No. 20-5489

IN THE

Supreme Court of the United States

RODNEY LAVALAIS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The government concedes that there is a firmly rooted circuit split over the issue raised in Mr. Lavalais's petition—namely, the circumstances warranting vacatur of felon-in-possession-of-a-firearm guilty pleas made without notice or understanding of the knowledge-of-status element recognized in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). U.S. Br. 10, 12–14. The government agrees that this conflict affects a large number of defendants, whose convictions will remain uncertain until this Court intervenes. *Id.* at 14–15. Thus, the government rightfully urges this Court to grant review this Term and agrees that Mr. Lavalais's petition—which now is fully briefed and ready to proceed—is a suitable vehicle for doing so. *Id.* at 15–16. Although the government expresses a preference for its own recently filed petition in *United States v. Gary*, No. 20-444 (filed Oct. 5, 2020), it acknowledges that waiting for certiorari-stage briefing in *Gary* to finish would delay resolution of this important question and offers Mr. Lavalais's case a reasonable course as well. U.S. Br. 10–11, 15–16; *see also* Pet. 24–25, *Gary*, *supra* (No. 20-444).

In fact, Mr. Lavalais's petition is a superior vehicle to *Gary*, a case that not only lags behind this one, but also suffers from vehicle concerns that may interfere with this Court's review. Thus, this Court should grant Mr. Lavalais's petition now rather than wait on a less suitable vehicle, particularly in light of the government's agreement that going forward with Mr. Lavalais's case instead is a reasonable option. At the very least, this Court should grant both petitions and consolidate the two for argument, as the government suggests as an alternative.

I. As the government acknowledges, Mr. Lavalais's case does not suffer from any vehicle defects that would impede this Court's review.

The government agrees that Mr. Lavalais's petition is a suitable vehicle for resolution of this critically important question, which now is the subject of numerous requests for review, including by the government.[1] U.S. Br. 10–11, 15–16. In fact, the government is able to identify only two plausible vehicle-related issues to support its preferred course of granting review in *Gary*—both of which the government acknowledges are not true barriers to this Court's review and would not preclude this Court from alternatively granting review in this case instead. U.S. Br. 16–18.

With respect to the government's first point—the formatting of the question presented as two questions, instead of one—this Court is free to reformulate a single question that best addresses the specific issues the Court wishes to resolve, as the government itself notes. U.S. Br. 17. The government is right that the disagreement raised by Mr. Lavalais's petition and others is a "holistic issue." *Id*. At base, all parties seek an articulation and explanation of the analysis applicable to the type of error that arose in Mr. Lavalais's case. Thus, Mr. Lavalais understands that the second question presented in his petition is not necessarily an independent inquiry, but

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[1] As the government notes, there are a number of other pending petitions seeking review of this issue. *See* U.S. Br. 11 n.1 (collecting petitions). As of this filing, the government has responded in opposition to two of them, noting that both cases contain vehicle defects that could interfere with this Court's review. *See* U.S. Br. 12-13, *Blackshire v. United States*, No. 19-8816; U.S. Br. 14-16, *Stokeling v. United States*, No. 20-5157. The government sought and received extensions of the response deadlines in the remaining cases. *See Rolle v. United States*, No. 20-5499; *Ross v. United States*, No. 20-5404; *Hobbs v. United States*, No. 20-171; *Sanchez-Rosado v. United States*, No. 20-5453.

instead is a subsidiary of and fairly encompassed by the broader, first question.

If this Court agrees with the government that bifurcation of the question in Mr. Lavalais's petition unnecessarily overcomplicates the issue, the entirety of the inquiry easily can be articulated in a single question:

> Whether a guilty plea that was not knowing and intelligently made due to lack of notice, admission, and understanding of the essential elements of the offense qualifies as structural error mandating automatic reversal and, if not, what circumstances that error warrants vacatur under the plain error standard.

This formulation not only is simpler than the government's proposal, but also avoids its shortcomings. The question proposed by the government presumes that this brand of error qualifies as a mere plea colloquy defect, and it separately presumes the correctness of the appellate court's formulation and application of the review standard below.[2] In other words, the government's question would appear to preclude examination of the underlying standard itself and assume its correctness. Of course, as the government acknowledges, this Court may ultimately determine that the proper course is to remand Mr. Lavalais's case in light of its newly articulated review framework, rather than to apply that standard in the first instance. U.S. Br. 17. But that does not mean—particularly at this juncture—that this Court should adopt a question presented that might wholly preclude it from examining the review standard

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[2] *See* U.S. Br. I (defining the question presented as "Whether petitioner, who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), was entitled to plain-error relief because the district court did not advise him during the plea colloquy that one element of that offense is knowledge of his status as a felon, where the court of appeals determined that he had failed to show that the district court's error affected the outcome of the proceedings").

applied by the Fifth Circuit. As the government itself notes, that standard does not just affect criminal defendants with *Rehaif*-based claims, but is broadly applicable and impactful. *See* U.S. Br. 15.

Finally, as to the government's second vehicle point, Mr. Lavalais agrees that this Court's review is not impeded by the government's footnote about the fourth element of plain error review in its appellate briefing below. *See* U.S. Br. 18.

