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

REPLY BRIEF FOR THE UNITED STATES

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Like the Fourth Circuit, respondent identifies no sound reason to warp existing doctrine in order to grant automatic windfalls for defendants like him. As the government's opening brief explains, a claim of plea-colloquy error under *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), satisfies the well-established standards of plain-error review only when a defendant can show that the error may actually have mattered to his case. Unable to make such a showing, respondent instead advocates for novel plain-error exceptions that would indiscriminately entitle claimants like him to automatic relief. Those exceptions cannot be squared with precedent and would call fundamental doctrinal principles into question.

Respondent's primary argument—that plain-error review does not apply to issues on which circuit law was unanimous—is a claim he never made below, where he instead acknowledged that plain-error review applied.

And for good reason: no circuit has accepted that argument and it cannot logically be cabined. Respondent's follow-on effort to defend the structural-error holding below repeats the Fourth Circuit's mistakes and would require a significant expansion of the narrow class of errors deemed so grave as to be structural. This Court can and should resolve claims like respondent's in the manner that its existing precedent requires, by declining to upset the finality of guilty pleas based on an assertion of error that lacks case-specific import.

A. Under Normal Plain-Error Standards, Respondent Is Not Entitled To Relief

As explained in the government's opening brief (at 15-24), this is a straightforward case of forfeited error that had no evident effect on the outcome of the case. Because respondent cannot show either that the error "affected [his] substantial rights" or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"—let alone both—this case should be at an end. *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted).

1. Respondent has not made the required showing of prejudice

This Court's decision in *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004), explains how to apply the plain-error doctrine to unpreserved plea-colloquy errors. When a defendant seeks "reversal of his conviction after a guilty plea" based on a forfeited claim of error in the colloquy, he must show that the error affected his substantial rights by demonstrating "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83.

Respondent addresses (Br. 38) *Dominguez Benitez* only briefly and belatedly. He disregards its emphasis on the need for a meaningful prejudice showing in order to "reduce wasteful reversals" and "respect the particular importance of the finality of guilty pleas," 542 U.S. at 82—considerations that apply with full force here. Instead, like the Fourth Circuit, he relies on a footnote disavowing any suggestion that plea proceedings like the one in *Boykin* v. *Alabama*, 395 U.S. 238 (1969)—a capital case in which the record contained "no evidence that [the] defendant knew of the rights he was putatively waiving," *Dominguez Benitez*, 542 U.S. at 84 n.10—could be upheld by a reviewing court. But respondent provides no sound basis for likening his own case to *Boykin*, in which the plea proceeding was so riddled with error that it did not even approximate a legitimate colloquy. See 395 U.S. at 239-240.

This Court has repeatedly declined to grant relief for more limited plea-related errors, such as improper judicial participation in plea negotiations, see *United States* v. *Davila*, 569 U.S. 597, 605, 611 (2013), a failure to advise the defendant that he would be unable to withdraw his plea if he was dissatisfied with his sentence, see *Dominguez Benitez*, 542 U.S. at 82-83, and a failure to advise the defendant that he would be entitled to the assistance of counsel at trial, see *United States* v. *Vonn*, 535 U.S. 55, 60 (2002). Respondent appropriately does not contend that his own error differs from those simply because it can be framed as constitutional, see Gov't Br. 18-19—indeed, the right to counsel at trial is the very right guaranteed by this Court's landmark decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). And the Court squarely held in *Neder* v. *United States*, 527 U.S. 1 (1999), that an elements-based error like his is subject

to case-specific prejudice analysis even when it has been preserved during a trial. See *id.* at 8-20.

The more exacting standards of review applicable to unpreserved claims, see *United States* v. *Olano*, 507 U.S. 725, 734 (1993), in combination with the "particular importance of the finality of guilty pleas," *Dominguez Benitez*, 542 U.S. at 82, compel a similar result here. In fact, the Court in *Vonn* appeared to accept that plain-error review would apply to the failure to inform a pleading defendant of the mens rea element—or, indeed *any* element—so long as he was advised of his basic rights. See 535 U.S. 67-69. Nor is *Neder* an isolated decision. "[T]ime 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, *e.g.*, *Marcus*, 560 U.S. at 264 (collecting cases).

