No. 20-7372

In The
Supreme Court of the United States

TERRY LEE OCKERT, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 987-3888

Michael J. Lockerby
Counsel of Record
George E. Quillin
Matthew H. Horton
Matthew M. Turk
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007
(202) 945-6079
mlockerby@foley.com

Counsel for Amicus Curiae

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization headquartered in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

At every opportunity, the Institute will resist the erosion of fundamental civil liberties, which many would ignore in a desire to increase the power and authority of law enforcement. The Institute believes that where such increased power comes at the expense of civil liberties, it provides only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

Appellate review protects the civil liberties of an accused individual. It also safeguards the broader citizenry from intrusive government actions. Given the recurring issues raised by Petitioner, Mr. Ockert, and their implications on appellate review, the Institute urges the Court to grant certiorari. The

---

[1] The parties were given notice more than 10 days before filing and have consented to the filing of this brief by individual consent. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

Court should vindicate the role of appellate review and promote its broad availability.

SUMMARY OF ARGUMENT

Circuit courts are split over the interpretation of Rule 12(c)(3) of the Federal Rules of Criminal Procedure and the applicability of its "good cause" requirement for raising untimely claims in plain error review under Rule 52(b). Before the 2014 Amendments, Rule 12(e) said that a "party waives any Rule 12(b)(3)" issue if a motion is "not raised by the deadline" but provided that, "[f]or good cause, the court may grant relief from the waiver." The 2014 Amendments to Rule 12 removed the term "waiver" and moved Rule 12(e) to Rule 12(c)(3).

The majority of circuits interpret Rule 12(c)(3) as requiring "good cause" for untimely claims before conducting plain error review under Rule 52(b) because the issue has been waived due to its untimeliness. These circuits view the 2014 Amendments to Rule 12 as simply a "wordsmithing" exercise intended to better describe the pre-amendment status quo. A minority of circuit courts take the opposite view. These circuits interpret Rule 12(c)(3) as removing the "good cause" threshold because untimely claims are no longer "waived" and because Rule 12(c)(3) is directed to trial courts, not appellate courts as in Rule 52(b).

The Advisory Committee Notes to the 2014 Amendments highlighted the controversy in adopting the new rule. Advisory Committee reports from 2011 and 2013 describe debates surrounding untimely motions under Rule 12. The Court should finally

bring certainty and uniformity to more than a decade of ongoing confusion.

Rule 12(c)(3) does not necessitate a "good cause" threshold for conducting plain error review. The 2014 Amendments to Rule 12(c)(3) removed the term "waiver" to reconcile the rule with the Court's decision in *Olano*, which distinguished "waiver" from "forfeiture." Before *Olano*, courts did not recognize this distinction and applied a strict standard of waiver to untimely claims. The 2014 Amendments removed the "non-standard use of the term 'waiver,'" thereby ending the view that untimely claims are waived. "[T]he drafters apparently believed the term 'waiver' was 'outdated in light of *Olano*.'" *United States v. Soto*, 794 F.3d 635, 652 (6th Cir. 2015).

The text of Rule 12(c)(3) imposes the good cause requirement on the "court." Rule 12(c)(3)'s reference to "the court," considered in context and in light of Committee notes, clearly means the district court. In contrast, Rule 52(b)'s reference to "the court" in the context of plain error review means the appellate court. Thus, Rule 12(c)(3) permits district courts to require a good cause showing for untimely motions, while appellate courts remain free to conduct plain error review under Rule 52(b) of untimely claims regardless of "good cause." It would be strange for repeated references to "court" in Rule 12 to mean the district court, except for a single instance in Rule 12(c)(3). By contrast, Rule 52 governs appellate court review and contains no pre-condition for conducting plain error review.

In the broader context of federal procedural rules, there are only two instances—Fed. R. Crim. P.

52(b) and the Federal Rules of Appellate Procedure—that implicate the appellate court, and Rule 12(c)(3) is not one of them. The Advisory Committee kept appellate review distinct from trial court review, expressly rejecting proposals for Rule 12(c)(3) to cross reference Rule 52. Rather, the Advisory Committee opted not to link appellate review with untimely motions and delegated to appellate courts how to handle untimely arguments raised for the first time on appeal. Rule 12(c)(3) lacks any mandate—much less authority—for appellate courts to evaluate "good cause" before performing a plain error review.

