No. 20-444

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ANDREW GARY

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a), is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 954 F.3d 194. The order of the court of appeals denying rehearing (Pet. App. 24a-32a) is reported at 963 F.3d 420.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2020. A petition for rehearing was denied on July 7, 2020. The petition for a writ of certiorari was filed on October 5, 2020, and granted on January 8, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent statutory provisions and rules are reprinted in the appendix to the petition for a writ of certiorari, Pet. App. 33a-35a, and the joint appendix, J.A. 96-98.

STATEMENT

Following a guilty plea in the United States District Court for the District of South Carolina, respondent was convicted on two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 3a. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals vacated and remanded. See Pet. App. 1a-23a.

1. On January 17, 2017, respondent was driving with his cousin when police officers pulled them over after seeing respondent run a red light. J.A. 53; Pet. App. 2a. Respondent volunteered that he was driving on a suspended license, and he was placed under arrest. *Ibid.* During an inventory search of his car, officers found a loaded gun and nine grams of marijuana. Pet. App. 2a. Respondent, who had several prior felony convictions, admitted to possessing the gun and was arrested for the South Carolina offense of possession of a firearm by a convicted felon. See J.A. 108-109, 130. He was later indicted by a state grand jury under a state statute that makes it "unlawful for anyone to carry about the person any handgun, whether concealed or not, except" in specified circumstances. S.C. Code Ann. § 16-23-20 (2015); see J.A. 11-19, 130.

Five months after that arrest, while respondent was out on bond, police officers on a routine patrol encountered him and the same cousin outside a motel room. Pet. App. 2a. The officers smelled marijuana as they

approached the men, who entered a car as the officers neared. *Ibid.* The officers observed that respondent's cousin had a marijuana cigarette in his lap. *Ibid.* Respondent and his cousin each consented to a personal search; officers found large amounts of cash on both respondent and his cousin, and a digital scale in his cousin's pocket. *Ibid.* The officers then obtained permission to search the car, in which they found a stolen firearm, ammunition, and a large amount of marijuana. *Id.* at 3a. Respondent admitted that the firearm was his. *Ibid.* He was arrested and charged under state law with possession of a stolen firearm, in violation of S.C. Code Ann. § 16-23-30(C) (2015). Pet. App. 3a; see J.A. 11, 16-19.

2. A federal grand jury in the District of South Carolina indicted respondent on two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 3a. The state charges were later dropped, and respondent elected to plead guilty to the two federal charges without a plea agreement. *Id.* at 3a & n.1.

During the plea colloquy required by Federal Rule of Criminal Procedure 11(b), the district court advised respondent about the rights that he would be waiving by pleading guilty. J.A. 36-39. The court explained, for example, that respondent would be entitled to a jury trial with the assistance of his attorney, at which respondent "would be presumed to be innocent," the government would have to prove its case "beyond a reasonable doubt," and respondent would have the right to "cross-examine the witnesses for the government" and to offer his own evidence. J.A. 36-37. The court confirmed that respondent nonetheless desired to plead

guilty by "acknowledg[ing] [his] guilt here in the courtroom under oath." J.A. 38-39.

The district court also detailed the charges against respondent. J.A. 40-41. It stated that if he proceeded to trial, the government would be required to prove four elements: (1) respondent had "been convicted of a crime punishable by imprisonment for a term exceeding one year"; (2) he then "possessed a firearm"; (3) the firearm had "travelled in interstate or foreign commerce"; and (4) respondent "did so knowingly; that is that [respondent] knew the item was a firearm and [his] possession of that firearm was voluntar[y] and intentional." Pet. App. 3a (citation omitted; second set of brackets in original); see J.A. 41-42. Consistent with the courts of appeals' uniform interpretation of the felon-in-possession offense at that time, the district court did not advise respondent that the government would also need to prove that he was aware that he was a felon. Pet. App. 3a; see *United States* v. *Langley*, 62 F.3d 602, 604-605 (4th Cir. 1995) (en banc) (holding that knowledge of status is not an element of an offense under 18 U.S.C. 922(g) and 924(a)(2)), cert. denied, 516 U.S. 1083 (1996), abrogated by *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019); see also *Rehaif*, 139 S. Ct. at 2195 (noting prior uniformity). The court explained that each count carried a maximum term of imprisonment of ten years. J.A. 42.

Following the district court's description of the charges, the prosecutor summarized the evidence supporting them. J.A. 53-55. She stated that with respect to each felon-in-possession count, respondent was admitting to possessing the firearm in question, that each firearm had traveled in interstate commerce, and that at the time of each arrest respondent had several prior

felony convictions for which he had not been pardoned. *Ibid.* Respondent agreed with the prosecutor's summary of the facts. J.A. 56.

The district court accepted respondent's plea. Pet. App. 3a.

3. The Probation Office's presentence report recounted that at the time of his offense conduct, respondent had at least seven prior felony convictions under South Carolina law. See J.A. 112-113, 116-128.

- In September 2009, respondent had been convicted on one count of third-degree burglary and two counts of second-degree burglary (for crimes that he had committed at different times). J.A. 116-121. He had been sentenced to a term of imprisonment "not to exceed 5 years," which was "suspended upon 2 years of probation." J.A. 116, 119.
- In October 2010, respondent had been convicted of breaking into a motor vehicle. J.A. 121-122. He had been sentenced to one year of imprisonment, "suspended upon the service of 6 months," and a year of probation. J.A. 121.
- In April 2014, respondent had been convicted of another second-degree burglary. J.A. 123-125. He had pleaded guilty to that offense after having been indicted for the greater offense of first-degree burglary "while having a prior record of two or more convictions for burglary or housebreaking." J.A. 124. He had been sentenced to an eight-year term of imprisonment and two years of probation, with the final five years of his prison sentence suspended upon his service of three years of incarceration (including time already served). J.A. 123.

- Finally, in November 2015, while still on probation for his 2014 burglary conviction, respondent had been convicted on two counts of second-degree assault and battery. J.A. 126-128. He had been sentenced to concurrent three-year terms of imprisonment on each count. *Ibid.* The state court had also revoked respondent's probation on the 2014 burglary conviction and imposed a further three-year prison sentence, to be served concurrently with the assault-and-battery sentences. J.A. 125.

All told, as a result of those seven felony convictions, respondent was sentenced to well over ten years of imprisonment. Although his terms of imprisonment were often suspended, he nonetheless spent considerable time in custody, including a continuous period of 691 days spent in custody for burglary. See Pet. App. 7a n.5. Respondent was in custody until June 1, 2016, approximately six months before his January 2017 state arrest for unlawfully possessing a firearm, which provided the basis for the first federal felon-in-possession count to which he ultimately pleaded guilty. J.A. 128.

Respondent did not dispute any of the facts in the presentence report about his prior convictions, and he acknowledged in his sentencing memorandum that he had been "aware that he was not supposed to have a weapon." J.A. 68; see *ibid.* (asserting that a lighter sentence was warranted because he "simply had [the weapon] for his protection"). Respondent likewise acknowledged during allocution that "I know I was wrong for having the firearm." J.A. 90. The district court sentenced respondent to concurrent terms of 84 months of imprisonment on each count. Pet. App. 3a.

