 U.S. at 73; *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89. At the same time, however, the rule "tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by preserving to a reviewing court's "sound discretion" a "limited power to correct errors that were forfeited because not timely raised," *Olano*, 507 U.S. at 731-732.

B. The Entire Record Is Relevant To Whether A Court Should Award Case-Specific Discretionary Relief On Plain-Error Review Following Conviction At Trial

In assessing whether to grant a defendant discretionary relief under Rule 52(b) following his trial and conviction, a court of appeals may appropriately consider the entire record before it. This Court has itself repeatedly looked to portions of the record outside of the specific portion that contains the error in order to assess whether that error affected the outcome or seriously affected judicial integrity; indeed, the Court has in multiple cases denied relief solely on that basis. A restriction on considering the entire record in cases like this one lacks precedent, defies logic, and would produce unjustifiable results—as petitioner's own circumstances well illustrate.

1. A reviewing court may look to the whole record to assess whether an error affected a defendant's substantial rights

Rule 52 of the Federal Rules of Criminal Procedure permits a reviewing court to grant relief only when an error has "affect[ed] substantial rights," Fed. R. Crim. P. 52(a)-(b), a phrase that this Court has long "taken to mean error with a prejudicial effect on the outcome of a judicial proceeding," *Dominguez Benitez*, 542 U.S. at 81. "When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial." *Olano*, 507 U.S. at 734. If the defendant did not make a timely objection, then Rule 52(b)'s plain-error standard "normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the

Government who bears the burden of persuasion with respect to prejudice." *Ibid.* In both contexts, this Court has consistently looked to the "entire record," *Young*, 470 U.S. at 16 (citing *Johnson* v. *United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)), not just the portion in which the asserted error occurred, to determine whether the necessary showing has been made.

a. In *Neder* v. *United States*, 527 U.S. 1 (1999), for example, the Court addressed a claim of *preserved* trial error that was substantially similar to the unpreserved claim that petitioner asserts here: the district court's failure to submit an element (the materiality of a false statement) to the jury. In finding that error harmless and sustaining the conviction, this Court considered both the evidence that Neder had presented at trial and the factual assertions he made on appeal. See *id.* at 16 ("Neder did not argue to the jury—*and does not argue here*—that his false statements of income could be found immaterial.") (emphasis added). And the Court's holding relied on the fact that Neder not only "did not" contest the materiality element but also apparently "*could not*" do so. *Id.* at 19 (emphasis added); see *ibid.* (relying on Neder's inability to dispute the materiality element in holding that denial of appellate relief did "not fundamentally undermine the purposes of the jury trial guarantee").

Similarly, in *United States* v. *Mechanik*, 475 U.S. 66 (1986), this Court addressed an error that occurred when two witnesses appeared before the grand jury simultaneously, in clear violation of Federal Rule of Criminal Procedure 6(d). The Court explained that Rule 6(d) "protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty." 475

U.S. at 70. Nevertheless, in determining that "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt," the Court did not limit itself "to the evidence produced before the *grand jury*." *Id.* at 71. Instead, it looked to the record as a whole, including "the evidence produced by the Government at *trial*," to confirm that the charges were supported by probable cause. *Ibid.*

The engrained nature of the whole-record inquiry is also evident from *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), a state case that did not directly involve Rule 52, but instead relied on more general harmless-error principles. In discussing whether a defendant had been prejudiced by a state court's unconstitutional limitations on his cross-examination of a prosecution witness, the Court described the harmless-error analysis as calling for examination of "the whole record." *Id.* at 681. This Court accordingly spelled out the content of the testimony that the jury had not been permitted to hear because of the erroneous ruling, see *id.* at 676-677, and explained that on remand, the state court's harmlessness analysis would need to account for "the damaging potential of th[at] cross-examination," *id.* at 684, not just the evidence that the jury actually heard.

b. It follows *a fortiori* from this Court's consideration of the whole record when analyzing prejudice from preserved errors that a reviewing court may also consider the whole record when analyzing prejudice from *unpreserved* errors. See *Young*, 470 U.S. at 16 (emphasizing, outside the context of a specific prejudice analysis, that "[e]specially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record"). Placing the burden of proving prejudice on the defendant,

rather than the government, does not fundamentally change the nature of the inquiry to a defendant's advantage. As discussed above, Rule 52(b) operates in tandem with the contemporaneous-objection rule to "encourage all trial participants to seek a fair and accurate trial the first time around." *Frady*, 456 U.S. at 163. If appellate courts were required to disregard evidence in the portions of the record other than the trial itself, it would provide defendants with a considerable incentive to instead "s[i]t silent at trial," *Vonn*, 535 U.S. at 63, and thereby leave the trial portion of the record bare of adverse facts.