Respondent thus errs in asserting (Br. 35) that "*Henderson v. Morgan*, 426 U.S. 637 (1976), holds that when a defendant pleads guilty without being informed of a critical element of the offense, vacatur is required without a showing of prejudice." Instead, consistent with other precedent on elements-based error, *Henderson* found vacatur of the conviction warranted based on the particular "circumstances," where "nothing in th[e] record" indicated "that [the defendant] had the requisite intent"—his counsel actually disputed it at sentencing—and where the defendant's "unusually low mental capacity * * * foreclose[d] the conclusion that the error was harmless beyond a reasonable doubt." 426 U.S. at 643, 646-647.

Respondent attempts (Br. 37) to explain *Henderson*'s harmless-error language by speculating that the Court *meant* to say "that reversal might not have been

required if [the defendant] had known of the omitted element's existence, despite the judge's failure to advise him regarding it." But respondent cites no support for that speculation other than Justice White's concurrence in *Henderson*, which nowhere recasts the Court's clear language in respondent's preferred terms. See 426 U.S. at 650. To the extent that respondent reads Justice White's concurrence to foreclose prejudice analysis for any elements-based error without a direct jury finding or defendant admission, that view of prejudice is not reflected in the opinion of the Court, which Justice White fully joined, *id.* at 652, and would in any event conflict with *Neder* and similar decisions.

Nor does respondent's automatic-reversal approach follow from the Court's reference in a state habeas case to a guilty plea being "invalid" if the defendant is not "aware of the nature of the charges against him, including the elements." *Bradshaw* v. *Stumpf,* 545 U.S. 175, 182-183 (2005). To the contrary, the Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), illustrates that a prejudice analysis *is* required on collateral review of a claim just like respondent's. The errors in *Bousley* and this case are conceptually indistinguishable, involving analogous misdescriptions of an offense element: the district court in *Bousley* failed to explain that the "use" element of 18 U.S.C. 924(c) (1988 & Supp. II 1990) required not just possession of a firearm but active employment, 523 U.S. at 617-618, and the district court here failed to explain that the knowledge element of 18 U.S.C. 924(a)(2) applies not only to possession but also to felon status. Respondent's repeated characterization (Br. 2, 26, 32, 34) of his crime as a "strict liability" offense at the time of his plea disregards that the offense has always been understood to have a knowledge

element, of which he was informed, see Pet. App. 3a; the question, as in *Bousley*, is one of scope.

Respondent's gerrymandered "dividing line" (Br. 39) for identifying "errors requiring automatic reversal," which would try to distinguish "between omissions and misdescriptions of elements," is thus incoherent and does not even cover his own case. It is also at odds with this Court's observation that "an error in the instruction that defined the crime—is * * * as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" *California* v. *Roy,* 519 U.S. 2, 5 (1996) (per curiam) (citation omitted). This Court has confirmed, moreover, that both types of errors can be reviewed for harmlessness. See *Neder*, 527 U.S. at 10. Nor can respondent solve the problems with his approach by claiming (Br. 39) it can be limited to cases in which an omitted element "separates wrongful from innocent conduct." In the absence of a lesser-included offense, *any* element-based requirement, including the one omitted in *Bousley*, separates guilt from innocence.

As recognized in this Court's existing doctrine both inside and outside the plea context and with respect to both forfeited and preserved errors, amorphous legal abstractions are not a helpful way to distinguish between errors that matter and errors that do not. The effective way—and the one that Federal Rule of Criminal Procedure 52 and this Court's precedents adopt—is case-specific prejudice analysis. See, *e.g.*, *Dominguez Benitez*, 542 U.S. at 81. Under that well-settled approach, a defendant who, like respondent, forfeited his claim and cannot show "a reasonable probability that, but for the error, he would not have entered the plea," *id.* at 83, is not entitled to relief.