II. Mr. Lavalais's petition is the best vehicle for review of this issue.

Mr. Lavalais's case is not just suitable for this Court's review; it is the best—and fastest—vehicle for resolving this critical issue. Although the government may have a slight preference for its own petition in *Gary*, certiorari-stage briefing in that case has just begun and, as the government concedes, waiting on *Gary* to ripen would delay resolution of this conflict. For that reason alone, this Court should simply grant review in Mr. Lavalais's case now rather than wait on *Gary*—a course that the government suggests as a reasonable alternative option. U.S. Br. 10–11, 15–16; Pet. 24–25, *Gary*, *supra* (20-444).

Even setting aside timing concerns, *Gary* is a less suitable vehicle for review of this issue. Of course, this Court is "a court of review, not of first view," and therefore tends to avoid issues not first addressed by the Court of Appeals below. *Cutter v. Wilkinson*, 544 U. S. 709, 718 n.7 (2005). Notably though, the Fourth Circuit's opinion in *Gary* was narrow and did not address the full scope of the question now presented to this Court. Specifically, the opinion was limited to determining that *Rehaif* error is structural and then engaging in plain error review in light of that determination. *See United States v. Gary*, 954 F.3d 194, 202–08 (4th Cir. 2020). The court did not

decide what form of plain error review should apply in the event *Rehaif* error is not structural. That makes the Fourth Circuit's decision atypical among other circuits to have addressed this issue.[3]

By contrast, the Fifth Circuit's decision in Mr. Lavalais's case presents two holdings, both of which are well developed for this Court's review, and the opinion is more representative of appellate treatment of this issue. The Fifth Circuit, like the Fourth Circuit, addressed the structural error question (rejecting that argument), but also defined and applied an alternative plain error review framework—analysis necessarily missing from *Gary*. *See United States v. Lavalais*, 960 F.3d 180, 186–88 (5th Cir. 2020). If this Court grants the government's petition in *Gary* and then determines that *Rehaif* error does *not* qualify as structural—and thus must identify an alternative review standard—it would do so in the first instance, unmoored from an appellate decision below. Accordingly, unlike *Gary*, Mr. Lavalais's case provides the benefit of a fully developed appellate record and full appellate analysis.

Relatedly, the Fourth Circuit's analysis in *Gary* was necessarily underdeveloped because that opinion issued before other Courts of Appeals had spoken on the structural error question and, therefore, the opinion did not address other courts' views on the issue. *See Gary*, 954 F.3d at 201. By contrast, the Fifth Circuit's decision came later, and the court's opinion expressly addressed the Fourth

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[3] *See, e.g.*, *United States v. Coleman*, 961 F.3d 1024 (8th Cir. 2020); *United States v. Trujuillo*, 960 F.3d 1196 (10th Cir. 2020); *see also United States v. Hicks*, 958 F.3d 399 (5th Cir. 2020).

Circuit's analysis. *Lavalais*, 960 F.3d at 187–88.

Finally, Mr. Lavalais's petition has the additional benefit of providing a vehicle that is not merely theoretical and an error that is not merely a technicality. Mr. Lavalais is not among the class of petitioners for whom there is some form of admission in the record of *Rehaif*'s *mens rea* element—i.e., knowledge of felony status.[4] For some petitioners, the question presented could become a mere academic exercise in the event this Court determines that automatic reversal is inappropriate. Not so for Mr. Lavalais and the group of defendants he exemplifies—for whom knowledge of status is at least ambiguous and the question of prejudice is actually complicated, depending on the contours of the standard. *See* Pet. 4. That is not to say that this Court need apply its announced standard to the underlying facts in the first instance—only that this Court's determination of the review standard applicable to *Rehaif* error actually matters in Mr. Lavalais's case.

At the very least, as discussed below, the analytical and factual contrasts between this case and *Gary* are benefits that may counsel in favor of consolidating the two cases for review together.

III. This Court should grant Mr. Lavalais's petition or, in the alternative, consolidate Mr. Lavalais's case with *United States v. Gary* and grant both petitions.

Because Mr. Lavalais's case presents the best and fastest vehicle for

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[4] *See, e.g.*, Pet. 4-5, *Gary*, *supra* (No. 20-444); U.S. Br. 3, *Blackshire*, *supra* (No. 19-8816).

addressing this time-sensitive question, this Court should simply grant his petition now. There is no reason to wait for completion of certiorari-stage briefing in *Gary*—an inferior vehicle, with still yet-to-be-known defects, on an uncertain timeline.

At the very least, this Court should alternatively grant both petitions, as the government suggests, and consolidate the cases for argument. Although consolidation would not eliminate the unnecessary delay associated with waiting on final certiorari briefing in *Gary*, it would at least moderate the various vehicle concerns with that case. Moreover, consolidation would lessen the danger of one vehicle becoming unsuitable before this Court's determination of the merits. And, finally, consolidation would provide the benefit of contrasting factual backgrounds and appellate court reasoning to more concretely illustrate potential dispositions and applications.

Finally, if this Court does not intend to grant certiorari in Mr. Lavalais's case but does intend to review the issue he raises, he asks that his petition be held pending resolution of this Court's chosen vehicle, whether that vehicle is *Gary* or a different case.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for a Writ of Certiorari, Mr. Lavalais's Petition should be granted.

Respectfully submitted October 14, 2020,

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