This Court's plain-error precedents accordingly illustrate that entire-record review is just as appropriate—if not even more appropriate—for errors that a defendant failed to preserve as for ones that he did. See *United States* v. *Davila*, 569 U.S. 597, 612 (2013) (explaining that the effect of an unpreserved error "should be assessed, not in isolation, but in light of the full record"). For example, in *United States* v. *Vonn*, *supra*, the defendant alleged that the district court committed plain error in conducting a deficient plea colloquy. 535 U.S. at 58. This Court held "that a silent defendant"—in other words, a defendant who forfeited the objection in the district court—"has the burden to satisfy the plain-error rule and that a reviewing court may consult *the whole record* when considering the effect of any error on substantial rights." *Id.* at 59 (emphasis added). Specifically, the Court directed that the inquiry into "whether [the] defendant's substantial rights were affected" should "look[] beyond the plea colloquy to other parts of the official record," including the "'sentencing hearing'" that occurred after the plea was already en-

tered. *Id.* at 61-62, 74 (citation omitted). And on the basis of those additional "source[s] of information, outside the four corners of the transcript of the plea hearing and Rule 11 colloquy, but still part of the record," the Court determined that the defendant in that case had suffered no impairment of his substantial rights that would warrant relief on his forfeited claim. *Id.* at 75; see *id.* at 67.

Similarly, in *United States* v. *Dominguez Benitez*, *supra*, this Court addressed a claim of plain error arising from a district court's failure to discuss, during a plea hearing, the fact that the defendant would have a right to counsel at trial if he pleaded not guilty. 542 U.S. at 79. Again, the Court did not limit its examination to the plea hearing at which the error occurred, but instead looked to statements made by the defendant and his counsel at an earlier status conference. *Id.* at 84-85. The Court explained that reviewing courts could properly survey the entire record to assess "the overall strength of the Government's case and any possible defenses that appear from the record." *Id.* at 85. And far from limiting that whole-record approach to cases involving plea-colloquy errors, the Court instead specifically reasoned that those were "subjects that courts are accustomed to considering in" other settings. *Ibid.* (citing analyses required by *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Brady* v. *Maryland*, 373 U.S. 83 (1963)).

Contrary to petitioner's contention (Br. 18), the advisory notes to Federal Rule of Criminal Procedure 11, which governs guilty pleas, are consistent with the view that *Vonn* and *Dominguez Benitez* reflect a broader principle that applies equally to cases that went to trial. The notes observe that "the kinds of Rule 11 violations

which might be found to constitute harmless error upon direct appeal are fairly limited" as compared to the types of trial errors that might be so found, because the "limited record made in [guilty-plea] cases" is less extensive than the record compiled when a defendant goes to trial. Fed. R. Crim. P. 11(h) advisory committee's note (1983 Amendment). The observation that cases involving a trial will typically have more extensive records does not suggest that courts are *limited* in such cases to just a subset of the record—if anything, it suggests the opposite. And petitioner identifies nothing in Rule 52 or elsewhere that precludes reviewing courts in all contexts from examining the record as a whole, including portions like the "sentencing hearing," *ibid.*, to assess the probability that an error affected the trial outcome.

Such a blinkered approach could not logically be reconciled with *Neder* and other cases that do not involve a guilty plea. The Court's decisions in both the plain-error and harmless-error contexts rest on an understanding that courts should not set aside convictions based on "errors or defects that ha[d] little, if any, likelihood of having changed the result of the trial." *Chapman* v. *California*, 386 U.S. 18, 22 (1967). Even where a defendant raised his objection in a timely fashion—and especially where he did not—an otherwise valid conviction should not be set aside if the reviewing court determines, on the whole record, that the error did not prejudice the defendant.

2. A reviewing court may likewise look to the whole record to assess whether an error seriously affected the fairness, integrity, or public reputation of judicial proceedings

Examining the entire record is similarly appropriate when reviewing courts assess the effect of the unpreserved error on "the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (citation omitted). The fourth requirement for plain-error relief implicates "case-specific and fact-intensive" questions of judicial "discretion" that juries would never be asked to consider, even in a hypothetical trial wholly free from error. *Puckett*, 556 U.S. at 135, 142. This Court has accordingly not applied, let alone provided any justification for, any limitation to the trial record when assessing the fourth plain-error requirement.

For example, in *Johnson* v. *United States*, *supra*, this Court determined that a trial court's failure to submit an offense element to the jury—the materiality of a false statement—did not warrant relief where the evidence supporting the element was "essentially uncontroverted." 520 U.S. at 470. The Court assumed without deciding that the omission had affected substantial rights, *id.* at 469, but nevertheless denied relief because the error did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," *ibid.* (quoting *Olano*, 507 U.S. at 736). And the Court's application of that fourth plain-error requirement depended on an analysis in which "the Court *itself* * * * found that the record contained enough evidence on materiality that no reasonable juror could have decided the materiality question in any other way." *United States* v. *Nasir*, 982 F.3d 144, 193 (3d Cir. 2020) (en banc) (Porter, J., concurring in part and dissenting in part).

In making that finding, the Court in *Johnson* "did not confine its review to information available only at the time of trial," but instead "considered whether [the defendant] made a plausible showing—not just at trial but afterwards"—that her false statement was not material. *Nasir*, 982 F.3d at 194 (Porter, J., concurring in part and dissenting in part) (footnote omitted). The Court observed that both in "the Eleventh Circuit and in her briefing before this Court, [the defendant] ha[d] presented no plausible argument that the false statement under oath for which she was convicted * * * was somehow not material." *Johnson*, 520 U.S. at 470. "On this record," the Court continued, "there is no basis for concluding that the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Ibid.* (brackets omitted). Such considerations would have been irrelevant if only the trial record mattered to the Court's plain-error review.