4. Respondent appealed his sentence, but did not challenge the convictions themselves. While respondent's appeal was pending, this Court decided *Rehaif* v. *United States*, *supra*. In that decision, the Court concluded that the courts of appeals had erred in their interpretation of the mens rea required to prove unlawful firearm possession under 18 U.S.C. 922(g) and 924(a)(2). Abrogating the precedent of every circuit, the Court held that the government not only "must show that the defendant knew he possessed a firearm," but "also that he knew he had the relevant status," *e.g.*, that he was a felon, "when he possessed it." *Rehaif*, 139 S. Ct. at 2194; see *United States* v. *Lockhart*, 947 F.3d 187, 196 (4th Cir. 2020) (en banc) (recognizing abrogation).

Nearly four months later, respondent submitted a letter to the court of appeals under Federal Rule of Appellate Procedure 28(j) citing *Rehaif*. Although respondent had not previously challenged or sought to withdraw his guilty plea, either in the district court or in his opening or reply briefs on appeal, respondent asserted that *Rehaif* "is extremely relevant to his case" because his indictment had not alleged that he was aware of his status as a felon, and because he "was not informed of all the elements of the offenses of conviction at his plea colloquy." C.A. Doc. 36, at 1-2 (Oct. 9, 2019).

5. After inviting the parties to file supplemental briefs addressing the relevance of *Rehaif* to respondent's appeal, the court of appeals vacated his convictions and remanded to the district court for further proceedings. Pet. App. 1a-23a.

Because respondent had not challenged the validity of his plea in the district court, the court of appeals recognized that its review was subject to the plain-error

framework that this Court described in *United States* v. *Olano*, 507 U.S. 725 (1993). See Pet. App. 5a. The court of appeals explained that, under *Olano*, "a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights." *Ibid.* (citing *Olano*, 507 U.S. at 732). The court further recognized that even where a defendant makes all three showings, a court of appeals may correct the error only "if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Ibid.* (quoting *Olano*, 507 U.S. at 732).

The court of appeals addressed only respondent's claim of a defective plea colloquy and concluded that "a standalone *Rehaif* error requires automatic vacatur of a defendant's guilty plea" on plain-error review. Pet. App. 5a (brackets and citation omitted). The court took the view that omission of the knowledge-of-status advisement from the plea colloquy, in and of itself, conclusively established all four requirements for plain-error relief. See *ibid.* As to the first two plain-error requirements, the court accepted the government's concession that the district court had erred by not advising respondent that conviction for the charged offenses required proof of knowledge of his status as a felon, and that the error had become plain following this Court's decision in *Rehaif*. *Id.* at 8a-9a. And notwithstanding that "numerous circuits applying *Olano*'s plain error standard have determined that there is no effect on a defendant's substantial rights where the evidence shows that the defendant knew of his status as a prohibited person at the time of his gun possession," *id.* at 7a; see *id.* at 7a n.6 (collecting cases from seven other circuits), the court concluded that the other two requirements were satisfied even without such a showing.

The court of appeals recognized that as a general matter, "to establish that a Rule 11 error has affected substantial rights" under the third element of the plain-error test, "a defendant must 'show a reasonable probability that, but for the error, he would not have entered the plea and satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine the confidence in the outcome of the proceeding.'" Pet. App. 11a (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004)) (brackets, ellipsis, and internal quotation marks omitted). But the court characterized the particular error here as "structural" error and applied circuit precedent holding that structural error inherently satisfies the third requirement for plain-error relief, irrespective of whether the defendant can show case-specific prejudice. *Id.* at 16a; see *id.* at 15a-19a.

The court of appeals further concluded that the error here satisfied *Olano*'s fourth requirement—that "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *Olano*, 507 U.S. at 736 (citation omitted; brackets in original). See Pet. App. 19a-22a. The court declared that "justice is not *only* a result," and that "the integrity of our judicial process demands that each defendant who pleads guilty receive the process to which he is due." *Id.* at 20a, 22a. The court stated that it could not "envision a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, [it] would not exercise [its] discretion to recognize the error and grant relief." *Id.* at 22a.

6. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 24a-32a. Judge

Wilkinson, joined by Judges Niemeyer, Agee, Quattlebaum, and Rushing, explained that he "concur[red] in the denial of rehearing en banc for one reason and one reason only"—namely, that "[t]he panel's holding is so incorrect and on an issue of such importance that I think the Supreme Court should consider it promptly." *Id.* at 25a; see *id.* at 25a-32a.

The concurring judges disagreed with the panel's conclusion that a *Rehaif* error during the plea colloquy is "structural." They explained that "*Rehaif* error comes nowhere near th[e] level" of a structural error, which might "by itself invalidate[] the criminal proceeding," emphasizing that structural errors must be "*innately* infectious, necessarily impugning each part of a trial, rather than *potentially* consequential, depending on the facts and circumstances of a given case." Pet. App. 27a-28a. They observed that this Court "has plainly resisted the linkage between elements errors and structural error" and has, in particular, "assiduously resisted automatic vacatur" in the context of guilty pleas. *Id.* at 29a; see *id.* at 29a-30a (citing cases). The concurring judges therefore would have adhered to the approach set forth by this Court in *United States* v. *Dominguez Benitez*, *supra*, under which vacatur of a guilty plea based on an unpreserved claim of error in the plea colloquy is appropriate only when a defendant establishes a "reasonable probability" that, but for the error, he would not have entered the plea. 542 U.S. at 83; Pet. App. 29a-30a. And they lamented that the panel's contrary approach would erode the finality of guilty pleas and impose "immense" "costs to criminal justice" without material benefits, as "the vast majority

of defendants who will seek to take advantage of a structural *Rehaif* error are perfectly aware of their felony status." Pet. App. 30a-31a.

SUMMARY OF ARGUMENT

The Fourth Circuit erred in concluding that "a standalone *Rehaif* error requires automatic vacatur of a defendant's guilty plea" on plain-error review, even when the error had no practical effect. Pet. App. 5a (brackets and citation omitted). The court's decision cannot be squared with the Federal Rules of Criminal Procedure, this Court's precedents, practical experience, the understanding of every other circuit to address the issue, or common sense. This Court should reverse the decision below and make clear that a defendant cannot obtain relief on an unpreserved claim that a plea colloquy omitted the knowledge-of-status requirement announced in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), without the normal demonstration that the error was actually consequential.

A. Under Federal Rule of Criminal Procedure 52(b), a court may review an unpreserved claim only for "plain error." A defendant is entitled to relief on plain-error review only if he shows, *inter alia*, that the error "affected [his] substantial rights" and also "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted). Respondent, like most defendants with similar claims of *Rehaif* error, can make neither showing.

To demonstrate that an error during a plea colloquy affected his "substantial rights," a defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004). Respondent

has never made such a showing, and the facts of his case preclude him from doing so. Nor can he avoid the requirement to show such prejudice simply by framing his claim in constitutional terms. This Court has repeatedly emphasized that constitutional claims are subject to the same plain-error analysis as nonconstitutional claims, including the requirement to show case-specific prejudice. And the Court's precedents specifically addressing elements-related plea-colloquy errors confirm that the normal standards of review can and do apply in this context.

Respondent also has not and cannot make the independently required showing that the *Rehaif* error during his plea colloquy "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Marcus*, 560 U.S. at 262 (citation omitted). To the contrary, the record affirmatively refutes the existence of such an effect. The undisputed evidence in the district court established that respondent had at least seven prior felony convictions, had been sentenced to multiple terms of imprisonment longer than one year, and had served at least one continuous period of nearly two years in prison. As respondent informed the court, he "was aware that he was not supposed to have a weapon." J.A. 68. In these circumstances, it is vacating respondent's conviction, rather than affirming it, that would undermine the integrity and public reputation of judicial proceedings.