ARGUMENT

I. THE COURT SHOULD ADDRESS THE CIRCUIT SPLIT ON THIS RECURRING ISSUE

The interpretation of Rule 12(c)(3) and the implications of maintaining ready access to appellate review under Rule 52(b) are critical to protecting civil liberties. Since the 2014 Amendments, the circuit split has solidified as more circuit courts struggle with the ambiguous language of Rule 12(c)(3). The Institute urges this Court to mend the split over Rule 12(c)(3) so that criminal defendants' "substantial rights" under 52(b) are treated fairly and uniformly on appeal throughout the nation.

The Fourth, Fifth, Sixth, and Eleventh Circuits hold that a Rule 12(b)(3) issue not raised to the district court receives plain-error review on appeal, without requiring the defendant to show good cause for the untimeliness. *United States v. Mathis*, 932 F.3d 242, 256 (4th Cir. 2019); *United States v.*

Vasquez, 899 F.3d 363, 372–73 (5th Cir. 2018); *Soto*, 794 F.3d 635 (6th Cir. 2015); *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015).

The Third, Seventh, Eighth, Ninth, and Tenth Circuits apply a "good cause" standard to a Rule 12(b)(3) motion for untimely claims or to claims raised for the first time on appeal. *United States v. Wheeler*, 742 F. App'x 646, 662 (3d Cir. 2018); *United States v. Hopper*, 934 F.3d 740, 761 (7th Cir. 2019); *United States v. Anderson*, 783 F.3d 727, 740–41 (8th Cir. 2015); *United States v. Guerrero*, 921 F.3d 895, 897–98 (9th Cir. 2019) (per curiam); *United States v. Bowline*, 917 F.3d 1227, 1229 (10th Cir. 2019).

The First and Second Circuits require "good cause" before conducting appellate review of claims that were untimely at the district court, but they have not addressed issues raised first on appeal. *See United States v. Sweeney*, 887 F.3d 529, 534 (1st Cir. 2018); *United States v. O'Brien*, 926 F.3d 57, 82–83 (2d Cir. 2019).

The D.C. Circuit remains on the fence. *See* Keeton, *United States v. Bowline*: The Federal Circuit Split over Untimely Arguments from Criminal Defendants Absent A Showing of Good Cause for the Delay, 43 Am. J. Trial Advoc. 471, 488 (2020) ("The lack of consensus and consistency left the D.C. Circuit in *United States v. Burroughs* without a clear guide to follow on the issue.") (citing 810 F.3d 833 (D.C. Cir. 2016)).

Historically, the Court has granted certiorari to resolve circuit splits over interpreting the Federal Rules of Criminal Procedure and preserving

arguments for appeal. *See, e.g.*, *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 764–65, (2020) (granting certiorari to resolve circuit split over sufficiently preserving sentencing arguments); *United States v. Vonn*, 535 U.S. 55, 62 (2002) (granting certiorari to resolve conflict over burden of plain error for argument raised first on appeal); *United States v. Lane*, 474 U.S. 438, 439 (1986) (granting certiorari to resolve circuit split over applying harmless error to misjoinder arguments); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (granting certiorari to resolve circuit split over determining whether untimely argument is waived or forfeited under *United States v. Olano*, 507 U.S. 725, 733 (1993)); *see also* Pet. for Cert. at 16–17. It is critical for the Court to grant certiorari to resolve the issues raised by Ockert's petition so that federal procedural rights of criminal defendants do not vary depending upon where the defendants are tried.

A. The Court Should Resolve the Circuit Split

Rule 12(c)(3) was ambiguous even before its adoption in 2014. The Advisory Committee recognized the different approaches to reviewing untimely claims and claims raised first on appeal following *Olano*, so the Committee sought to clarify the term "waiver" and the term's relation to Rule 12. Addendum B1 to the Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and Procedure 2 (May 2013) ("Report to the Standing Committee, May 2013"). In *Olano*, the Court explained the critical difference between forfeiture and waiver. 507 U.S. at 733 ("Whereas forfeiture is the failure to make the timely assertion of a right,

waiver is the 'intentional relinquishment or abandonment of a known right."). Because "the [C]ommittee believed that courts were incorrectly treating the failure to file a timely pretrial motion as an intentional relinquishment of a known right," rather than as a forfeiture, the Committee removed the "non-standard use of the term 'waiver'" from Rule 12. Advisory Committee on Criminal Rules, Minutes 3 (Apr. 25, 2013); *see also Soto*, 794 F.3d at 652 ("[T]he [C]ommittee believed that courts were incorrectly treating the failure to file a timely pretrial motion as an intentional relinquishment of a known right, and therefore an absolute bar to appellate review.").