The Court has similarly looked to the whole record in determining whether the fourth plain-error requirement was satisfied in cases involving error before a grand jury or in connection with a guilty plea. In *United States* v. *Cotton*, 535 U.S. 625 (2002), for example, the Court considered whether plain-error relief was warranted based on the erroneous omission of a drug-weight allegation from an indictment. Rather than confine its review to the record before the grand jury that had returned the indictment, the Court examined the record developed subsequently at trial and in connection with sentencing. See *id.* at 633 & n.3. Finding that "[t]he evidence that the conspiracy involved at least 50 grams of cocaine base was overwhelming and essentially uncontroverted" at those later stages, the Court found "no basis for concluding that the [indictment's

omission of this allegation] 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 633 (brackets, citation, and some internal quotation marks omitted). Similarly, in *Puckett* v. *United States*, *supra*, the Court relied on information about the defendant's conduct contained in a presentence report to conclude that it would be "ludicrous" to find that the government's earlier breach of a plea agreement had compromised the public reputation of judicial proceedings. 556 U.S. at 143.

The Court's approach in those cases embodies the concern that the "real threat * * * to the 'fairness, integrity, and public reputation of judicial proceedings'" would arise if defendants received unwarranted relief on an unpreserved claim of error "despite overwhelming and uncontroverted evidence." *Cotton*, 535 U.S. at 634 (citation omitted); see *Puckett*, 556 U.S. at 143. That threat would materialize if a reviewing court were required to make its assessment in an evidentiary silo, unable to take account of the entire record. The discretion imparted by the plain-error standard allows courts to provide "fundamental fairness." *Young*, 470 U.S. at 16. Granting relief on an unpreserved claim where the record as a whole shows that the result was, in fact, fundamentally fair would be exactly the sort of "practice which [this Court] ha[s] criticized as 'extravagant protection.'" *Ibid.* (quoting *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.12 (1977)).

3. Review of the whole record is particularly appropriate in this case, where petitioner's strategic decision precluded introduction of relevant evidence at trial

Constraining a court to the trial record alone would be particularly unwarranted in the context of a pre-*Rehaif* felon-in-possession prosecution like this one,

where petitioner's litigation choices precluded the government from presenting evidence at trial about his prior convictions. Before *Rehaif*, this Court had held in *Old Chief* v. *United States*, 519 U.S. 172 (1997), that where a defendant offered to stipulate to his felon status, concerns about undue prejudice required the government to accept the stipulation and precluded the government from presenting its own evidence about the nature of the defendant's criminal record. *Id.* at 180; see *id.* at 180-192. Accordingly, "defendants typically avail[ed] themselves of *Old Chief* when they ha[d] multiple or damning felony records." *United States* v. *Miller*, 954 F.3d 551, 559 n.23 (2d Cir. 2020), petition for cert. pending, No. 20-5407 (filed Aug. 14, 2020).

In doing so, they foreclosed the government from introducing evidence into the record at trial that would have been highly probative of knowledge. In petitioner's case, for example, his *Old Chief* stipulation (J.A. 118) denied the government the ability to introduce evidence at trial about the nature of his five prior felony convictions, which would have reinforced the natural inference that he was undoubtedly aware of his criminal record when he possessed the gun. No sound reason exists for limiting plain-error review to not just a trial record, but to a trial record that is itself limited by a defendant's own strategic—although then-permissible—decision to keep additional evidence about his prior convictions from the jury. See, *e.g.*, *United States* v. *Maez*, 960 F.3d 949, 963 (7th Cir. 2020) (observing in analogous case that if "the trial records were left bare of such information," it was "largely because *Old Chief* stipulations barred the government from offering it"), petitions for cert. pending, Nos. 20-6129, 20-6226, 20-6227 (filed Oct. 19, 2020 and Oct. 28, 2020).

Petitioner's case is far from unique. In *United States* v. *Owens*, 966 F.3d 700 (8th Cir. 2020), petition for cert. pending, No. 20-6098 (filed Oct. 13, 2020), for example, the government's evidence at trial about the defendant's criminal history "was limited to a stipulation of the parties that [the defendant] 'had sustained at least one felony conviction for which he could receive a term of imprisonment greater than one year.'" *Id.* at 709 (citation omitted). Had the defendant raised a knowledge-of-felon-status defense, however, the government "could have offered reliable evidence" that the defendant had "serv[ed] twenty-two years in prison for murder and other felonies" and was thus undoubtedly "aware of his status as a person convicted of an offense punishable by more than a year in prison." *Id.* at 706-707. And in *United States* v. *Mancillas*, 789 Fed. Appx. 549 (7th Cir. 2020), the defendant stipulated to his felon status at trial "to prevent the government from offering evidence of his nine prior felonies—a number that itself renders a lack of awareness all but impossible." *Id.* at 550. Similar examples abound. See, *e.g.*, *United States* v. *Sandford*, 814 Fed. Appx. 649, 653 (2d Cir. 2020) (denying relief where there was "'no doubt'" that the defendant "'would have stipulated to knowledge of his felon status to prevent the jury from hearing evidence'" that the defendant "ha[d] three prior felony convictions" and "[f]or two of these felonies, * * * ultimately served over one year in prison") (citation omitted), petition for cert. pending, No. 20-6165 (filed Oct. 26, 2020); *United States* v. *Spencer*, 813 Fed. Appx. 385, 389 (11th Cir. 2020) (per curiam) ("When he possessed the firearm, Spencer had previously been convicted of six felonies. * * * Spencer was on supervised released when he committed these current felonies.").