B. Respondent's and the court of appeals' rationales for avoiding the straightforward application of plain-error review are doctrinally and practically unsound. Contrary to respondent's belated suggestion, *Rehaif* errors are not categorically exempt from plain-error re-

view simply because this Court's decision in *Rehaif* abrogated uniform precedent in the circuits. This Court has specifically found plain-error review appropriate even when the weight of precedent was heavily against a defendant's legal argument at the time of the district-court proceedings, and every court of appeals—including the court below—has recognized that plain-error review applies in circumstances like this.

The Fourth Circuit's automatic-vacatur approach to plain-error review of *Rehaif* error in a plea colloquy, which is premised on labeling such errors as "structural," is similarly infirm. To begin with, this Court has classified only a very limited type of error as "structural," emphasizing that a structural error must affect the very "'framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (citation omitted). A discrete *Rehaif* error during a plea colloquy does not fit that description, and is instead similar to other elements-related errors that this Court has not deemed structural. In any event, even if a *Rehaif* error *were* structural, this Court has never held that the existence of a structural error invariably excuses a defendant from showing an effect on substantial rights in order to obtain plain-error relief, and such a holding would be unwarranted here. Finally, this Court has additionally made clear that even if an error is structural *and* deemed to affect substantial rights, the absence of a serious effect on judicial integrity—as is the case here—would in itself preclude plain-error relief.

The practical consequences of the Fourth Circuit's approach only underscore its doctrinal faults. As expe-

rience in the other circuits reflects, a *Rehaif* error during a plea colloquy typically makes no difference at all to a defendant's decision to plead guilty. In most cases—like this one—the record overwhelmingly establishes that the defendant was well aware of his own criminal record. And for the rare defendant who could demonstrate otherwise, the reasonable-probability standard provides an opportunity to obtain relief. By instead undoing *every* plea, irrespective of whether the error had any consequence for the proceedings, the Fourth Circuit's automatic-vacatur approach undermines the finality of guilty pleas, grants a windfall to undeserving defendants, and imposes substantial costs on the judicial system with no corresponding benefit. The plain-error rule exists precisely to foreclose such an approach, and the Court should reject that approach here.

ARGUMENT

A DEFENDANT IS NOT ENTITLED TO RELIEF ON AN UNPRESERVED CLAIM OF *REHAIF* ERROR IN A PLEA COLLOQUY UNLESS HE SHOWS CASE-SPECIFIC EFFECT AND LOSS OF JUDICIAL INTEGRITY

Like the vast majority of defendants with similar claims, respondent cannot identify any realistic way in which his guilty plea to felon-in-possession charges was affected or impugned by the district court's misdescription of the mens rea element of that crime. His claim accordingly does not warrant appellate relief under the plain-error standard that applies when such a claim is raised for the first time on appeal. Where a defendant has not shown a reasonable probability that he would in fact have gone to trial following an error-free colloquy, the misdescription did not "affect[] [his] substantial rights." *United States* v. *Olano*, 507 U.S. 725, 736

(1993). Nor can a defendant show that enforcing the ordinary preservation rules would "seriously [undermine] the fairness, integrity or public reputation of judicial proceedings," *ibid.* (citation omitted), when the record as a whole demonstrates that the defendant possessed the requisite knowledge that he was a felon. The Fourth Circuit's automatic-vacatur approach, which effectively excises those case-specific components from the plain-error standard, conflicts with this Court's precedent in multiple ways, defies common sense, and results in an unjustifiable windfall for defendants like respondent—whose gun possession followed numerous prior felony convictions and years in custody. The decision below should be reversed.

A. Well-Established Plain-Error Principles Foreclose Relief For Defendants Like Respondent Without A Showing Of Both Individualized Effect And Specific Injustice

Pursuant to Federal Rule of Criminal Procedure 52(b), "[w]hen a criminal defendant fails to raise an argument in the district court, an appellate court ordinarily may review the issue only for plain error." *Davis* v. *United States*, 140 S. Ct. 1060, 1061 (2020) (per curiam). As the court of appeals recognized (Pet. App. 5a), Rule 52(b) accordingly requires a defendant to satisfy the plain-error standard to obtain relief on an unpreserved claim that the district court's advisements during the plea colloquy omitted the knowledge-of-status element announced in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). Such a defendant satisfies the first two plain-error requirements—to show "an 'error'" that is "'clear or obvious'"—based on *Rehaif* itself. *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted); see *Henderson* v. *United States*, 568 U.S. 266, 269 (2013) (obviousness assessed at "the time of appellate review").

But a defendant like respondent, who cannot show that the omission prejudiced him or that his conviction reflects serious unfairness, cannot establish either of the remaining two case-specific plain-error requirements—that the error "affected [his] substantial rights" and also "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," *Marcus*, 560 U.S. at 262 (citation omitted).

1. The error in respondent's plea colloquy did not affect respondent's substantial rights because he has not demonstrated a reasonably probable effect on his plea decision

a. An appellate court's authority to set aside a criminal conviction based on an error typically "is tied in some way" to whether the error prejudiced the defendant. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004). Rule 52 codifies that approach by permitting 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 (citing *Kotteakos* v. *United States*, 328 U.S. 750 (1946)).

"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.*

To carry that burden, the defendant must show "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 and citation omitted). That requirement applies with particular force—indeed, perhaps even greater force—when a defendant seeks "reversal of his conviction after a guilty plea." *Id.* at 83. As this Court has explained, requiring such a showing in order to undo a plea both "respect[s] the particular importance of the finality of guilty pleas" and "reduce[s] wasteful reversals." *Id.* at 82. Thus, in that context, as in others, the defendant "must * * * satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 83 (citation omitted).

Specifically, the Court held in *United States* v. *Dominguez Benitez*, *supra*, that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11"—the federal rule governing pleas and plea colloquies—"must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. As all parties and the court of appeals agreed, the relevant error here occurred during respondent's plea colloquy when the district court informed him that a conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), requires proof that he knew of his possession of the firearm, without further informing respondent that he must also have known of his felon status. See Pet. App. 8a-9a. Accordingly, respondent's failure to allege, let alone demonstrate, that the mistake likely affected his

plea decision precluded the court of appeals from granting relief.

The *Dominguez Benitez* standard applies to respondent's claim of plea-colloquy error no matter whether he characterizes it as Rule 11 error or constitutional error. Many claims of Rule 11 error could be alternatively framed in constitutional terms. By design, Rule 11's requirements include, as well as supplement, constitutional requirements. See *United States* v. *Vonn*, 535 U.S. 55, 67 (2002); *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969); Fed. R. Crim. P. 11 advisory committee's note (1975 Enactment). As a result, some Rule 11(b) errors can also implicate a defendant's constitutional rights. In particular, because a "plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent,'" *Bousley* v. *United States*, 523 U.S. 614, 618 (1998) (citation omitted), a defendant with a Rule 11 claim may also claim constitutional error on the theory that he lacked "sufficient awareness of the relevant circumstances and likely consequences" of his plea, *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Constitutional framing of the claim at issue here, however, does not alter the applicable prejudice standard.