The Advisory Committee considered stating that the "good cause" standard applied both in the district court and again on appeal. Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and Procedure 386-87 (May 2011). However, the Advisory Committee explicitly chose *not* to adopt language excluding plain error review under Rule 52(b) because of a lack of agreement among Committee members. The Advisory Committee thus preserved the ambiguity in Rule 52(b), leaving it to "the Courts of Appeals to decide if and how to apply Rules 12 and 52 when [untimely] arguments are raised for the first time on appeal." Report to the Standing Committee, May 2013 at 5–6. Conflicting interpretations were thus foreseeable and almost certain to result, as they since have.

The past confusion and controversy among both the circuit courts and the members of the Advisory Committee continue to plague the courts. Appellate opinions routinely cite the ambiguities in

the rule, the circuit split, and the resulting confusion. *See, e.g., Guerrero*, 921 F.3d at 897 ("our sister circuits have reached conflicting conclusions on the standard of review that should apply in this context"); *Bowline*, 917 F.3d at 1236–37 ("other circuits have said that they would apply plain-error review to untimely Rule 12 claims raised for the first time on appeal without requiring good cause"); *Soto*, 794 F.3d at 649 (discussing "great confusion" among the circuit courts both before and after the amendments to Rule 12 in 2014). This confusion also shows no signs of abating.

As a result of this confusion, untimely motions (including pretrial motions) under Rule 12 are not subject to uniform criteria in federal courts. Pretrial motions in particular are critical to protecting a defendant's fundamental right to a fair trial, and rules governing them should be "proper and uniform." *United States v. Robinson*, 361 U.S. 220, 222 (1960). The circuit split has created a system that is neither proper nor uniform in dealing with untimely Rule 12 claims. The availability and depth of review of such claims are wholly dependent upon where the appeal is heard. Some circuits openly offer plain error review to examine constitutional violations and government misconduct. *See Olano*, 507 U.S. at 736 (citing *United States v. Young*, 470 U.S. 1, 15 (1985)) (explaining that plain error review is employed to prevent "a miscarriage of justice"). Other circuits, however, hold that a defendant has automatically waived untimely arguments—even where the record lacks any evidence of an intentional relinquishment. *United States v. Ockert*, 829 F. App'x 338, 344 n.3 (2020); *see Hopper*, 934 F.3d at 762 (7th Cir. 2019) (quoting *United States v. Kelly*, 772 F.3d 1072, 1079 (7th Cir. 2014)) ("[I]f a defendant fails to raise a[n] . . .

argument below—even if he does so under circumstances that suggest a forfeiture—we cannot proceed directly to a review of the district court's actions for plain error."). This non-uniform treatment of Rule 12 directly harms a criminal defendant's fundamental rights.

In this case, the "automatic waiver" principle adopted by the Tenth Circuit certainly harmed Ockert's fundamental rights. Where the government's warrantless search and seizure was found to be lawful based "on a premise . . . the government had not even advocated and that is clearly contrary to this Court's cases," the error is clear and obvious. Pet. for Cert. at 26. While the government was able to succeed on an argument it never advocated, Ockert was foreclosed from ever presenting his defense. Absent this error below, there is a reasonable probability the outcome would have been different. *Id.* at 25. Had Ockert's appeal been heard in either the Fourth, Fifth, Sixth, or Eleventh Circuit, he would have been able to raise his suppression argument on appeal subject to plain error review. Instead, he was denied even the opportunity to present the argument.