Indeed, in some cases, a defendant's *Old Chief* stipulation will have precluded the jury from hearing that the defendant had previously been convicted of possessing a firearm as a felon under state or federal law—a "criminal history [that] undoubtedly [would] have provided sufficient evidence to prove that [a defendant] knew his status." *United States* v. *Caudle*, 968 F.3d 916, 922 (8th Cir. 2020). For example, in *United States* v. *Moore*, 954 F.3d 1322 (11th Cir. 2020), petition for cert. pending, No. 20-6781 (filed Dec. 17, 2020), one defendant who was tried pre-*Rehaif* had been "previously convicted of violating 18 U.S.C[.] § 922(g), the very statute at issue" in his new prosecution—and moreover bore "a tattoo of the number 92 on his left arm, representing the length [in months] of his previous sentence" for that conviction. *Id.* at 1338.

The equitable implications of constraining review to a portion of the record that the defendant himself has limited are particularly pertinent to the fourth plain-error requirement. "In the context of plain error review, an error that was invited by the appellant 'cannot be viewed as one that affected the fairness, integrity, or public reputation of judicial proceedings.'" *United States* v. *Lespier*, 725 F.3d 437, 450 (4th Cir. 2013) (citation omitted), cert. denied, 571 U.S. 1154 (2014). "To the contrary, the fairness and public reputation of the proceeding would be called into serious question if a defendant were allowed to gain a new trial on the basis of the very procedure he had invited." *United States* v. *Gomez*, 705 F.3d 68, 76 (2d Cir.), cert. denied, 571 U.S. 817 (2013). A defendant with a reasonable argument for acquittal under a potential knowledge-of-status requirement should have raised a contemporaneous objection to that effect, as other defendants had done at

the time. See, *e.g.*, Pet. for Reh'g at 2, *United States* v. *Rehaif*, No. 16-15860 (11th Cir. Sept. 7, 2017) (arguing, in a rehearing petition that had been pending for five months at the time of trial in this case, that Section 924(a)(2) requires the government to prove knowledge of status); see also *United States* v. *Games-Perez*, 695 F.3d 1104, 1116-1117 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of rehearing en banc) (presenting case for knowledge requirement). A defendant who not only failed to raise an objection, but also affirmatively utilized the existing law to foreclose the introduction of evidence that would have powerfully demonstrated his knowledge of his status, cannot demand that a later reviewing court overlook his forfeiture while adhering to the earlier evidentiary limitations.

C. Petitioner's Arguments For Restricting The Plain-Error Inquiry To The Trial Record Lack Merit

Notwithstanding this Court's precedents examining the full record, and the full record's clear relevance to the inquiry, petitioner urges (Br. 2) the excision of "materials that were never admitted into evidence nor presented to the jury." He presumably is not advocating an *absolute* bar on such evidence—a court would have no way at all to assess the effect of, say, the erroneous exclusion of defense evidence or denial of defense cross-examination without allowing the defendant to rely on "materials that were never admitted into evidence nor presented to the jury." *Ibid.*; see *Van Arsdall*, 475 U.S. at 676-677, 684. And to the extent that petitioner would instead advocate a lopsided approach under which a court could rely on such materials only when they are *favorable* to the defendant—as in the case of, say, a *Rehaif* claim in which a defendant's cognitive impairments were discussed only at sentencing—such an approach

lacks any basis in law or logic. Cf. *Wong* v. *Belmontes*, 558 U.S. 15, 20 (2009) (per curiam) (holding that in evaluating whether a defendant was prejudiced by the ineffectiveness of his counsel in failing to present certain evidence, "it is necessary to consider all the relevant evidence that the jury would have had before it if [defense counsel] had pursued the different path—not just the [additional] evidence [the defendant] could have presented, but also the [prosecutor's additional] evidence that almost certainly would have come in with it") (emphasis omitted). Petitioner's specific efforts to support his approach are unsound.

1. At the outset, petitioner errs in asserting (Br. 12) that two of this Court's early decisions considering forfeited errors—*Wiborg* v. *United States*, 163 U.S. 632 (1896), and *Clyatt* v. *United States*, 197 U.S. 207 (1905)—establish that "the trial record controls" both "the prejudice determination for plain error" and "also the public-reputation considerations." In each of those cases, the Court looked to the entire record available on appeal and corrected the unpreserved error only after finding no evidence at all to support a necessary element—the *mens rea* element in *Wiborg*, see 163 U.S. at 659-660, and the element of the victim's prior peonage in *Clyatt*, see 197 U.S. at 222. Neither decision gave the Court occasion to consider the question presented here—namely, what treatment to give to evidence that is in the record, but not in the trial record specifically, when assessing a forfeited error on appeal.