It is well-established that constitutional errors are subject to the normal strictures of plain-error review, including case-specific prejudice analysis. As this Court has repeatedly explained, "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure," including Rule 52(b). *Johnson* v. *United States*, 520 U.S. 461, 466 (1997); see, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991) (recognizing "that most constitutional errors can be harmless"); see also *Dominguez*

Benitez, 542 U.S. at 81 n.7. "[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988); see *id.* at 254 (holding "that a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)"). Courts therefore have "no authority" to make exceptions to Rule 52(b)'s plain-error requirements, even for constitutional claims. *Johnson*, 520 U.S. at 466.

b. This Court's precedents confirm that elements-related plea-colloquy errors are subject to the typical rules of appellate and collateral review even when they implicate a defendant's constitutional rights. In *Henderson* v. *Morgan*, 426 U.S. 637 (1976), for example, the Court considered prejudice in the context of a plea-colloquy error that was, if anything, more serious than the error at issue here—namely, the failure to inform a defendant that conviction for second-degree murder required proof that he intended to cause the victim's death. See *id.* at 644-647. The Court found that "intent is such a critical element of the offense of second-degree murder that notice of that element is required" under the Constitution. *Id.* at 647 n.18; see *ibid.* ("assum[ing]," without deciding, that constitutionally adequate "notice of the true nature, or substance, of a charge" does not "always require[] a description of every element of the offense"). The Court nonetheless "survey[ed] [the] factual record before vacating defendant's plea on the ground that he was misinformed as to a key element of the charge against him." Pet. App. 29a (Wilkinson, J., concurring in the denial of rehearing en banc); see *Henderson*, 426 U.S. at 641-647.

Specifically, the Court determined that the defendant's "unusually low mental capacity * * * forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder." *Henderson*, 426 U.S. at 646-647. In so doing, the Court necessarily indicated that an outcome-focused prejudice standard applied to such claims. The precise prejudice standard invoked in *Henderson*, which arose on review of a state court's affirmative grant of collateral relief and predates this Court's more modern precedents, is not identical to the plain-error standard later adopted in *Dominguez Benitez*. But it illustrates that, even when framed in constitutional terms, a challenge to a guilty plea that was entered without awareness of an element of the offense—even a critical one—does not automatically warrant relief.

The Court's decision in *Bousley* v. *United States*, *supra*, illustrates that same principle. See Pet. App. 29a (Wilkinson, J., concurring in the denial of rehearing en banc). In *Bousley*, the Court considered a circumstance where, as here, a defendant had pleaded guilty to an offense whose definition was subsequently narrowed by this Court. 523 U.S. at 616-618. The Court agreed that a defendant's guilty plea could be constitutionally invalid if "neither he, nor his counsel, nor the court correctly understood the essential elements of the crime," as the defendant claimed. *Id.* at 618. The Court nevertheless made clear that, where such a claim had been defaulted, a showing of case-specific prejudice was a necessary prerequisite to relief. See *id.* at 623. Because the case arose on collateral, rather than direct, review of a federal conviction, the Court required a much more robust

showing—namely, "actual innocence" of the offense, *ibid.*—than *Dominguez Benitez* requires under Rule 52(b). But the underlying principle—that relief is unwarranted in the absence of a case-specific demonstration of an effect on the outcome—is the same one that undergirds the more modest Rule 52(b) requirement. Cf. *Dominguez Benitez*, 542 U.S. at 83 n.9 (comparing direct and collateral review).

Respondent himself acknowledged the salience of *Bousley* in his brief in opposition to a writ of certiorari, and his attempt to distinguish it in fact does the opposite. See Br. in Opp. 21. Citing *Bousley* as an example of "a trial court simply misdescribing one of the elements of the offense, while advising the defendant of all the elements," he asserted without elaboration that the "error here is thus very different." *Ibid.* But the error here *was* "simply [a] misdescri[ption] [of] one of the elements of the offense"—namely, the misdescription of the knowledge element of the felon-in-possession offense as requiring knowledge of only possession rather than possession and felon status. *Ibid.*; see Pet. App. 3a. That error is the same in all relevant respects as the one in *Bousley*, where the court accepting the plea described the "use" element of 18 U.S.C. 924(c) (1988 & Supp. II 1990) as requiring only possession of a firearm rather than both possession and active employment. 523 U.S. at 617-618. As *Bousley* reflects, such an error does not provide a basis for relief unless the claimant makes some showing that it mattered.

c. The only plea-colloquy scenario in which this Court has suggested that a case-specific prejudice analysis would be unnecessary is when a proper plea colloquy is wholly absent—a scenario far afield of the much

more limited elements-focused errors at issue in *Henderson*, *Bousley*, and this case.

Specifically, the Court in *Dominguez Benitez* included a footnote contrasting the error at issue there with the extreme circumstances of *Boykin* v. *Alabama*, 395 U.S. 238 (1969), which considered the constitutionality of a completely uninformed plea. *Dominguez Benitez*, 542 U.S. at 84 n.10. In *Boykin*, the death-sentenced defendant pleaded guilty to multiple robberies only three days after counsel was appointed, in a plea hearing during which the court "asked no questions." 395 U.S. at 239-240. The Court in *Boykin* accordingly declined to "presume a waiver" of the defendant's numerous constitutional rights "from a silent record," and vacated the defendant's conviction. *Id.* at 243. The *Dominguez Benitez* footnote, in turn, disclaimed any "suggest[ion] that such a conviction"—namely, one in which "the record" of the defendant's plea "contain[ed] no evidence that a defendant knew of the rights he was putatively waiving"—"could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." 542 U.S. at 84 n.10.

But as the case-specific prejudice analysis of *Henderson* and *Bousley* makes clear, a discrete error in which a "court merely omit[ted] an element of the charge" is not akin to "a case where the court engages in no plea colloquy at all." *United States* v. *Trujillo*, 960 F.3d 1196, 1204 (10th Cir. 2020), petition for cert. pending, No. 20-6162 (filed Oct. 23, 2020). An appellate court evaluating a distinct elements-related error like a *Rehaif* error need not, as in *Boykin*, "presume" a nonexistent waiver of rights in order to affirm the conviction. 395 U.S. at 243. Instead, a reviewing court evaluating a *Rehaif* error need only consider whether one additional

piece of information—that the government would need to prove knowledge of felon status if the case went to trial—was reasonably likely to have made a difference in the defendant's decision to enter the existing waiver. As *Henderson* and *Bousley* reflect, the focused nature of that inquiry—which will typically be straightforward, see pp. 38-41, *infra*—illustrates that elements-based errors like *Rehaif* errors differ in kind from the substantially more fundamental error in *Boykin*. And respondent's failure even to attempt the requisite showing here foreclosed the court of appeals from granting relief.

2. The error in respondent's plea colloquy did not seriously affect the fairness, integrity, or public reputation of judicial proceedings

Even if omission of a knowledge-of-status advisement from a guilty-plea colloquy invariably satisfied the third, "substantial rights," requirement of plain-error review, relief would still be unwarranted unless the fourth plain-error requirement were satisfied as well. *Marcus*, 560 U.S. at 265. And in this case—as will be true in many cases—the record provides "no basis for concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 470 (brackets and internal quotation marks omitted).

Indeed, the record affirmatively refutes the existence of such an effect. The undisputed presentence report showed that before respondent's arrests with firearms in 2017, he had been convicted of at least seven felonies on four prior occasions, sentenced to terms of well over a year of imprisonment several times (with some suspended), and incarcerated for multiple years—including, at one point, for 691 consecutive days—for

his burglary and assault and battery convictions. See pp. 5-6, *supra*; Pet. App. 7a n.5. In addition, the most recent release from incarceration was only six months before the unlawful-firearm-possession arrest underlying the first count in this case, with the second arrest only five months later. See pp. 2, 6, *supra*. Respondent could not have realistically hoped to persuade a jury that he had forgotten or profoundly misunderstood all of those facts, and nothing about holding him to his plea is unfair. As he acknowledged in his sentencing memorandum, he "was aware that he was not supposed to have a weapon." J.A. 68. In these circumstances, "[t]he real threat" to the fairness and integrity of judicial proceedings, *United States* v. *Cotton*, 535 U.S. 625, 634 (2002), would be to grant relief.