2. Respondent has not made the required showing of a serious effect on the fairness, integrity, or public reputation of judicial proceedings

Even if respondent could clear the prejudice hurdle, his inability to demonstrate that "the error seriously affected the fairness, integrity or public reputation of judicial proceedings," *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) (brackets and internal quotation marks omitted), would independently foreclose relief. See Gov't Br. 23-24. Respondent does not show otherwise.

a. Respondent's suggestion (Br. 43) that he should be permitted to satisfy the fourth plain-error requirement "without any case-specific showing of prejudice" runs afoul of this Court's instructions that the fourth plain-error requirement "is meant to be applied on a case-specific and fact-intensive basis" and that a "'*per se* approach to plain-error review is flawed.'" *Puckett* v. *United States*, 556 U.S. 129, 142 (2009) (citation omitted). Respondent's alternative suggestion that the case be remanded for application of the fourth plain-error element disregards that the issue has already been litigated, and the Fourth Circuit simply got it wrong. See Pet. App. 19a-22a. In circumstances like this, this Court can and should provide necessary guidance by correcting the error. See, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 629, 633-634 (2002). Respondent errs in contending that the proper application of the fourth plain-error element could be affected by *Greer* v. *United States*, No. 19-8709 (oral argument scheduled for Apr. 20, 2021), which presents the question whether a court may review documents outside the trial record when considering whether trial error affected a defendant's substantial rights. The petitioner in *Greer* himself acknowledges that plea-colloquy errors require "whole

record" review. See Pet. Br. at 17-18, *Greer*, *supra* (No. 19-8709).

To the extent that respondent suggests he could satisfy the fourth plain-error requirement, he is mistaken. Before his arrests with firearms in 2017, respondent had been convicted of at least seven crimes punishable by more than one year of imprisonment; he had been sentenced to terms of well over one year of imprisonment several times; and he had been incarcerated for multiple years. See Gov't Br. 5-6. Contrary to his contention (Br. 47-48), the government did not "waive[] its ability to rely on any prior conviction other than the 2014 burglary conviction" when a government attorney emphasized the time respondent had served on that conviction in response to one question at oral argument. The government never disclaimed reliance on other convictions, and its brief observed that respondent had "several convictions" for which he had faced a maximum penalty of over one year. Gov't C.A. Supp. Br. 4.

b. In light of his criminal record, respondent cannot plausibly maintain that the later announcement of a requirement that he know about at least one prior conviction of "a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g)(1), impugns the fairness of the conviction here. He posits (Br. 46-47) that he might not have been aware of his eight-year burglary sentence, suspended upon the service of three years' of incarceration, because he received credit for a nearly two-year term of pretrial incarceration. But neither of the secondary sources that he cites (Br. 46-47), which are about COVID-19 practices and jury bonds, supports respondent's theory that periods of pretrial

detention are routinely longer than the statutory maximum punishment for the crime (let alone that he personally was under such an impression).

Nor is respondent likely to have *both* been ignorant of the penalty for his burglary conviction *and* so focused on the technical "misdemeanor" classification of his two assault-and-battery convictions as to miss the maximum sentence of three years that each of them carried—and that he actually received. See Gov't Br. 5-6. Furthermore, federal law already compensates for potential confusion between felonies and misdemeanors by only counting "misdemeanor[s]" whose maximum sentence exceeds two years. 18 U.S.C. 921(a)(20)(B).

Ultimately, none of respondent's arguments suggests that his conviction was unjust or casts doubt on the fact that, as his own sentencing memorandum described, he "was aware that he was not supposed to have a weapon," J.A. 68—a level of awareness beyond what *Rehaif* requires. In these circumstances, "[t]he real threat" to the fairness and integrity of judicial proceedings, *Cotton*, 535 U.S. at 634, would be to vacate his plea.