To the extent that petitioner relies (Br. 30) on *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), that reliance is likewise misplaced. *Sullivan* did not involve plain-error review. It was instead a state case in which applicable

state law automatically deemed objections to jury instructions preserved for plenary appellate review where the case resulted in a sentence of death, as *Sullivan* itself did. See Cert. Reply Br. at 6 & n.3, *Sullivan*, *supra*, No. 92-5129. Accordingly, Louisiana did not argue for, and this Court did not apply, the Rule 52 plain-error review applicable to forfeited claims. See *Sullivan*, 508 U.S. at 279-280; see also *Neder*, 527 U.S. at 39 (Scalia, J., concurring in part and dissenting in part) ("The limited harmless-error approach of *Sullivan* applies only when specific objection to the erroneous instruction has been made and rejected.") (emphasis omitted). And *Neder* later rejected, in the context of harmless-error review of the erroneous omission of an offense element from the jury instructions, the argument that *Sullivan* precludes a court from considering "record evidence of guilt the jury did not *actually* consider." *Neder*, 527 U.S. at 17-19; see *Washington* v. *Recuenco*, 548 U.S. 212, 222 n.4 (2006) ("We recognized in *Neder*, however, that a broad interpretation of our language from *Sullivan* is inconsistent with our case law.").

Neder's explicit rejection of that limitation also forecloses petitioner's efforts (Br. 13-14) to draw support for such a limitation from this Court's other harmless-error cases. In any event, the decisions he cites do not in fact support the limitation he seeks. Petitioner points to cases in which the Court has stated that harmless-error review must account for "'other evidence presented' at trial." Br. 14 (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 308 (1991)); see *id.* at 14-15 (discussing *Sullivan*, *supra*; *Neder*, *supra*; *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Rose* v. *Clark*, 478 U.S. 570 (1986);

and *Mechanik*, *supra*). But none of those decisions refused to consider evidence pertinent to the harmless-error inquiry on the ground that it had not been presented to the jury (or, in *Mechanik*, to the grand jury, see pp. 17-18, *supra*). To the contrary, several considered just such evidence. See, *e.g.*, *Fulminante*, 499 U.S. at 297 (considering statements made "during a renewed hearing on Fulminante's motion to suppress," for which the jury presumably would not have been present); *Mechanik*, 475 U.S. at 70.

Petitioner's reliance (Br. 13) on those harmless-error decisions also rests on the mistaken premise that, "[e]xcept for [the] allocation of the burden of persuasion, * * * plain-error review under Rule 52(b) is the same as harmless-error review under Rule 52(a)." That may be true enough with respect to the prejudice inquiry—in which the harmless-error decisions affirmatively *support* consideration of the whole record, see pp. 17-18, *supra*—but disregards that plain-error review includes the additional requirement that the error have adversely affected "the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (citation omitted). That extra requirement cabins a reviewing court's exercise of its "remedial discretion," *Olano*, 507 U.S. at 736, requiring not only outcome-affecting prejudice, but a broader systemic effect that justifies excusing the defendant's forfeiture. Considerations such as "fundamental fairness," *Young*, 470 U.S. at 16, and how the public would perceive a judicial decision granting or withholding such extraordinary relief, see *Cotton*, 535 U.S. at 634, are not for the jury, and it would make little sense to restrict a reviewing court's consideration of them to trial-admissible evidence.

Finally, decisions in the courts of appeals likewise do not support petitioner's arguments. He asserts (Br. 34) that "federal appellate courts considering errors outside of the *Rehaif* context restrict plain error review to the trial record," pointing to six circuit-court decisions that purportedly stand for that proposition. None of those decisions, however, refused to consider evidence in the district-court record on the ground that it had not been presented at trial, and the courts of appeals found plain-error relief unwarranted in all six cases. See *United States* v. *Perez-Montañez*, 202 F.3d 434, 442-443 (1st Cir.), cert. denied, 531 U.S. 886 (2000); *United States* v. *Martinez*, 136 F.3d 972, 976-977 (4th Cir.), cert. denied, 524 U.S. 960, and 525 U.S. 849 (1998); *United States* v. *Ceron*, 775 F.3d 222, 225-227 (5th Cir. 2014) (per curiam); *United States* v. *McDonald*, 336 F.3d 734, 737-739 (8th Cir. 2003), cert. denied, 540 U.S. 1200 (2004); *United States* v. *Conti*, 804 F.3d 977, 982-983 (9th Cir. 2015); *United States* v. *Hall*, 610 F.3d 727, 743-744 (D.C. Cir. 2010). Indeed, apart from the Third Circuit's recent, divided en banc decision in *United States* v. *Nasir*, *supra*, petitioner has not identified a single decision from this Court or any other court that refuses to consider evidence in the record for purposes of plain-error review, simply because that evidence was not heard by the jury. See Br. in Opp. 13-14 (noting that some courts limit such consideration to the final requirement of plain-error relief); cf. *United States* v. *Medley*, 972 F.3d 399 (4th Cir. 2020), reh'g granted, 828 Fed. Appx. 923 (4th Cir. 2020) (granting rehearing to reconsider precedent that arguably precluded consideration of such evidence).