B. Granting Automatic Vacatur Based On Unpreserved Claims Of Plea-Colloquy *Rehaif* Error Is Doctrinally And Practically Unsound

Under the well-established approach to plain-error review, which every circuit other than the Fourth Circuit has followed in addressing an unpreserved claim of *Rehaif* error in a plea colloquy,[*] this is a straightforward case for denial of relief. Respondent and the court

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[*] *E.g.*, *United States* v. *Burghardt*, 939 F.3d 397, 403-405 (1st Cir. 2019), cert. denied, 140 S. Ct. 2550 (2020); *United States* v. *Balde*, 943 F.3d 73, 97 (2d Cir. 2019); *United States* v. *Sanabria-Robreno*, 819 Fed. Appx. 80, 82-83 (3d Cir. 2020), petition for cert. pending, No. 20-6610 (filed Dec. 3, 2020); *United States* v. *Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020), petition for cert. pending, No. 20-5489 (filed Aug. 20, 2020); *United States* v. *Hobbs*, 953 F.3d 853, 857-858 (6th Cir. 2020), petition for cert. pending, No. 20-171 (filed Aug. 13, 2020); *United States* v. *Williams*, 946 F.3d 968, 973-975 (7th Cir. 2020); *United States* v. *Coleman*, 961 F.3d 1024, 1028-

of appeals can avoid that result only through an automatic (or, at least, near-automatic) vacatur rule for all *Rehaif* errors. Not only are their efforts to support such a rule doctrinally infirm, but their approach would produce an untenable regime in which relief is uniformly granted for errors that in reality are unlikely to have affected many convictions.

1. **Rehaif** ***error is not categorically exempt from plain-error review***

Notwithstanding the court of appeals' correct recognition that respondent's unpreserved claim of *Rehaif* error was subject to plain-error review, see Pet. App. 5a, respondent has belatedly suggested otherwise. In his brief in opposition to the petition for a writ of certiorari, respondent contended (at 10) for the first time that plain-error review "should not apply under the circumstances here at all," because the courts of appeals had unanimously rejected a knowledge-of-status requirement prior to *Rehaif*. See Br. in Opp. 11-14. That novel argument lacks any meaningful support in this Court's precedent or lower-court authority.

In *Johnson* v. *United States*, *supra*, this Court found plain-error review appropriate even though, at the time of trial, "near-uniform precedent both from this Court and from the Courts of Appeals" was contrary to the defendant's legal argument. 520 U.S. at 467-468. Following *Johnson*, the courts of appeals have consistently rejected arguments that plain-error review is inapplicable where circuit precedent would have foreclosed the un-

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1029 (8th Cir. 2020), petition for cert. pending, No. 20-6714 (filed Dec. 18, 2020); *United States* v. *Espinoza*, 816 Fed. Appx. 82, 84 (9th Cir. 2020), petition for cert. pending, No. 20-6583 (filed Dec. 3, 2020); *Trujillo,* 960 F.3d at 1201-1203 (10th Cir.); *United States* v. *Bates*, 960 F.3d 1278, 1296 (11th Cir. 2020).

preserved claim. See, *e.g.*, *United States* v. *Johnson*, 979 F.3d 632, 637 (9th Cir. 2020); *United States* v. *Hughes*, 401 F.3d 540, 547-548 (4th Cir. 2005); *United States* v. *Knoll*, 116 F.3d 994, 1000 (2d Cir. 1997), cert. denied, 522 U.S. 1118 (1998).

Respondent argues (Br. in Opp. 14) that a different approach is necessary when that circuit precedent accords with uniform precedent in other circuits, on the theory that raising a claim in such circumstances would truly be futile. But *Rehaif* itself demonstrates otherwise, and the *Rehaif* petitioner was not alone in raising the contention on which he ultimately prevailed. See, *e.g.*, D. Ct. Doc. 59, at 5-7, *United States* v. *Sifuentes*, No. 18-CR-111 (N.D. Tex. Dec. 14, 2018) (motion to dismiss indictment, filed before this Court granted the writ of certiorari in *Rehaif*, arguing that felon-in-possession statute required proof of knowledge of felon status). Respondent has identified no court that has accepted his proposed limitation on plain-error review, relying instead on decisions finding that a defendant did not need to *re*assert a claim after it was initially rejected by the district court in order to preserve it for appeal. Br. in Opp. 11-12; see, *e.g.*, *United States* v. *Kyle*, 734 F.3d 956, 962 n.3 (9th Cir. 2013) (collecting such cases). Those decisions do not support the unprecedented plain-error exception, for a wholly unmentioned claim, that respondent seeks here.

Respondent errs in contending (Br. in Opp. 13) that this Court "established a similar futility exception in an analogous area of law" in *Reed* v. *Ross*, 468 U.S. 1 (1984). In *Reed*, this Court held that a state prisoner on collateral review can establish "cause," for purposes of excusing failure to comply with a state rule requiring exhaustion of claims, by showing that the unpreserved

claim had "no reasonable basis in existing law" at the time of the state-court proceedings. *Id.* at 15; but see *Bousley*, 523 U.S. at 623 ("[F]utility cannot constitute cause if it means simply that a claim was 'unacceptable to [a] particular court at [a] particular time.'") (citation omitted). At the same time, *Reed* recognized that a prisoner seeking to present such an unpreserved claim needed to make a *separate* showing of "actual prejudice." 468 U.S. at 11-12 (citations omitted). It is that latter aspect of the inquiry—which respondent does not discuss—that would be analogous to the issue here, involving the case-specific third and fourth components of plain-error review. See *Henderson*, 568 U.S. at 278 (emphasizing, in the context of considering an error that became plain only due to intervening case law, that the third and fourth requirements of plain-error review continue to impose "screening criteria" for relief).

Respondent's effort to entirely exempt *Rehaif* error from Rule 52(b) also cannot be squared with this Court's "repeated[] caution[s] that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (citation omitted; third set of brackets in original). As the Court has made clear, "[e]ven less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which [the Court] ha[s] no authority to make." *Johnson*, 520 U.S. at 466. And without such an exception, respondent cannot establish any entitlement to vacate his conviction.

2. Rehaif *error is not exempt from the normal plain-error requirements on the theory that it is "structural"*

The Fourth Circuit attempted to justify its automatic-vacatur approach by labeling *Rehaif* error as "structural." See Pet. App. 19a. That rationale is flawed in three independent respects. *Rehaif* errors are not structural; an error's classification as "structural" does not, in any event, suffice to establish the third plain-error requirement; and even if *Rehaif* errors did invariably satisfy that requirement, the fourth plain-error-review requirement would nevertheless apply.

a. Rehaif *error is not structural*

As every court of appeals aside from the Fourth Circuit to address the question has recognized, a *Rehaif* error is not "structural." See *United States* v. *Patrone*, 985 F.3d 81, 85 (1st Cir. 2021); *United States* v. *Lavalais*, 960 F.3d 180, 187-188 (5th Cir. 2020), petition for cert. pending, No. 20-5489 (filed Aug. 20, 2020); *United States* v. *Watson*, 820 Fed. Appx. 397, 400-401 (6th Cir. 2020), petition for cert. pending, No. 20-6109 (filed Oct. 14, 2020); *United States* v. *Triggs*, 963 F.3d 710, 714 (7th Cir. 2020); *United States* v. *Coleman*, 961 F.3d 1024, 1028-1030 (8th Cir. 2020), petition for cert. pending, No. 20-6714 (filed Dec. 18, 2020); *Trujillo*, 960 F.3d at 1202-1203 (10th Cir.); *United States* v. *Scott*, 828 Fed. Appx. 568, 571-572 (11th Cir. 2020) (per curiam).