B. Respondent's Automatic-Vacatur Rule Is Legally And Practically Unsound

Respondent devotes most of his brief not to satisfying this Court's standards for plain-error review, but to avoiding them. Primarily, he seeks (Br. 8-39) a new "futility" exception to Rule 52(b), which he would then pair with an expansion of the narrow class of structural errors to include *Rehaif* errors. Neither proposal has merit. And his automatic-reversal rule would lead to pointless and counterproductive remands in this case and many like it—the precise outcome that the plain-error rule guards against.

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

Every court of appeals to consider the issue, including the Fourth Circuit, has applied plain-error review pursuant to Rule 52(b) in evaluating unpreserved *Rehaif* error in a plea proceeding. See Gov't Br. 24-25 & n.*. Respondent nonetheless asks (Br. 8-21) this Court to carve out a new "futility" exception to Rule 52(b) and thereby exempt *Rehaif* errors from plain-error review. Respondent never advanced that argument below, the Fourth Circuit never considered it, and this Court could therefore decline to entertain it. See, *e.g.*, *Timbs* v. *Indiana*, 139 S. Ct. 682, 690 (2019) (declining to address respondent's "reformulation" of question presented when doing so "would lead us to address a question neither pressed nor passed upon below"). In any event, respondent's proposed exception has no basis in precedent, is logically unsound, and would be detrimental to orderly judicial consideration of legal claims.

a. In *Johnson* v. *United States*, 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. That holding cannot be squared with petitioner's proposal here.

Following *Johnson*, the courts of appeals have largely rejected a futility exception to the plain-error rule. See *United States* v. *Garcia-Carrillo*, 749 F.3d 376, 378 & n.6 (5th Cir.) (per curiam), cert. denied, 574 U.S. 1014 (2014); *United States* v. *Yancy*, 725 F.3d 596, 600 (6th Cir. 2013); *United States* v. *Powell*, 652 F.3d 702, 709-710 (7th Cir. 2011); *United States* v. *Gonzalez-Huerta*, 403 F.3d 727, 734-735 (10th Cir.) (en banc), cert.

denied, 546 U.S. 967 (2005); *United States* v. *Hughes*, 401 F.3d 540, 547-548 (4th Cir. 2005); *United States* v. *Keys*, 133 F.3d 1282, 1284-1287 (9th Cir.), cert. denied, 525 U.S. 891 (1998); *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir.), cert. denied, 519 U.S. 1011 (1996). Respondent asserts (Br. 19-20) that the Second and D.C. Circuits apply a futility exception to Rule 52(b), but those courts have (appropriately) expressed serious doubt about the continuing viability of such an exception in light of *Johnson*. See *United States* v. *Martoma*, 894 F.3d 64, 72 n.4 (2d Cir. 2018) (noting expression of doubt "on at least twenty-two occasions"), cert. denied, 139 S. Ct. 2665 (2019) (citation omitted); *United States* v. *Perkins*, 161 F.3d 66, 72 (D.C. Cir. 1998) (noting that *Johnson* "casts doubt" on circuit's "supervening-decision doctrine").

Respondent contends (Br. 17) that *Johnson* should not apply here, because every circuit had rejected a knowledge-of-status requirement in felon-in-possession cases before *Rehaif*. But respondent's proposed all-circuit carve-out from *Johnson* makes little sense. So long as a claim is foreclosed by precedent (perhaps en banc precedent) in the defendant's own circuit, a district court is bound to reject the claim, irrespective of what (if anything) another circuit may have said. Respondent attempts (*ibid.*) to rationalize his proposal based on the likelihood of certiorari review in this Court, but such likelihood is inherently context-specific. And in the absence of a circuit conflict, the Court is not necessarily less likely to grant certiorari on an issue addressed by 12 circuits, as opposed to 11, 6, or even 1—as *Rehaif* itself demonstrates. Rather than key a legal rule about preservation of claims to the likelihood of discretionary review in this Court, the far more sound approach is the

current one, under which a defendant is always incentivized to preserve a claim that he views as meritorious and significant to his case.