2. Petitioner is also mistaken in arguing that examining evidence not heard by the jury in deciding whether

to grant plain-error relief would "violate[] the constitutionally mandated role of the jury as factfinder, and the defendant's Fifth and Sixth Amendment rights." Br. 20 (capitalization altered; emphasis omitted); see *id.* at 20-32. As discussed above, see pp. 13-15, *supra*, a defendant has no constitutional entitlement to correction of forfeited errors. And a reviewing court in no way "usurp[s] the jury's role by effectively finding guilt," Pet. Br. 27, when it determines that a defendant's case does not satisfy the limitations on the relief that is afforded to unpreserved claims of error. Instead, the court makes an appropriately judicial determination about whether to extend discretionary relief to a defendant who, because of his forfeiture, has no right to receive it.

At bottom, petitioner's objection is not actually to the *scope* of plain-error review, but instead to the fact that it occurs at all. If the reviewing court's role were truly a "usurpation" of the jury's, it would equally be so—or perhaps even *more* so—if it were limited to examining only the evidence that was presented to the jury. But this Court's numerous precedents affirming convictions and sentences despite error in the trial conclusively foreclose any constitutional objection to a reviewing court's independent consideration of the record, in support of an inquiry fundamentally different in nature from what a jury does. Juries decide guilt and innocence; reviewing courts analyze the second-order question of what such a jury might have done in an error-free trial, or broader questions of systemic effect well outside a jury's mission or expertise.

Indeed, *Neder* specifically held, in the harmless-error context, that if a reviewing court determines that "the jury verdict would have been the same absent the

error," then denying relief on appeal "does *not* fundamentally undermine the purposes of the jury trial guarantee." *Neder*, 527 U.S. at 19 (emphasis added). That logic applies even more forcefully in the context of plain-error review of claims that a defendant failed properly to preserve, as even the dissent in *Neder* accepted. See *id.* at 34-35 (Scalia, J., concurring in part and dissenting in part). And it is especially forceful in the context of omitted jury instructions, where the defendant would have every incentive to stay silent and thereby deny the government notice that it should introduce evidence at trial proving the omitted requirement.

3. Petitioner is additionally mistaken in arguing (Br. 32-39) that record evidence not presented to the jury at trial should automatically be disregarded as unduly prejudicial or categorically unreliable. That argument cannot be squared with the Court's directive that courts consider "the whole record"—which necessarily includes the materials that petitioner would now bar—in reviewing the prejudicial effect of plea-colloquy errors. *Vonn*, 535 U.S. at 59. Petitioner offers no sound reason why the "'sentencing hearing'" and the "other portions * * * of the limited record made" in guilty-plea cases, such as the presentence report, *id.* at 59, 74 (citation omitted), become unduly prejudicial or categorically unreliable simply because the record also includes a trial.

Record information relevant to a *Rehaif* claim is especially unlikely to trigger petitioner's concerns. The most salient "'circumstantial evidence'" from which a defendant's "knowledge [of his felon status] can be inferred," *Rehaif*, 139 S. Ct. at 2198 (citation omitted), is the defendant's own criminal history—namely, the existence, classification, and severity of his prior offenses; the number and recency of his convictions; and the

length of the resulting sentences. The absence of such information from the trial record itself will typically be due to the defendant's choice to enter an *Old Chief* stipulation, and such a defendant is accordingly ill-positioned to object to its consideration on plain-error review. In any event, concerns about undue prejudice from a defendant's criminal history are particular to jurors, and do not extend to judges who regularly view such evidence and will not be "lure[d] * * * into a sequence of bad character reasoning." *Old Chief*, 519 U.S. at 185. And *Old Chief*—which rested on the assumed premise that knowledge of felon status was irrelevant to a felon-in-possession charge, see *id.* at 190-191—itself explicitly recognizes that the risk of undue prejudice would not normally bar even jurors themselves from hearing "evidence creating a coherent narrative of [a defendant's] thoughts and actions in perpetrating the offense," *id.* at 192. In light of *Rehaif*, criminal-history evidence is now plainly relevant to that narrative, and should be available to judges just as it would be to juries.

Criminal-history evidence in cases like this also typically enters the record in the sentencing context, where a number of safeguards ensure its reliability. It is sourced from judicial records—at least one of which was already the subject of an *Old Chief* stipulation or other proof beyond a reasonable doubt at trial of a prior conviction's existence—and collected systematically by the Probation Office for inclusion in the presentence investigation report prepared to aid the district court. See Fed. R. Crim. P. 32(c)-(d). This Court has "presume[d] that reports prepared by professional probation officers * * * are generally reliable," *Gardner* v. *Florida*, 430

U.S. 349, 359 (1977), and such a presumption surely undergirds the Federal Rules' requirement that federal probation officers prepare presentence reports in federal cases, see Fed. R. Crim. P. 32(c)-(d). Once the report is prepared, the defendant has a full and fair opportunity to contest its contents at his sentencing hearing. See Fed. R. Crim. P. 32(e)-(f) (requiring disclosure of presentence report to defendant and opportunity to lodge objections); *Gardner*, 430 U.S. at 360 ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision.").