i. A "structural error" is an error that "'affects the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (brackets and citation omitted). Most constitutional errors, even when preserved in the trial court, can be disregarded where "the government can show 'beyond a reasonable doubt that the error complained of did not

contribute to the verdict obtained.'" *Ibid.* (citation omitted). But structural errors are so different in kind that they cannot "be deemed harmless beyond a reasonable doubt." *Ibid.*

This Court has found structural errors "only in a 'very limited class of cases,'" *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted), and has explained that "'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred' are not 'structural errors,'" *Marcus*, 560 U.S. at 265 (citation omitted). The limited class of structural errors—which includes, for example, denial of counsel of choice, denial of self-representation, denial of a public trial, and denial of a reasonable-doubt instruction, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006)—does not include the misdescription or omission of an offense element during a plea colloquy.

As *Henderson* and other precedents illustrate, this Court has instead treated such errors in the same way that it treats nearly all errors—as requiring an effect on the outcome as a prerequisite for relief. See pp. 19-23, *supra*. In *Dominguez Benitez*, for example, the Court observed that the erroneous omission of one of the plea-colloquy warnings required by Rule 11 (that the defendant would be unable to withdraw his plea if he was dissatisfied with his sentence) is not even "colorably structural." 542 U.S. at 81 n.6; see *id.* at 82-83. The Court has likewise found review for prejudicial effect—namely, a reasonably probable effect on the plea—appropriate for violation of the bar on judicial participation in plea negotiations. See *United States* v. *Davila*, 569 U.S. 597, 605, 611 (2013). And it has simi-

larly found plain-error review appropriate in the context of a failure to advise the defendant that he would be entitled to the assistance of counsel if he proceeded to trial. See *Vonn*, 535 U.S. at 60.

The Court did not view all of those errors as constitutional in nature. See *Davila*, 569 U.S. at 610; *Dominguez Benitez*, 542 U.S. at 82. But this Court long ago "adopted the general rule that a constitutional error does not automatically require reversal of a conviction." *Weaver*, 137 S. Ct. at 1907 (quoting *Fulminante*, 499 U.S. at 306); see *Chapman* v. *California*, 386 U.S. 18 (1967). And as particularly relevant here, the Court has specifically held that harmless-error review applies even to the omission of an offense element from jury instructions at trial. See *Neder*, 527 U.S. at 8-20. "Indeed, time and again, the Court has applied harmless error review to elements errors." Pet. App. 29a (Wilkinson, J., concurring in the denial of rehearing en banc); see *Marcus*, 560 U.S. at 264 (collecting cases); see, *e.g.*, *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008) (per curiam); *Yates* v. *Evatt*, 500 U.S. 391 (1991); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam); *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Rose* v. *Clark*, 478 U.S. 570 (1986). Like *Henderson* and *Bousley*, those decisions confirm that a misdescription of the elements of an offense does not automatically render a conviction infirm.

ii. Contrary to the court of appeals' conclusion, Pet. App. 15a-19a, none of the features that sometimes justify classifying an error as "structural" is present here. As with most other plea-colloquy errors, this is not a circumstance where "the effects of the error are simply too hard to measure," "the error always results in fundamental unfairness," or "the right at issue is not de-

signed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908.

First, the likely effect on the defendant's plea decision of omitting an advisement of an offense element can readily be measured by (among other things) looking to the "government's evidence," *Trujillo*, 960 F.3d at 1207, the "defendant's admissions," *ibid.*, and "[t]he benefit received by the defendant from pleading," *United States* v. *Burghardt*, 939 F.3d 397, 405 (1st Cir. 2019), cert. denied, 140 S. Ct. 2550 (2020). See *Weaver*, 137 S. Ct. at 1917 (Breyer, J., dissenting) (emphasizing that "*all* structural errors * * * have features that make them 'defy analysis by "harmless-error" standards'") (citation omitted). As this Court has explained, an appellate court reviews the entire record—not just the plea colloquy—to measure the prejudicial effect of an omission from the colloquy. See *Vonn*, 535 U.S. at 75-76. In a case like this one, that record includes the undisputed presentence report and the defendant's (not uncommon) admission that he "was aware that he was not supposed to have a weapon," J.A. 68. Even in cases where the record is more equivocal, the standard of review—under which the defendant must show a reasonable probability that the error affected his plea, see *Dominguez Benitez*, 542 U.S. at 82—is a familiar and readily applicable one.

Courts of appeals other than the Fourth Circuit have regularly been able to apply that standard to unpreserved claims of *Rehaif* error in a plea colloquy. See, *e.g.*, *Trujillo*, 960 F.3d at 1207. If anything, measuring the effect of an omitted advisement about the knowledge-of-status requirement will typically be *easier* than evaluating the effect of other misadvisements

for which a case-specific prejudice analysis is required. See *Puckett*, 556 U.S. at 141 (observing that error was not structural where, *inter alia*, the "'difficulty of assessing the effect'" was "no greater" than other errors "routinely subject to harmlessness review") (citation omitted). The inquiry into the effect of the error in *Dominguez Benitez* itself, for example—omission of an advisement about the circumstances allowing for plea withdrawal—is substantially more dependent on a defendant's own subjective priorities than the evidence-focused inquiry here. See 542 U.S. at 83-84; see also *Davila*, 569 U.S. at 605, 611 (requiring prejudice analysis for judicial participation in plea negotiations); *Vonn*, 535 U.S. at 60 (requiring plain-error review for failure to advise defendant about right to counsel at trial).

Second, *Rehaif* error in a plea colloquy does not "always result[] in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Instead, the "kind and degree of harm that [*Rehaif*] errors create can * * * vary" depending on the facts of each case and the record before the court of appeals. *Marcus*, 560 U.S. at 265. While it is possible to "imagine a scenario where failure to advise a defendant of the elements of a crime *could* render a proceeding unfair"—as it did in *Henderson*—it "does not *necessarily* or *fundamentally* do so," and therefore does not qualify as structural error. *Trujillo*, 960 F.3d at 1207. Applying the *Dominguez Benitez* standard thus adequately guards against potential unfairness. A defendant who cannot show a reasonable probability that an advisement about knowledge of status would have led him to insist on a trial has no more basis to complain of "unfairness"—let alone "fundamental unfairness"—than any other defendant whose plea colloquy was incomplete. See, *e.g.*, *Lavalais*, 960 F.3d at 188 ("We see

nothing unfair about affirming [a defendant's] conviction when the record contains substantial evidence that he knew of his felon status.") (citation omitted; brackets in original); cf. *Neder*, 527 U.S. at 9 ("Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair.").