Ockert is not alone experiencing hardship due to the circuit split. There are numerous examples where, but for the "good cause" test, plain error review would have produced different outcomes. *See, e.g.*, Pet. for Cert. at 12-13 in No. 20-5639, *cert. denied*, *Cain v. United States*, 141 S. Ct. 1082 (2021) (explaining an automatic waiver of motions to suppress raised first on appeal prevented petitioner from showing plain error in admitting involuntary confessions); Pet. for Cert. at 15 in No. 19-7112, *cert. denied*, *Galindo-Serrano v. United States*, 140 S. Ct.

2646 (2020) (explaining that but for a waiver of issues raised first on appeal, petitioner could have shown the delay in bringing the defendant before a magistrate judge was unreasonable and unnecessary as acknowledged by the court). The number of potentially different outcomes calls into question "the fairness, integrity, and public reputation" of judicial proceedings. *Rosales-Mireles*, 138 S. Ct. at 1906.

The Court should resolve this split in favor of permitting plain error review of particular arguments not timely raised. The confusion caused by Rule 12 shows no signs of resolution, and criminal defendants continue to be harmed as some courts consider untimely arguments to be automatically waived. However, it is clear from the text, amendments, and Committee notes that an automatic waiver was never intended, and that "good cause" is not required for plain error review under Rule 52.

B. Prior Arguments Against Reviewing this Issue Are Inapt

In opposing four recent petitions for certiorari on this issue, the government advocated against the Court's review based on several repeated arguments: (1) circuits that permit plain error review failed to consider the Court's decision in *Davis v. United States*, 411 U.S. 233 (1973); (2) jurisprudence on the issue is underdeveloped; (3) permitting plain error review without "good cause" would have minimal impact on outcomes; and (4) "most courts" reached general consensus on the issue. *See* Brief for the United States in Opposition, *Guerrero v. United States*, *cert. denied*, 140 S. Ct. 1300 (2020) (No. 19-6825) ("Guerrero Brief in Opposition"); Brief for the

United States in Opposition, *Bowline v. United States*, *cert. denied*, 140 S. Ct. 1129 (2020) (No. 19-5563) ("Bowline Brief in Opposition"); Brief for the United States in Opposition, *Galindo-Serrano v. United States*, *cert. denied*, 140 S. Ct. 2646 (2020) (No. 19-7112) ("Galindo-Serrano Brief in Opposition"). These arguments are flawed.

(1) The government argued that circuit courts must "consider the significance of this Court's interpretation of Rule 12 in *Davis* as to the proper construction." *See* Bowline Brief in Opposition at 18–19. While *Davis* remains "good law," *Davis* was limited by *Olano* and is not operative under the circumstances.

Davis held that an untimely claim was *waived* according to the "express waiver provision" of the 1944 version of Rule 12. *Davis*, 411 U.S. at 239–40, 242. In *Olano*, the Court distinguished waiver from forfeiture. *Olano*, 507 U.S. at 733 (quoting *Johnson v. United States*, 225 U.S. 405, 464 (1912)). *Olano* therefore limited *Davis* to circumstances in which a defendant "intentionally relinquished or abandoned" her rights. *Davis* has no import where, as with Ockert, the claim is untimely and the defendant has not relinquished any rights.

Regardless of *Davis*' role in interpreting Rule 12, if four circuits purportedly misinterpret *Davis*, as the government previously argued, then those alleged misinterpretations further demonstrate the need for the Court to clarify the applicable standards.

(2) The government argued that there is insufficient jurisprudence and more circuits should

consider the issue before granting certiorari. *See, e.g.*, Bowline Brief in Opposition at 20 (arguing only *Soto* "examined the question in any depth" and that the issue would "benefit from further consideration" by other courts). But there are numerous examples of circuit courts considering the issue and more than ample jurisprudence. *See, e.g., Mathis*, 932 F.3d 242; *Vasquez*, 899 F.3d 363; *Soto*, 794 F.3d 635; *Sperrazza*, 804 F.3d 1113; *Wheeler*, 742 F. App'x 646; *Hopper*, 934 F.3d 740; *Anderson*, 783 F.3d 727; *Guerrero*, 921 F.3d 895; *Bowline*, 917 F.3d 1227; *Sweeney*, 887 F.3d 529; *O'Brien*, 926 F.3d 57; *Burroughs*, 810 F.3d 833; *Robinson*, 361 U.S. 220; *United States v. Schropp*, 829 F.3d 998 (8th Cir. 2016); *United States v. Santana-Dones*, 920 F.3d 70 (1st Cir.), *cert. denied*, 140 S. Ct. 257, 205 (2019).