Furthermore, with respect to *Rehaif* error in particular, the prior circuit uniformity was not unquestioned. See *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-of-status requirement). Accordingly, numerous defendants argued for a knowledge-of-status requirement before the *Rehaif* decision. See, *e.g.*, *United States* v. *Stone*, 706 F.3d 1145, 1146-1147 (9th Cir.), cert. denied, 569 U.S. 985 (2013); *United States* v. *Stein*, 712 F.3d 1038, 1040 (7th Cir.) (per curiam), cert. denied, 571 U.S. 828 (2013); *United States* v. *Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States* v. *Enslin*, 327 F.3d 788, 798 (9th Cir.), cert. denied, 540 U.S. 917 (2003); *United States* v. *Dafney*, 79 Fed. Appx. 655 (5th Cir. 2003) (per curiam), cert. denied, 540 U.S. 1228 (2004); *United States* v. *Meza*, No. 13-cr-192, 2014 WL 1406301, at *2 (E.D. Wis. Apr. 11, 2014); see also Gov't Br. 26. The government's brief in opposition to certiorari in *Rehaif* identified a number of prior petitions for writs of certiorari that had raised similar claims. See Br. in Opp. at 7-8, *Rehaif*, *supra* (No. 17-9560). All of that makes clear that defendants—correctly—did not necessarily view such claims to be "futile." Defendants can and do raise potentially outcome-determinative claims that are directly foreclosed by decisions of this Court. See, *e.g.*, *Gamble* v. *United States*, 139 S. Ct. 1960, 1963-1964 (2019) (defendant filed motion to dismiss irrespective of "longstanding interpretation of the Double Jeopardy Clause").

A defendant's obligation to raise a difference-making claim that he views as potentially meritorious in the district court is more than a mere timing formality. Instead, as the Fourth Circuit itself has recognized, the plain-error doctrine "also allows appellate courts not to miss the forest for the trees. It allows [courts] to sense from some remove that which really matters." *United States* v. *Ali*, No. 15-4433, 2021 WL 1050003, at *11 (Mar. 19, 2021). Although the district court cannot accept a foreclosed claim as such, it may be able to tailor proceedings to avoid or minimize the issue, or at least to create a record that will aid any further review. A defendant in respondent's position, for example, could potentially enter a contingent guilty plea, see Fed. R. Crim. P. 11(a)(2), or otherwise create a record indicating that his plea was dependent on the absence of a knowledge-of-status element.

b. Respondent's efforts to find a basis in the Federal Rules for his futility exception lack merit. Rule 52(b) strikes a "careful balance * * * between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135. This Court has "repeatedly cautioned" that "'[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb" that balance. *Ibid.* (citation omitted; brackets in original). "Even less appropriate" would be what respondent proposes here: "the creation out of whole cloth of an exception to [the Rule], an exception which [the Court] ha[s] no authority to make." *Johnson*, 520 U.S. at 466.

Respondent suggests (Br. 9) that Rule 52(a), rather than Rule 52(b), could apply to unpreserved errors, because Rule 52 does "not expressly say whether unpreserved claims may be addressed *only* under Rule 52(b)." But Rule 52(b) deals specifically with unpreserved

claims. Bypassing it in favor of Rule 52(a) would violate the canon that the specific governs the general, see *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 646 (2012), and would risk rendering Rule 52(b) superfluous. And to the extent that Rule 2's generalized goals of "secur[ing] simplicity in procedure and fairness in administration, and * * * eliminat[ing] unjustifiable expense and delay" bear on the analysis of Rule 52, Resp. Br. 11 (quoting Fed. R. Crim. P. 2), those goals are best-served by applying the plain-error rules evenhandedly, including to *Rehaif* errors, rather than creating ad hoc exceptions. See pp. 20-23, *infra*; Gov't Br. 38-44.