Finally, a *Rehaif* error during a plea colloquy does not infringe on a defendant's "autonomy" interest in ensuring that he alone decides whether to plead guilty. Pet. App. 16a. A defendant's autonomy right "to make his own choices about the proper way to protect his own liberty" in deciding whether to concede guilt overall, see *Weaver*, 137 S. Ct. at 1907-1908, is not implicated here. The choice to plead guilty does not become someone else's choice simply because the colloquy was deficient. This Court's decisions have accordingly drawn a clear distinction between elements-based errors like the one at issue here and errors that in fact infringe on the defendant's ability to choose his own path. See *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1510 (2018) (distinguishing an error arising from a lawyer's decision to concede guilt over his client's objection from a "strategic dispute[] about whether to concede an element of a charged offense"); *Bousley*, 523 U.S. at 621-622 (distinguishing between "a claim that a plea of guilty had been coerced by threats made by a Government agent" and a claim that a plea "was not intelligent because the information provided him by the District Court at his plea colloquy was erroneous").

b. An unpreserved Rehaif *error would be subject to the third plain-error requirement even if it were structural*

Even if the error here *were* structural, that would not excuse respondent from satisfying the requirement that a defendant show an effect on substantial rights in order to obtain plain-error relief. This Court has held that structural errors warrant reversal "without regard to the mistake's effect on the proceeding" in the context of "*preserved* error." *Dominguez Benitez*, 542 U.S. at 81 (emphasis added). But it has "declined to resolve whether 'structural' errors * * * automatically satisfy the third prong of the plain-error test" where the error was not preserved. *Puckett*, 556 U.S. at 140 (citation omitted). If it is necessary to resolve that question in this case, then the answer, at least as to *Rehaif* errors in a plea colloquy, should be no.

"Despite its name, the term 'structural error' carries with it no talismanic significance as a doctrinal matter." *Weaver*, 137 S. Ct. at 1910. Instead, giving effect to the "structural error" label in a new context, like plain-error review, requires an analysis of "the systemic costs of remedying the error" at issue. *Id.* at 1912. Thus, in *Weaver* v. *Massachusetts*, *supra*, this Court required a showing of prejudice for a defendant pursuing an unpreserved claim of structural error (the deprivation of the right to a public trial) in the context of an ineffective-assistance-of-counsel claim raised on collateral review. *Id.* at 1913-1914. The Court explained that, notwithstanding the undisputedly structural nature of the error, "the costs and uncertainties" of requiring a new trial were high and the "finality interest is more at risk," justifying the imposition of the normal prejudice standard. *Id.* at 1912; see *Puckett*, 556 U.S.

at 141-142 (requiring prejudice analysis in plain-error context for error that, while not structural, would not require harmless-error analysis if preserved).

Likewise here, the many systemic benefits of guilty pleas—including prompt resolution of criminal charges, conservation of judicial and prosecutorial resources, and the potential for more favorable sentencing terms —"can be secured * * * only if dispositions by guilty plea are accorded a great measure of finality." *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977); see *Dominguez Benitez*, 542 U.S. at 82 (noting "the particular importance of the finality of guilty pleas"). As detailed further below, see Pt. B.3., *infra*, undoing the convictions of felon-in-possession defendants who cannot show that *Rehaif* would have affected their plea would impose substantial and unjustified burdens on the judicial system. In particular, the primary effect would simply be to require new proceedings—if they are even possible—whose outcome either will be the same, or will differ only for reasons unrelated to knowledge of felon status.

As this Court has previously emphasized in the context of a structural-error determination, because "the life of the law has not been logic but experience," it need not simply "stand back and see what would be accomplished by" allowing relief for a nonprejudicial error. *Neder*, 527 U.S. at 15 (citing O. W. Holmes, *The Common Law* 1 (1881)). And nothing in this Court's precedents requires it to do so here, where common sense dictates otherwise.

c. The fourth requirement of plain-error review applies to structural errors and precludes relief here

Finally, even if the error here were structural, and even if it automatically satisfied the substantial-rights component of the plain-error test, that still would not support an automatic-vacatur rule. Instead, this Court has twice made clear that even assuming that an error were both structural and automatically affecting substantial rights, the fourth plain-error requirement—which requires that "the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Marcus*, 560 U.S. at 265 (citation and internal quotation marks omitted)—can by itself preclude relief.

In *Johnson*, a defendant who had not preserved his objection to the omission of an offense element from the jury instructions argued that the error was structural and automatically satisfied the third plain-error requirement. 520 U.S. at 468-469. Although the Court would hold in a later case that such an error is not structural, see *Neder*, 527 U.S. at 8-20, it assumed away that issue in *Johnson* and held that relief was in any event foreclosed by the fourth plain-error requirement, see 520 U.S. at 469-470. Noting the "'overwhelming'" and "essentially uncontroverted" evidence supporting the offense element that had been omitted, the Court found "no basis for concluding that the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 470 (brackets and citation omitted). The Court subsequently followed a similar course in relying on the fourth plain-error requirement to deny relief in *United States* v. *Cotton*, *supra*, where the defendant claimed that the omission of an allegation

of drug quantity from an indictment was structural error and inherently prejudicial. 535 U.S. at 633-634.

The court of appeals here, in contrast, essentially excised the fourth plain-error requirement altogether for unpreserved claims of *Rehaif* error in a plea colloquy. Although it nominally acknowledged that the third and fourth requirements are distinct, its holding on the latter was premised on the same process-based rationale that undergirded its structural-error holding. Pet. App. 19a-22a. "We cannot envision," the court stated, "a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, we would not exercise our discretion to recognize the error and grant relief." *Id.* at 22a. As a result, while this Court has emphasized that the fourth plain-error requirement "is meant to be applied on a case-specific and fact-intensive basis," *Puckett*, 556 U.S. at 142, the court of appeals did not meaningfully examine the record in this case at all.

The court of appeals thereby eliminated the fact-specific analysis that this Court has identified as essential to preserving a balance between efficiency and fairness in evaluating unpreserved claims. See *Puckett*, 556 U.S. at 135. In its place, the court of appeals adopted a "*per se* approach to plain-error review" that this Court has repeatedly emphasized "is flawed." *Id.* at 142 (quoting *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985)). This very case puts those flaws into stark relief. As previously explained, see pp. 23-24, *supra*, the facts here do not call into question that respondent's convictions rest on the unlawful possession of a firearm when he not only was, but knew that he was, a felon. No principle of fairness requires undoing his conviction. To the contrary,

in these circumstances, the vacatur of respondent's conviction would be "so ludicrous as itself to compromise the public reputation of judicial proceedings." *Puckett*, 556 U.S. at 143.

3. Automatic vacatur of pleas based on* Rehaif *error in the colloquy would produce unjustifiable results

The practical consequences of a *Rehaif* plea-colloquy error confirm that it can, and should, be subject to case-specific analysis under the third and fourth plain-error requirements. In most cases, a district court's omission of an advisement that a conviction for possessing a firearm as a felon requires proof that the defendant knew his felon status is highly unlikely to have made any difference to the defendant's plea decision. The predominant result of disregarding the substantial-rights and judicial-integrity requirements for plain-error relief would therefore be to grant undeserving defendants an unjustifiable windfall that would impose substantial burdens on the judicial system.

a. "Convicted felons typically know they're convicted felons." *Lavalais*, 960 F.3d at 184. And a jury, which can 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), is likely to recognize that someone convicted of a felony knew about it. 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."); Pet. App. 31a ("Felony status is simply not the kind of thing that one forgets.") (Wilkinson, J., concurring in the denial of rehearing en banc).