Moreover, several cases discussed or noted the circuit split and the continued uncertainty. *See, e.g., Guerrero,* 921 F.3d at 897; *Soto*, 794 F.3d 635; *Bowline*, 917 F.3d 1227. And the Ninth Circuit's 2020 decision in *Guerrero* was published expressly to clarify confusion among district courts. 921 F.3d at 897–98 ("We have decided to publish in this case to clarify the standard of review that governs in the wake of the 2014 [A]mendments to [Rule] 12.").

Further consideration by lower courts is unlikely to create uniformity. Even before the 2014 Amendments, courts struggled with the term "waiver" in the context of Rule 12. *Soto*, 794 F.3d at 649 (citing 1A Charles Alan Wright et al., Federal Practice and Procedure: Federal Rules of Criminal Procedure § 193 (4th ed. 2008)); *United States v. Burke*, 633 F.3d 984, 990 (10th Cir. 2011) (recognizing the circuit's cases on the applicable standard of

review "have sent a mixed message, to say the least"). While confusion and uncertainty led to the 2014 Amendments, a lack of clarity in the amendments enabled the uncertainty and confusion to persist. Thus, underdeveloped case law is no longer a reason to avoid this issue.

(3) The government argued that it is unlikely "the disagreement will affect the outcome" of cases, despite any purported similarities between good cause and plain error. Galindo-Serrano Brief in Opposition at 14; Bowline Brief in Opposition 20; Brief for the United States in Opposition at 14 in No. 20-5639. The circuit decisions have shown otherwise.

Though the plain error test is still difficult to meet, *Rodriguez*, 398 F.3d at 1298 (quoting *United States v. DiFalco*, 837 F.3d 1207, 1221 (11th Cir. 2016)), there are identifiable and unfortunate circumstances in which plain error review would yield different and meaningful results—as it has in Ockert's case. *See Ockert*, 829 F. App'x 338 (waiver of motion to suppress); *United States v. Cain*, 800 F. App'x 672 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1082 (2021) (same); *United States v. Galindo-Serrano*, 925 F.3d 40 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 2646 (2020) (wavier of due process claim for delay in bringing defendant before a magistrate judge).

The Tenth Circuit rarely, if ever, finds "good cause" to conduct plain error review. *See Burke*, 633 F.3d at 989, 991 (noting the Court "rarely . . . grant[s] relief under the good-cause exception"); *United States v. Hamilton*, 587 F.3d 1199, 1216 (10th Cir. 2009). Notably, the Institute did not identify a case in which the Tenth Circuit found good cause and conducted

plain error review of an untimely claim or a claim raised for the first time on appeal.

On the other hand, it is not uncommon for other circuits to afford defendants the opportunity to demonstrate plain error. *See, e.g.*, *United States v. Wernick*, 691 F.3d 108, 117 (2d Cir. 2012); *United States v. Moore*, 375 F.3d 259, 264-65 (3d Cir. 2004); *United States v. France*, 164 F.3d 203, 207 (4th Cir. 1998); *United States v. Merriweather*, 78 F.3d 1070, 1077-78 (6th Cir. 1996); *United States v. Williams*, 133 F.3d 1048, 1051-53 (7th Cir. 1998); *United States v. Millard*, 139 F.3d 1200, 1208 (8th Cir. 1998); *United States v. Cabrera*, 222 F.3d 590, 595 (9th Cir. 2000); *United States v. Hill*, 749 F.3d 1250, 1263 (10th Cir. 2014); *United States v. Hawkins*, 934 F.3d 1251, 1264 (11th Cir. 2019).

(4) The government argued that "most courts" recognize "that amended Rule 12 precludes consideration of untimely claims without a showing of good cause." Guerrero Brief in Opposition at 16. This characterization lacks context and clarity. It fails to capture the uncertainty experienced by circuit courts in the majority.