Respondent contends (Br. 9) that a futility exception might be found in "the legal roots of the phrase 'plain error,'" but the sources that he cites do not support that contention. In *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935), this Court described its own equitable power to vacate and remand a case based on a "change, either in fact or in law, which has supervened since the judgment was entered." Nothing about *Patterson*'s description of this Court's "GVR" practice suggests a broad futility exception to plain-error review, or that courts must grant relief for inconsequential errors; the Court in *Patterson* instead emphasized that the error there "may affect the result" and that on remand, the state court could "deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case." *Ibid.* And the Court's decision in *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), has no application here. The Court there noted an exception to the "general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing,"

where "the grounds of the decision" for which rehearing is sought themselves "supply *a new and unexpected basis* for a claim by the defeated party," *id.* at 366-367 (emphasis added). The issue that respondent belatedly raised here, however, was in the case from its inception.

Respondent's secondary sources are likewise inapposite. He contends that a 1939 treatise states that "courts could review claims not raised below, without applying the strictures of plain error, where the claims rested on law that 'only ar[o]se after the case ha[d] come to the appellate court.'" Resp. Br. 10 (quoting Lester Bernardt Orfield, *Criminal Appeals in America* 96 (1939)) (brackets in original). But the full quotation reads: "Since the duty to review rests in the discretion of the court, no set rules can be laid down as to when [unpreserved] questions will be reviewed. Questions which only arise after the case has come to the appellate court, *such as the jurisdiction of that court,* may be reviewed." Orfield 96 (emphasis added; footnote omitted). And the 1966 student case note cited by respondent (Br. 10) states only that "an appealing party may usually assert [a] newly-proclaimed right for the first time on appeal." Recent Development, *Federal Procedure: Intervening Change in Law and the Waiver of Constitutional Claims*, 66 Colum. L. Rev. 386, 386 (1966). The note does not address any requirement to show prejudice or any futility exception to Rule 52(b).

2. **Rehaif *error is not "structural"***

Respondent's effort to avoid prejudice analysis altogether leads him not only to advocate for a novel futility exception, but also to defend both the Fourth Circuit's expansion of the limited class of structural errors to include *Rehaif* error and its conclusion that forfeited structural errors may invariably bypass prejudice analysis.

See Resp. Br. 8. Like the Fourth Circuit, respondent is incorrect on both issues.

a. Respondent does not acknowledge that this Court has found structural errors "only in a very limited class" of cases, *Neder*, 527 U.S. at 8 (citations and internal quotation marks omitted); that this Court has found the omission of one of the plea-colloquy warnings required by Federal Rule of Criminal Procedure 11 to be not even "colorably structural," *Dominguez Benitez*, 542 U.S. at 81 n.6; and that this Court has applied a "strong presumption" that errors are not structural when "the defendant had counsel and was tried by an impartial adjudicator," *Marcus*, 560 U.S. at 265 (citation omitted).

Against those precedents, respondent argues (Br. 22) that a plea-colloquy *Rehaif* error must be structural because it violates "the defendant's autonomy interest," relying principally on *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018). But *McCoy* treated only "counsel's admission of a client's guilt over the client's express objection" as structural error, and emphasized the seriousness of that error in part by contrasting it with a "strategic dispute[] about whether to concede an element of a charged offense." *Id.* at 1510-1511. Respondent's autonomy argument also proves too much, as he suggests that any plea-related error would be structural as long as it could, *in theory*, bear on a defendant's choice of whether to plead guilty. That rationale would encompass nearly any misinformation about, for example, the defendant's rights, the crime of conviction, or the government's evidence. But this Court has repeatedly endorsed prejudice analysis by a reviewing court—and engaged in such analysis itself—when presented with claims of error in plea proceedings. See, *e.g.*, *Davila*, 569 U.S. at 605, 611; *Dominguez Benitez*, 542 U.S. at 82-

83; *Vonn*, 535 U.S. at 60. On respondent's flawed logic, all of those decisions are not only wrong, but violations of a defendant's autonomy.