Since 1983, Congress has "made disclosure of the report mandatory[,] * * * authorized disclosure to both the defendant and defense counsel[,] and * * * required that disclosure be made at a reasonable time before sentencing," *United States Department of Justice* v. *Julian*, 486 U.S. 1, 10 (1988)—requirements designed to "ensur[e] accuracy of sentencing information," Rule 32 advisory committee's note (1983 Amendment), 18 U.S.C. App. at 996 (Supp. IV 1986); Fed. R. Crim. P., 97 F.R.D. 245, 307 (1983). And Federal Rule of Criminal Procedure 32 now mandates that the sentencing court "verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report" and "allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(A) and (C). Petitioner contends (Br. 36-37) that looking to a presentence report in assessing whether to grant plain-error relief would be inconsistent with Rule 32(e), which generally

bars disclosure of the report before guilt has been adjudicated, on the grounds that its contents might be prejudicial. But for a defendant like petitioner who raises a *Rehaif* claim for the first time on appeal, the presentence report has already been incorporated into the record.

Defendants have a compelling motivation to verify in the district court that the Probation Office's recitation of their prior offenses did not overstate their criminal history. The presentence report generally does not collect information irrelevant to sentencing. Under the Sentencing Guidelines, "a defendant's criminal history category" is "one of the two variables that fixes the [recommended] sentencing range." *United States* v. *McGhee*, 651 F.3d 153, 155 (1st Cir. 2011). Calculation of the criminal-history score turns on not only the existence, but also the length, of the sentences actually received for a defendant's prior convictions. See Sentencing Guidelines § 4A1.1; *id.* § 4A1.1(a) (adding three points for "each prior sentence of imprisonment exceeding one year and one month"). And even beyond the Guidelines, Congress has required that district courts consider "the history and characteristics of the defendant" in crafting an appropriate sentence. 18 U.S.C. 3553(a)(1). Criminal history thus often bears heavily on the district court's exercise of its discretion under Section 3553(a). See, *e.g.*, *United States* v. *Rosales-Bruno*, 789 F.3d 1249, 1263 (11th Cir. 2015) ("Placing substantial weight on a defendant's criminal record is entirely consistent with [Section] 3553(a) because five of the factors it requires a court to consider are related to criminal history.").

The procedures and incentive to ensure an accurate criminal-history record for purposes of sentencing will

ordinarily ensure its reliability for purposes of plain-error review as well. And in cases that present substantial reason to doubt either the reliability of, or the inference to be drawn from, the criminal-history record at sentencing, a reviewing court could exercise its discretion to grant plain-error relief. That is exactly what happened in the Fourth Circuit decision that petitioner highlights (Br. 38), where a majority of the court concluded that the defendant "was prejudiced by the *Rehaif* error," *United States* v. *Lockhart*, 947 F.3d 187, 196 (4th Cir. 2020) (en banc), and a jury acquitted him on remand. The proceedings there do not support petitioner's request for a rule that would categorically preclude consideration on plain-error review of any evidence not presented at trial. Such a rule lacks the case-specific flexibility of this Court's consistent whole-record approach to plain-error review and would burden the system with costly remands that are all but certain to end up with the same result unless factors wholly unrelated to knowledge of felon status—*e.g.*, witnesses' faded memories, or a more lenient conclusion in an otherwise unwarranted resentencing—grant the defendant a windfall.

D. The Court Of Appeals Correctly Declined To Grant Plain-Error Relief In This Case

Because knowledge of felon status will only infrequently be reasonably contestable, courts of appeals regularly deny plain-error relief to defendants raising unpreserved *Rehaif* claims. See *Nasir*, 982 F.3d at 197 (Porter, J., concurring in part and dissenting in part) (reporting that in the 18 months following *Rehaif*, at least "140 appellate judges and 15 district judges sitting by designation * * * voted to uphold a felon-in-possession conviction on plain-error review of a *Rehaif* claim").

This case itself is one of the many in which plain-error relief is unjustified, and the court of appeals' denial of it was therefore correct.

As an initial matter, the evidence presented to the jury included petitioner's *Old Chief* stipulation "that, when he allegedly possessed a firearm, he already had been 'convicted in a court of a crime punishable by imprisonment for a term of more than one year, that is, a felony offense.'" J.A. 118. Although that stipulation does not speak directly to petitioner's knowledge of his felon status, a jury is free to bring into deliberations its "own general knowledge," *Head* v. *Hargrave*, 105 U.S. 45, 49 (1882), and its "commonsense understanding," *Parker* v. *Matthews*, 567 U.S. 37, 44 (2012) (per curiam), to infer that petitioner was aware of this important fact about himself. "Convicted felons typically know they're convicted felons." *United States* v. *Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020), petition for cert. pending, No. 20-5489 (filed Aug. 20, 2020). See *Rehaif*, 139 S. Ct. at 2209 (Alito, J., dissenting) ("Juries will rarely doubt that a defendant convicted of a felony has forgotten that experience."); *United States* v. *Gary*, 963 F.3d 420, 423 (4th Cir. 2020) (Wilkinson, J., concurring in the denial of rehearing en banc) ("Felony status is simply not the kind of thing that one forgets.").