Even courts in the "majority" lack confidence in their position. The Ninth Circuit has questioned its membership in the majority and expressed *disagreement* with the majority view. In *Guerrero*, the panel begrudgingly adhered to its view of the circuit case law and applied the "good cause" requirement. *Guerrero*, 921 F.3d at 897. If the Ninth Circuit started from "a blank slate," it "might have been inclined to follow" the circuits that "review untimely defenses, objections, and requests for plain error." *Id.* So while

the Ninth Circuit is part of the majority, it actually *agrees* with the minority that "good cause" is not needed.

The D.C. Circuit acknowledged the precarious situation but has not affirmatively expressed its view. *Burroughs*, 810 F.3d at 837 ("It is not settled whether Burroughs's [untimely argument] bars us altogether (in the absence of good cause) from reviewing it on appeal, or whether we may give it limited review for plain error. We have not expressed a consistent position on the standard of review."). The D.C. Circuit skirted the issue, finding instead that the motion failed to "show that the error was plain." *Id.* at 838.

II. THE RULES OF CRIMINAL PROCEDURE CORRECTLY OMIT A "GOOD CAUSE" REQUIREMENT FOR PLAIN ERROR REVIEW OF UNTIMELY MOTIONS

Rule 12(b)(3) outlines issues for pretrial motions. The deadline for pretrial motions is either set by the court or "the start of trial." Fed. R. Crim. P. 12(c)(1). Before the 2014 Amendments, Rule 12 said that a "party waives any Rule 12(b)(3)" issue if a motion is "not raised by the deadline," though "[f]or good cause, the court may grant relief from the waiver." Fed. R. Crim. P. 12(e) (2012). Following the 2014 Amendments, Rule 12 now says that "[i]f a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause." Fed. R. Crim. P. 12(c)(3). The key difference is removing the term "waiver."

Rule 52(b) permits the appellate court "to notice 'plain errors or defects affecting substantial rights.'" Peter J. Henning *et al.*, 2A Fed. Prac. & Proc. Crim. § 469 (4th ed. 2020). For issues raised first on appeal, the Tenth Circuit incorrectly requires a showing of "good cause" before conducting plain error review. But nothing in the text of the rules, the Committee Notes, or this Court's precedent either establishes or supports the "good cause" requirement for issues raised first on appeal.

A. According to the Text of Rules 12 and 52, "Good Cause" Has No Bearing on Appellate Review

Statutory interpretation begins with its "plain meaning," where the words "must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014) (quotations omitted). "Where a 'phrase in isolation' has multiple plausible readings … the meaning "must be drawn from the context in which it is used." *Reno v. Koray*, 515 U.S. 50, 56 (1995). The ongoing circuit split and circuit opinions show that the plain reading of Rule 12(c)(3) offers uncertain guidance and is subject to multiple plausible interpretations. But clarity is available when Rule 12(c)(3) is read in context with other sections of Rule 12 and Rule 52.

According to the text of Rule 12, the "good cause" requirement applies solely to district courts. Rule 12(c)(3) says that "a court may consider" an untimely issue "if the party shows good cause." Rule 1(b)(2) broadly defines "court" to encompass district and appellate courts. *Soto*, 794 F.3d at 653. Despite

the broad definition of "court" under Rule 1, "the more specific Rule 12 refers repeatedly to 'the court' in nearly all of its subparts, and each subpart clearly addresses the functions of district courts—not appellate courts." *Id*. Similarly, Rule 12 repeatedly uses "the court" to reference district court activities, but then Rule 12(c)(3) says that "a court may consider" an untimely motion "if the party shows good cause." *Id*. It would be unusual for the term "court" to reference district court activities throughout Rule 12, but then arbitrarily reference both district courts and appellate courts in Rule 12(c)(3).

Comparing Rule 12(c)(3) and Rule 52(b) is also instructive. *See Util. Air Regul. Grp.*, 573 U.S. at 321 ("reasonable statutory interpretation must account for … the broader context of the statute as a whole.") (quotations omitted). Rule 52(b) says plain error "may be considered even though it was not brought to the court's attention." Unlike Rule 12(c)(3), Rule 52(b) is generally recognized as governing activities of the appellate court. *See* Lisa Griffen, 1 Federal Criminal Appeals § 4:47 (2021) ("plain error permits an appellate court to notice obvious errors"), Peter J. Henning et al., 2A Fed. Prac. & Proc. Crim. § 469 (4th ed. 2020) (same), *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020) ("When a criminal defendant fails to raise an argument in the district court, an appellate court ordinarily may review the issue only for plain error."). And unlike Rule 12(c)(3), a plain reading of Rule 52(b) lacks any requirement for "good cause." It would be strange for Rule 12 to reference district court activities and Rule 52 to reference appellate court activities, yet the "good cause" requirement of Rule 12(c)(3) would somehow govern appellate courts through Rule 52(b).