Respondent separately asserts that, contrary to the experience of nearly every court of appeals, it is always "impossible" to determine whether a *Rehaif* plea-colloquy error affected the outcome of the proceedings. Resp. Br. 29 (citation omitted). He speculates that a defendant "may 'wish to avoid, above all else, the opprobrium that comes with admitting' that he committed the particular crime with which he is charged." *Id.* at 30 (citation omitted). But this case concerns defendants who *did* plead guilty; the question is the specific effect—if any—of a *Rehaif* error. Respondent further speculates (*id.* at 30-31) that some defendants may be particularly reticent to acknowledge their awareness of a prior conviction. But it is difficult to see a defendant who was willing to publicly acknowledge the felony conviction *itself* balking at acknowledging that he was aware of the conviction, so long as he actually was. In any event, record evidence might bear on that preference; in this case, for example, respondent's voluntary admission that he "was aware that he was not supposed to have a weapon," J.A. 68, confirms that he lacked such reticence. Respondent separately ventures (Br. 31-32) outside of the circumstances here, pointing to certain financial crimes that require a willful violation of the law and arguing that mens rea is so central to those crimes that its omission is more likely to affect a defendant's plea decision. See also NACDL Amicus Br. 14-15. But in any such case, for the very reasons that respondent identifies (Br. 32), the defendant might well be able to demonstrate a reasonable likelihood that his

plea decision was affected by the erroneous mens rea advisement.

Respondent's immeasurability argument also relies on an unduly cramped view of the record available to assess an error's potential prejudicial effect. He incorrectly asserts (Br. 32) that under "the Government's theory," courts could consider only "whether strong evidence of guilt existed." As the government's opening brief explained (at 31), an appellate court in fact reviews "the whole record" to measure the prejudicial effect of an omission from the colloquy. *Vonn*, 535 U.S. at 59. That record includes not only the government's evidence, but also anything else therein, including the defendant's admissions and the "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). Respondent's claim (Br. 33) that a "'record' from a guilty plea proceeding" is unreliable and "does not provide an acceptable platform from which to conduct a harmless-error inquiry" cannot be squared with the multiple cases in which this Court has reviewed plea-related errors for prejudicial effect. And for the reasons explained in the Government's brief in *Greer*, plea- and sentencing-related materials (such as a presentence report) provide a reliable basis for plain-error review. See Gov't Br. at 34-48, *Greer*, *supra* (No. 19-8709).

Finally, respondent errs in contending that *Rehaif* error in a plea colloquy "always results in fundamental unfairness." Resp. Br. 34 (citation omitted). As the government's opening brief demonstrated (at 32, 40-42), the normal *Dominguez Benitez* standard applied by the overwhelming majority of the courts of appeals is readily able to distinguish between the few cases in which a

Rehaif plea-colloquy error has created unfairness, and the many in which it has not. Respondent does not attempt to show otherwise. He instead simply asserts (Br. 35) that a plea-colloquy *Rehaif* error "is something our Constitution cannot tolerate." But it is well-established that "most constitutional errors" are not structural. *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991).

b. Even if a *Rehaif* plea-colloquy error were structural, that would not excuse respondent from a case-specific showing that the circumstances of his particular case justify granting relief. As respondent recognizes (Br. 40-42), this Court has repeatedly "declined to resolve whether 'structural' errors * * * automatically satisfy the third prong of the plain-error test." *Puckett*, 556 U.S. at 140 (citations omitted). If it were necessary to resolve that issue here, then for the reasons set forth in the government's opening brief (at 34-35), the logic of this Court's precedents indicates that the prejudice element should remain as a prerequisite to undoing a guilty plea based on a *Rehaif* claim. Respondent's observation (Br. 42) that no "holding" of the Court dictates that result does not suggest that the open question should be resolved in the manner he prefers. And his attempted distinction (*ibid.*) of ineffective assistance of counsel claims disregards that the *Dominguez Benitez* approach is drawn from that very context. See 542 U.S. at 82-83 & nn.8-9, 85.