Additional evidence presented to the jury undercuts the possibility that the jury would have failed to make that commonsense inference here. In addition to the stipulation, "[t]he government introduced evidence that [petitioner] concealed his firearm," "touched the right side of his waistband repeatedly" while speaking with police, and fled "[a]s soon as the officers stated they were going to pat him down for weapons," discarding

the weapon while he ran. J.A. 118. As the court of appeals correctly observed, "the jury could have inferred" from petitioner's conduct that he knew that he was "barred from possessing firearms," which would in turn imply the lesser showing that *Rehaif* requires—"that he knew he was a felon." J.A. 121. Indeed, the government emphasized to the jury petitioner's clear nervousness that the police would discover a gun on his person as crucial circumstantial evidence that he had in fact possessed the pistol—the disputed issue at trial that the jury necessarily found beyond a reasonable doubt. See J.A. 79 (summarizing evidence in closing statement that "all throughout those discussions, [petitioner] was being more or less compliant. * * * [I]t was not until Sergeant Nelson finally told him, 'You know what? * * * [W]e're going to do a patdown just to make sure we're safe'—that was the point at which * * * he took off running[.] * * * So something about being told that he was going to get patted down apparently changed his mind"). It would equally prove petitioner's knowledge that his possession was unlawful—which is even more than necessary under *Rehaif*.

To the extent that the trial evidence alone does not refute any attempt by petitioner to show prejudice and a serious effect on the integrity of judicial proceedings, see *Olano*, 507 U.S. at 734, 736, the rest of the record amply does so. In the presentence report, the Probation Office recounted that petitioner had already been convicted of at least five felony offenses at the time of his arrest in this case. See S.J.A. 7-15. It also reported that petitioner had served multiple terms of imprisonment for those offenses, including continuous terms of 36 months and 20 months. *Ibid.* That report also documents that petitioner was released from custody on his

latest felony conviction just six months before his arrest in this case. S.J.A. 15. And far from challenging the report's explanation of his criminal history, see J.A. 91, petitioner's attorney affirmatively validated it, referring at sentencing to the "lengthy sentences, which amount to almost six years," that petitioner had previously received. J.A. 96.

Had his criminal history been incorrect, petitioner had a strong incentive to dispute it. In calculating his advisory guidelines range, the Probation Office determined that petitioner's prior convictions resulted in a criminal history category of VI, S.J.A. 15, which nearly doubled his guidelines range from 97-121 months (had he fallen into the lowest criminal history category) to 168-210 months, S.J.A. 23, well above the 120-month statutory maximum. See Sentencing Guidelines Ch. 5, Pt. A (2016) (Sentencing Table); see also 18 U.S.C. 924(a)(2). During the sentencing hearing, moreover, the government recited aspects of petitioner's criminal history in advocating for a substantial sentence under the Section 3553(a) factors, J.A. 101-104. And the district court noted "the seriousness of the * * * criminal history that is brought to the sentencing process" in this case, J.A. 105, before imposing a statutory-maximum term of imprisonment, J.A. 108. The jury would likewise have considered the criminal history serious, and would not have been reasonably likely to conclude that petitioner was unaware of it when he possessed the gun that he discarded while fleeing from the officers. Petitioner does not meaningfully argue otherwise; indeed, to this day, he has neither contested his criminal history nor asserted that he was in fact unaware of his felon status.

On this record, the court of appeals was clearly correct in declining to grant petitioner plain-error relief on his unpreserved claims. "[D]iscretion under Rule 52(b) should be exercised 'sparingly,' and reserved for 'exceptional circumstances,'" especially where, as here, such relief would "require[] additional jury proceedings on remand." *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1909 (2018) (quoting *Jones* v. *United States*, 527 U.S. 373, 389 (1999) and *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). Petitioner's request for brand new proceedings in the district court, based on an aspect of proof that he did not timely assert and could not plausibly have contested, does not warrant that sort of extraordinary relief. Instead, the "real threat * * * to the 'fairness, integrity, and public reputation of judicial proceedings,'" *Cotton*, 535 U.S. at 634 (citation omitted), would come from granting petitioner relief that he does not deserve based on an inappropriately restricted view of the record in his case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
BENJAMIN W. SNYDER
Assistant to the Solicitor General
JOSHUA K. HANDELL
DAVID M. LIEBERMAN
Attorneys

MARCH 2021

APPENDIX

1. 18 U.S.C. 922(g) provides:

Unlawful acts

(g) 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;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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.

2. 18 U.S.C. 924(a)(2) provides:

Penalties

(2) 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.

3. Fed. R. Crim. P. 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.