Considering the broader framework of the federal procedural rules, there are two instances where appellate courts are plainly implicated, and Rule 12(c)(3) is not one of them. The first instance is the Federal Rules of Appellate Procedure. Fed. R. App. P. 1 ("These rules govern procedure in the United States courts of appeals."). The second instance is Rule 52. *See* Fed. R. Crim. P. 52 (1944) Advisory Committee's Note ("This rule is a restatement of existing law … 'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal"); *but see Herzog v. United States*, 226 F.2d 561, 570 (9th Cir. 1955), *adhered to on reh'g*, 235 F.2d 664 (9th Cir. 1956) (recognizing Rule 52(b) relates to appellate courts, but may be exercised *sua sponte* by any court that can notice the error). By contrast, Rule 12(c)(3) is identifiably directed to district court activities. *Soto,* 794 F.3d at 653.

Amendments to the text must be considered as well. *See Johnson*, 225 U.S. at 415 ("A change of language is some evidence of a change of purpose"). It is axiomatic that changes to a statute's language signify changes to the statue's meaning. *United States v. Wilson*, 503 U.S. 329, 336 (1992). Lawmakers are presumed to have knowledge of this Court's decisions. Eig, Cong. Research Servs., Statutory Interpretation: General Principles and Recent Trends 20 (Sept. 2014). The Advisory Committee removed the term "waiver" from the text of Rule 12, giving the rule new meaning in light of this Court's decision in *Olano*. *Soto*, 794 F.3d at 652.

Because of the distinction between forfeiture and waiver, the Advisory Committee removed waived

claims from Rule 12(c)(3). By removing "waiver" from Rule 12, Rule 12(c)(3) no longer brands untimely claims as having been waived. Rather, Rule 12(c)(3) treats untimely motions as just that, *i.e.,* forfeited motions. Circuit courts should therefore treat untimely claims as forfeited under *Olano* and, due to the express removal of the term "wavier" in the 2014 amendment, apply plain error review to untimely claims.

The Tenth Circuit's decision below ignores the plain meaning of this amendment and the Court's decision in *Olano*. The Tenth Circuit found that Ockert waived his suppression motion because he failed to advance particular arguments of a multi-part test and because, in the Tenth Circuit, "suppression-related arguments are automatically waived if not preserved below." *Ockert*, 829 F. App'x at 342–44, n.3. A plain reading of current Rule 12(c)(3) leaves no room for "waiver." As a result, the Tenth Circuit's rule that *automatically* waives unpreserved suppression arguments is facially improper. And the Tenth Circuit's view that Ockert *waived* certain arguments in a multi-part test flouts this Court's understanding of the term waiver. Ockert never intentionally relinquished any arguments or any constitutional or statutory rights.

B. Advisory Committee Notes Support the Conclusion that "Good Cause" Is Not Required

Advisory Committee notes can provide a reliable source of insight into the meaning of a rule. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165–66, n. 9 (1988). In amending Rule 12 in 2014, the

Advisory Committee explained that the amendments were made in part because appellate courts were incorrectly treating a defendant's failure to file a timely pretrial motion as a waiver. Fed. R. Crim. P. 12 (2014) Advisory Committee's Note ("Although the term waiver . . . ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion."). "Thus, the drafters apparently believed the term *'waiver' was 'outdated in light of Olano,*' and therefore 'changed the term' to give the rule new meaning." *Soto*, 794 F.3d at 652 (emphasis added).

