No. 20-5852

In the

Supreme Court of the United States

ROBERT LOUIS BRANDON,
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 FOR PETITIONER

Nelson S. Ebaugh
Nelson S. Ebaugh, P.C.
3730 Kirby Dr, Ste 1200
Houston, Texas 77098
Tel. (713) 752-0700
Fax (713) 739-0500
nebaugh@ebaughlaw.com

Attorney for Petitioner

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The government does not dispute that the circuits are divided as to whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), is automatically entitled to relief on plain-error review if he was not advised during his plea colloquy that one element of that offense is knowledge of his felon status. U.S. Mem. 2; *see also* Pet. 7-8. The government also does not dispute that this recurring question warrants the Court's review this Term. U.S. Mem. 2; *see also* Pet. 8. Instead, the government contends that this case "is not a suitable vehicle for resolving the circuit conflict" because the court of appeals' decision here: (1) "did not expressly address whether the failure to advise a pleading defendant of *Rehaif*'s knowledge requirement is a structural error that entitles a defendant to relief without a showing that the error affected the outcome," and (2) "did not reach or resolve the separate plain-error requirement -- which this Court has found dispositive in two previous cases involving claims of structural error -- that the error have seriously affected the fairness, integrity, or public reputation of judicial proceedings." U.S. Mem. 2. The government is wrong. In fact, petitioner's case is as suitable a vehicle for certiorari as either *Gary* or *Lavalais*.

I. A party is not limited to the precise arguments he made below.

In the court of appeals, the petitioner raised the issue of whether "the district court plainly erred by accepting his guilty plea because the record does not establish that, at the time he possessed the firearm, he knew he had previously been convicted of a qualifying felony offense." Pet. App. 1a. Accordingly, petitioner "can make any

argument in support of that claim" to this Court, including the argument that the failure to advise petitioner of *Rehaif*'s knowledge requirement is a structural error. *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Moreover, the court of appeals could not even address the structural error argument in the case below because the issue had been foreclosed by *United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020), petition for cert. pending, No. 20-5489 (filed Aug. 20, 2020). *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting *en banc* or by the United States Supreme Court, a panel cannot overrule a prior panel's decision."). In sum, even though the court of appeals did not directly address structural error in petitioner's case, this case is nonetheless a suitable vehicle.

II. This case could actually be a better vehicle for certiorari than either *Gary* or *Lavalais* because the decision below conflicts with this Court's position on probationary sentences as set forth in *Rehaif*.

The conclusion that this case is a suitable vehicle cannot be overcome by the court of appeals' decision not to reach the last prong of the plain-error test. To be sure, this Court has twice avoided resolving whether other challenged errors were "structural" after finding that the question ultimately made no difference to the resolution of the case since the defendant could not meet the last prong of the plain-error test. *See Johnson v. United States*, 520 U.S. 461, 469 (1997) (holding that "we need not decide that question because, even assuming that the failure to submit

materiality to the jury 'affec[ted] substantial rights,' it does not meet the final requirement of *Olano*"); *United States v. Cotton*, 535 U.S. 625, 632-33 (2002) (declining to resolve whether the indictment's failure to allege a fact that increased the statutory maximum was a structural error, or whether such an error otherwise met the third prong of *Olano*, "because even assuming respondent's substantial rights were affected, the error did not seriously affect the fairness integrity, or public reputation of judicial proceedings"). However, even though the court of appeals did not reach the last prong of the plain-error test, there are other factors that lead to the conclusion that this Court should grant certiorari in this case either independently or together with *Lavalais* or *Gary*.

In its response to Lavalais' certiorari petition, the government agreed that *Lavalais* would be an equally "suitable" vehicle for certiorari as *Gary*, and importantly "would allow the Court to grant certiorari now without waiting for the certiorari stage briefing in *Gary* to conclude." U.S. Brief, *Lavalais*, at 15-16. Here, as in *Lavalais*, the certiorari-stage briefing has been concluded, and a certiorari grant in this case would likewise allow the Court to resolve the question dividing the circuits "without waiting for the certiorari-stage briefing in *Gary* to conclude." Moreover, question 1 presented for review in the instant petition is not only framed analogously to question 1 in *Lavalais*, question 2 presented for review in the instant petition is framed exactly as question 2 in *Lavalais*. Compare Pet. i with *Lavalais* Pet. ii. Accordingly, petitioner's case is as suitable a vehicle for certiorari as either *Gary* or *Lavalais* to resolve "the overarching conflict about whether to conduct a case-

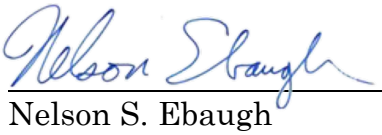
specific prejudice inquiry." U.S. Br., *Lavalais*, at 17. And in fact, it could actually be a better vehicle for certiorari because the decision below conflicts with this Court's position on probationary sentences as set forth in *Rehaif*. *See* Pet. 9-10; *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019) ("If the provisions before us were construed to require no knowledge of status, they might well apply to . . . a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is "*punishable* by imprisonment for a term exceeding one year." (citation omitted; emphasis in original)).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Date: November 6, 2020

Respectfully submitted,



Nelson S. Ebaugh
State Bar No. 24007139
Nelson S. Ebaugh, P.C.
3730 Kirby Drive, Suite 1200
Houston, Texas 77098
Tel. (713) 752-0700
Fax (713) 739-0500
nebaugh@ebaughlaw.com

Attorney for Petitioner – CJA counsel, appointed under 18 U.S.C. § 3006A