Although it is conceivable that a defendant who previously received a sentence of less than a year might be

unaware that a longer sentence was possible, see *Rehaif*, 139 S. Ct. at 2198, the various stages of the criminal process that led to the earlier conviction—including arraignment, plea or trial, and sentencing—and consultations with counsel during those proceedings will typically have provided ample notice of the maximum sentence. Accordingly, a defendant who subsequently is willing to admit all of the other elements of a felon-in-possession charge—including the fact of his felon status—will rarely view the knowledge-of-status element as a reason to go to trial. Indeed, defendants who do go to trial on felon-in-possession charges both before and after *Rehaif* have regularly chosen "to concede the fact of the prior conviction" pursuant to *Old Chief* v. *United States*, 519 U.S. 172, 174 (1997), reasonably electing to avoid the risk of focusing their trial on their prior felonies or time spent incarcerated.

b. This case exemplifies the severe disconnect between an automatic-vacatur approach and the practical realities of felon-in-possession cases. Respondent had at least *seven* prior felony convictions, which were the product of four separate state proceedings, and he had been incarcerated for well over one year, both in aggregate and in one continuous stretch. See pp. 5-6, *supra*; Pet. App. 7a n.5. Respondent has never stated that he was in fact unaware he was a felon or that his plea decision would have differed if the district court had advised him of the knowledge-of-status requirement; instead, the most he could argue in his brief opposing a writ of certiorari was that none of the individual pieces of evidence offered by the government "definitively establish[ed]" that he knew he was a felon. Br. in Opp. 15-17; see *Shinn* v. *Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) ("A reasonable probability means a 'substantial,'

not just 'conceivable,' likelihood of a different result.") (citation omitted). And even if respondent were now to suggest he would have gone to trial, a "*post hoc* assertion[]" that he would in fact have elected to argue to a jury that he had forgotten his felon status would be insufficient to warrant relief in these circumstances. See *Lee* v. *United States*, 137 S. Ct. 1958, 1967 (2017).

Respondent's case is far from atypical. Other circuits have regularly confronted similar circumstances and found that a discrete *Rehaif* error does not warrant undoing the defendant's guilty plea. See, *e.g.*, *Sanabria-Robreno*, 819 Fed. Appx. at 83 (defendant served more than one year in prison for state drug offenses, before which he had "signed a form acknowledging that the maximum penalties for the crimes were between seven and fifteen years of imprisonment"); *United States* v. *Dowthard*, 948 F.3d 814, 818 (7th Cir. 2020) (defendant "has offered us no reason to believe he might not have" known about his status in light of the fact that he previously served more than one year in prison, "the sheer number of his other convictions," and his failure to "assert[]—in his briefs or during oral argument—that he would have insisted on going to trial (or held out for a better deal)"); *United States* v. *Sanchez*, 983 F.3d 1151, 1165 (10th Cir. 2020) (defendant, *inter alia*, "received three sentences longer than a year * * * [p]rior to his plea"); *United States* v. *Stacy*, 824 Fed. Appx. 1008, 1011 (11th Cir. 2020) (per curiam) (defendant "received multiple sentences of more than one year of imprisonment for serious felonies—including attempted murder, robbery, and attempted carjacking" and "was released from [a] prison sentence [for which he had served four

and a half years] less than two months before possessing the loaded firearm at issue here"), petition for cert. pending, No. 20-6291 (filed Nov. 6, 2020).

It is also not uncommon, for example, for a felon-in-possession defendant to have previously been convicted under state or federal law for possession of a firearm as a felon, and that "criminal history * * * undoubtedly * * * provide[s] sufficient evidence to prove that [a defendant] knew his status." *United States* v. *Caudle*, 968 F.3d 916, 922 (8th Cir. 2020). And felon-in-possession defendants also have often served lengthy sentences for their prior convictions, demonstrating in a particularly vivid manner that they were convicted for "a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g)(1). In *United States* v. *Stokeling*, 798 Fed. Appx. 443, 445 (11th Cir. 2020) (per curiam), petition for cert. pending, No. 20-5157 (filed July 9, 2020), for instance, the defendant had previously spent 12 years in prison and acknowledged that fact in his plea colloquy. To reverse felon-in-possession convictions for unpreserved *Rehaif* error in such circumstances would divorce the law from reality.

c. "For those very few [defendants] who claim plausibly to be unaware of their felony status, the reasonable probability standard in *Dominguez-Benitez* stands ready to pick them up" and allow for plain-error relief. Pet. App. 31a (Wilkinson, J., concurring in the denial of rehearing en banc). Circuits following the rule of *Dominguez Benitez* have thus granted plain-error relief to defendants whose atypical circumstances have been deemed sufficient to show case-specific prejudice. See, *e.g.*, *United States* v. *Guzmán-Merced*, 984 F.3d 18, 20 (1st Cir. 2020) (defendant "did not serve even a day in prison for his prior offenses," was only 18 years old

at the time of his prior convictions, illegally possessed a firearm four years later, and had "learning disabilities"). But this Court has emphasized that "[m]eeting all four" plain-error requirements is "difficult, 'as it should be,'" *Puckett*, 556 U.S. at 135 (citation omitted), and this Court exercises its power to grant plain-error relief "sparingly," *Jones* v. *United States*, 527 U.S. 373, 389 (1999). The court of appeals' automatic-vacatur approach would do precisely the opposite, in a context in which it is especially unwarranted.

Even if cabined only to *Rehaif* errors, automatic relief would impose a considerable and unjustified burden on the judicial system. The felon-in-possession offense is one of the most frequently prosecuted federal crimes, and a significant number of convictions are obtained by guilty plea. See Pet. App. 25a (Wilkinson, J., concurring in the denial of rehearing en banc) (observing that "[m]any, many cases await resolution" of the question here); see also *Rehaif*, 139 S. Ct. at 2212-2213 (Alito, J., dissenting); U.S. Sent. Comm'n, *Quick Facts, Felon in Possession of a Firearm*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf (reporting that approximately 10% of cases reported to the Sentencing Commission in Fiscal Year 2019 involved felon-in-possession convictions).

A survey of the U.S. Attorneys' Offices within the Fourth Circuit indicates that in that circuit alone, plea-colloquy *Rehaif* errors are at issue in more than 80 pending appeals, many of which have been stayed pending a final decision in this case. The numerous decisions involving this issue in the courts of appeals—and the more than two dozen pending petitions raising the question in this Court—likewise speak to the frequency with

which the issue has arisen. And many of the defendants in those cases, like respondent here, either pleaded guilty without an agreement or otherwise do not have applicable appeal waivers.

Contrary to respondent's suggestion (Br. in Opp. 9), the implications of granting relief in every case that presents this issue are not limited solely to a series of mechanical reaffirmations of the same guilty plea that the defendant previously entered. If prevailing on a claim like respondent's were truly that inconsequential, respondent himself—let alone the many other similarly situated defendants—would not have bothered to raise the claim. Defendants have substantial incentives to belatedly raise a *Rehaif* error even where the record leaves no doubt that they knew of their felon status. While they are unlikely to try to persuade juries that they were unaware of their status as a felon, they may hope that dimmed memories and stale or misplaced evidence may leave the government unable to establish one of the other (previously admitted) elements of the offense. Defendants may alternatively hope that a new trial will be enough trouble for the government that it will drop the charges, or that a do-over of the proceedings will result in a lighter sentence. The result would be for a manifestly guilty defendant to go free, or to receive an otherwise unauthorized sentence reduction. And even where conviction and the same sentence can be reobtained, the proceedings necessary to achieve that result will occupy considerable prosecutorial, defense, and judicial resources to no useful end.

Nothing supports, let alone requires, those undesirable consequences. Instead, this Court should apply the normal standards of plain-error review to *Rehaif* error—a result that "is consistent with [this Court's] cases,

serves worthy purposes, has meaningful effects, and is in any event compelled by the Federal Rules." *Puckett*, 556 U.S. at 143.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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