In any event, while the question of whether structural error automatically satisfies the third plain-error requirement is open, this Court *has* squarely held that structural error does not automatically satisfy the *fourth* plain-error requirement. In both *Johnson* and *Cotton* v. *United States*, this Court made clear that even

assuming that an error were deemed both structural and automatically affecting substantial rights, relief is still unwarranted unless the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Marcus*, 560 U.S. at 265 (citation omitted). See *Johnson*, 520 U.S. at 469-470; *Cotton*, 535 U.S. at 633-634. Respondent attempts (Br. 44) to distinguish those precedents by noting that "neither of those cases involved guilty pleas." But that distinction cuts the other way, as this Court has emphasized "the particular importance of the finality of guilty pleas" in explaining why the "burden [of plain-error review] should not be too easy for defendants" to carry. *Dominguez Benitez*, 542 U.S. at 82-83.

3. Practical considerations weigh heavily in favor of reversal

As the government's opening brief explained (at 38-44), the predominant practical result of the automatic-vacatur rule, adopted below and defended by respondent here, is to grant undeserving defendants a windfall while imposing substantial burdens on the judicial system.[*] This case exemplifies the problem, as defendants

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[*] Respondent's suggestion (Br. 50-51 & n.20) that the government exaggerated the significance of this case within the Fourth Circuit by stating that "more than 80 pending appeals" would be affected, Gov't Br. 42, is misplaced. The government provided respondent with a list of 95 cases. The list was slightly overinclusive—in part because the Fourth Circuit stayed some appeals arising in different procedural postures pending the resolution of this case. See, *e.g.*, *James* v. *Andrews*, No. 21-6159; *United States* v. *Barnes*, No. 19-4259; *In re Jeffers*, No. 19-359; *United States* v. *Holden*, No. 18-4804; *United States* v. *Sloan*, No. 18-4782. But even so, the government's list included 82 cases on direct appeal involving potential plea-colloquy *Rehaif* errors.

like respondent—who had multiple prior felony convictions and had been incarcerated for years, see Gov't Br. 5-6—would have their guilty pleas vacated without showing that a knowledge-of-status requirement would affect their plea decision. In contrast, by applying the normal plain-error standards, other circuits appropriately grant relief to the "very few [defendants] who claim plausibly to be unaware of their felony status," while safeguarding the finality of guilty pleas for defendants who cannot plausibly make such a claim. Pet. App. 31a (Wilkinson, J., concurring in the denial of rehearing en banc). Respondent criticizes (Br. 50) the government for pointing out these "practical consequences," but the limitations that plain-error review imposes are designed to facilitate sound judicial administration—and specifically to avoid the sort of pointless remands that his rule would inevitably produce. See, *e.g.*, *United States* v. *Young*, 470 U.S. 1, 15 (1985).

Respondent contends that if *Rehaif* errors are subject to plain-error review, the result would be "a constant stream in all future criminal prosecutions of motions, objections, and demands for evidentiary hearings at every stage of litigation, all grounded in the faintest hope that each precedent unfavorable to the defense could conceivably be changed in the future." Resp. Br. 12, 15-16, 52. The Court was aware of that concern in *Johnson*, but nonetheless emphasized the applicability of the case-specific plain-error requirements. See 520 U.S. at 468. The concern is also empirically unsupported, as every court of appeals to have considered the issue—including the Fourth Circuit—already applies plain-error review to unpreserved *Rehaif* errors, and respondent points to no evidence of a dramatic fallout.

As respondent's own amici point out, defense counsel have numerous good reasons to focus on meritorious claims. See NAFD Amicus Br. 17-18. Defendants are also unlikely to focus on claims that make no difference to their own cases.

But defendants would have a substantial incentive to raise claims even of inconsequential error on appeal, if they know that by doing so, they will automatically get a do-over. Many of them may simply replead, see Resp. Br. 51, but take the opportunity to argue for a lower sentence than the one they originally received. See, *e.g.*, *Pepper* v. *United States*, 562 U.S. 476, 480 (2011) (holding that court may consider postsentencing rehabilitation at plenary resentencing). Others may hope that the government will drop the case. Some may try new negotiation tactics in an effort to obtain a more favorable plea bargain. Still others might roll the dice at trial, but focus on defenses unrelated to knowledge of status. None of that has anything to do with *Rehaif*, and none of it warrants upending the finality of a guilty plea by a defendant who cannot show that the plea was affected by *Rehaif* error.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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