The Advisory Committee notes stated that the Committee did not intend to change the standard of Rule 12, and that it wanted to avoid "tying the hands" of appellate courts. Fed. R. Crim. P. 12 (2014) Advisory Committee's Note; Advisory Committee on Criminal Rules, Minutes 3 (Apr. 25, 2013). The Committee considered a cross reference in Rule 12(c)(3) to Rule 52—which would have indicated that Rule 52 was not to apply to Rule 12—but the Committee explicitly rejected this language. Report to the Standing Committee, May 2013. The cross reference to Rule 52 was "unnecessarily controversial" because including that language would have only continued the practice of allowing courts to treat untimely pretrial motions as an intentional relinquishment of a known right, and therefore an absolute bar to appellate review. *Id.* Consequently, the Committee left it to "the Courts of Appeals to decide if and how to apply Rules 12 and 52," *id.* at 5–

6, thus clearing the path for courts to end the "good cause" gate to Rule 52(b) review according to *Olano*.

C. This Court's Precedent Supports the Conclusion that "Good Cause" Is Not Required

The Tenth Circuit maintains an improper "automatic waiver" rule. In the decision below, the Tenth Circuit noted *Olano*'s distinction between waived and forfeited claims. *Ockert*, 829 F. App'x at 342. Its circuit precedent, however, holds that "suppression-related arguments not raised in the defendant's original motion to suppress" are automatically waived. *Id.* The lower court did not even consider whether "evidence shows that [Ockert] was aware of the argument below yet consciously chose to forgo it." *Id.* The Tenth Circuit's *automatic* waiver is incompatible with the requisite *intent* to relinquish rights under *Olano*. *See* 507 U.S.at 733.

This Court long accepted the proposition that plain error applies to issues raised first on appeal, and does not impose a "good cause standard." Nothing in this Court's line of cases since *Olano* supports automatic waiver of Rule 52(b) review or mandates good cause review. *See, e.g., Davis*, 140 S. Ct. at 1061 ("When a criminal defendant fails to raise an argument in the district court, an appellate court ordinarily may review the issue only for plain error."); *Rosales-Mireles*, 138 S. Ct. at 1904 ("A plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention.").

The Tenth Circuit also improperly held that Ockert waived his motion-suppression claim because his motion focused on certain factors but not others. *Ockert*, 829 F. App'x at 343 ("Ockert argued [] only the first and fourth elements of the plain view doctrine.… Here, however, his argument relies completely on the second and third elements…."). It is impossible to characterize Ockert's claim for suppression as intentionally relinquished (*i.e.,* waived) when Ockert raised and continues to press the claim.

To the extent that Ockert's arguments below addressed only certain factors, this Court recently ruled that questions of fact in sentencing should be reviewed for plain error and are never waived. *Davis*, 140 S. Ct. at 1061 ("[T]here is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error."); *Carlton v. United States*, 576 U.S. 1044 (2015) (Justices Sotomayor and Breyer concurring with denial of cert.) (Rule 52(b) "codifies the common-law plain-error rule, similarly draws no distinction between factual errors and legal errors.").

The Court should instruct the appellate courts to follow the Court's lead and reduce roadblocks to plain error review. *Davis*, 140 S. Ct. at 1061 ("Our cases likewise do not purport to shield any category of errors from plain-error review.").

The Court should also square the Tenth Circuit's approach to plain error review with the more open approach that this Court understands is the status quo. *Id.* ("[A]lmost every other Court of Appeals conducts plain-error review of

unpreserved arguments, including unpreserved factual arguments.").

CONCLUSION

The decision of the Tenth Circuit should be reversed. The plain text of Rule 12, the 2014 Amendments, and the Advisory Committee notes all make it clear that such an automatic waiver of issues raised for the first time on appeal was never intended, and "good cause" is not required for plain error review under Rule 52. A "good cause" requirement erodes civil liberties of criminal defendants by foreclosing defendants from even presenting arguments showing plain error review may have produced different and meaningful outcomes. However, the circuit split is firmly established, and criminal defendants continue to receive unequal treatment of their appeals. It is up to this Court to grant the petition for a writ of certiorari to resolve the issue so that criminal defendants receive the uniformity they deserve.

Respectfully submitted,

Michael J. Lockerby
Counsel of Record
George E. Quillin
Matthew H. Horton
Matthew M. Turk
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007
mlockerby@foley.com
(202) 945-6079

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerfield Road
Charlottesville, Virginia 22911
Telephone: (434) 978-3888

Counsel for Amicus Curiae

April 8, 2021