No.

In the Supreme Court of the United States

ERIC LEE BROWN, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an error can be "plain" within the meaning of Federal Rule of Criminal Procedure 52(b) based on established legal principles, or whether an error can be plain only if controlling precedent has previously recognized the same error in precisely the same circumstances.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Brown*, No. 1:19-cr-00002-WLS-TQL-1, U.S. District Court for the Middle District of Georgia. Judgment entered November 14, 2019.
- *United States v. Brown*, No. 19-14607, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered May 17, 2021.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is unpublished but is available at 855 Fed. Appx. 659.

JURISDICTION

The court of appeals entered judgment on May 17, 2021. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

Title 49, Section 46306 of the U.S. Code provides:

> (b) General criminal penalty. Except as provided by subsection (c) of this section, a person shall be fined under title 18, imprisoned for not more than 3 years, or both, if the person * * *
>
> (6) knowingly and willfully operates or attempts to operate an aircraft eligible for registration under section 44102 of this title knowing that—
>
> (A) the aircraft is not registered under section 44103 of this title;
>
> (B) the certificate of registration is suspended or revoked; or
>
> (C) the person does not have proper authorization to operate or navigate the aircraft without registration for a period of time after transfer of ownership[.]
>
> (c) Controlled Substance Criminal Penalty. * * *
>
> (2) A person violating subsection (b) of this section shall be fined under title 18, imprisoned for not more than 5 years, or both, if the violation is related to transporting a controlled substance by aircraft or

aiding or facilitating a controlled substance violation and the transporting, aiding, or facilitating—

(A) is punishable by death or imprisonment of more than one year under a law of the United States or a State; or

(B) that is provided is related to an act punishable by death or imprisonment for more than one year under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance).

Title 18, Section 924(a) of the U.S. Code provides:

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

Title 18, Section 922 of the U.S. Code provides:

(g) It shall be unlawful for any person [meeting one of nine specified conditions] to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Rule 52 of the Federal Rules of Criminal Procedure provides:

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Note to Subdivision (b). This rule is a restatement of existing law, *Wiborg v. United States*, 163 U.S. 632, 658; *Hemphill v. United States*, 112 F.2d 505 (C.C.A. 9th), reversed 312 U.S. 657. Rule 27 of the Rules of the Supreme Court provides that errors not specified will

be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.

INTRODUCTION

This case presents an entrenched, 5-5 split concerning the plain-error rule that affects hundreds of criminal and civil cases every year, if not more. Under Rule 52(b) of the Federal Rules of Criminal Procedure, courts of appeals may consider errors not raised below if they are "plain" and satisfy certain other criteria. Courts apply the same standard to review errors in the civil context. But the courts of appeals are intractably divided on how to decide whether an error is "plain" in the first place. This Court has held that "plain" error simply means error that is "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734 (1993). Nonetheless, the Eleventh Circuit and four other circuits have imposed an additional requirement. They hold that an error cannot be clear or obvious unless there is binding, on-point precedent from this Court or their own court of appeals that directly resolves the exact issue presented in the same statutory context. In the Eleventh Circuit, "to show plain error, the defendants must point to some precedent from the Supreme Court or our Court directly resolving the issue." *United States v. Harris*, 7 F.4th 1276, 1298 (2021). Or, as the Sixth Circuit has put it in a representative decision: "For an error to be plain, it must be clear and obvious—which it cannot be if it involves a question of first impression in this Circuit." *United States v. Potts*, 947 F.3d 357, 367 (2020).

Five other circuits reject this rule, concluding that error may be plain "in the absence of direct precedent," *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003), including specifically in a "matter of first impression," *United States v. Tann*, 577 F.3d 533, 537 (3d Cir. 2009).

Those cases hold that errors can be plain, for example, based on principles articulated in prior cases interpreting "analogous statutes." *Id.*

Under the latter approach, petitioner's conviction would have been vacated. Petitioner was charged with "knowingly and willfully operat[ing] … an aircraft eligible for registration"—here, a remote-controlled drone purchased from Best Buy—while "knowing that [the drone] is not registered" with the Federal Aviation Administration, in violation of 49 U.S.C. § 46306(b)(6). He pled guilty after the district court failed to inform him that the term "knowingly" required the government to prove that he knew not just that the drone was unregistered, but that registration was required. On appeal, the Eleventh Circuit held that the error was not plain—despite this Court's decision in *Rehaif* establishing that the term "knowingly" in a criminal statute modifies all of the elements that follow it—solely because the Eleventh Circuit had never specifically interpreted the aircraft statute, which produces at most a few prosecutions a year. The court applied longstanding circuit precedent holding that error cannot be plain in the absence of binding Supreme Court or Eleventh Circuit precedent "directly resolv[ing] the issue." App. 9a.

This case thus presents an ideal opportunity to resolve this longstanding and hugely consequential split about whether an error can be plain in the absence of binding precedent concerning the precise statute or rule at issue. It is hard to overstate the practical consequences. The federal courts of appeals apply plain-error review in hundreds if not thousands of cases every year, so it is critical that they apply a uniform and correct standard to evaluate whether an error is plain. The rule adopted by the Eleventh Circuit and four others is irreconcilable with the text of Rule 52(b), which contains no language categorically requiring binding, directly on-

point precedent. It also defies longstanding pre-Rule precedent that Rule 52 codified, in which this Court frequently held errors plain even absent directly controlling precedent. Rather, under the ordinary meaning of "plain" and under centuries of precedent, an error can be plain if the error is obvious based on prior precedent interpreting an analogous statute or deciding an analogous legal question.

The five circuits that apply the categorical rule are in essence abdicating their responsibility to actually perform plain-error review. They do not ask whether an error is clear or obvious, but instead whether they've recognized that error before. The consequence is to bar criminal defendants in these five circuits from establishing that errors in their cases are plain, based merely on the happenstance of whether they have been charged under a statute that their circuit has previously interpreted. Worse, the categorical rule preserves the convictions of criminal defendants who are innocent, again merely based on the happenstance of whether they have been charged with a recently enacted or rarely used statute, like petitioner's.

This Court should grant certiorari.

STATEMENT

1. In July 2019, petitioner Eric Lee Brown pled guilty to attempting to operate an unregistered aircraft as a means of facilitating a felony, in violation of 49 U.S.C. § 46306(b)(6) and (c)(2). The indictment charged petitioner with "knowingly and willfully" "attempt[ing] to operate an aircraft eligible for registration" by the FAA, "knowing that the aircraft was not registered, and said operation related to the facilitating of possession with intent to distribute marijuana." App. 3a.

The "aircraft" was a small remote controlled drone that petitioner purchased from Best Buy a week before

his arrest. App. 2a-3a. The government intended to introduce facts at trial it contended would prove that petitioner had agreed to use the drone to deliver marijuana to a Georgia state prison in exchange for $3,000. App. 3a, 12a-13a. Petitioner ran a few test flights after purchasing the drone but there was no evidence that he ever used it to transport drugs. App. 2a-3a. Petitioner was arrested on a road near the prison following a traffic stop, after officers discovered the drone in his car as well as a quantity of marijuana. App. 13a-14a.

Petitioner and the government entered into a factual stipulation accompanying the plea agreement agreeing that at trial, the government could have introduced evidence to prove that the drone was eligible for registration with the FAA, and that petitioner did not register it or obtain an aircraft operating license. App. 3a, 16a. The agreement also stated that the Best Buy website associated with the drone petitioner purchased contained a link to an FAA website containing registration requirements, and that petitioner had browsed the Best Buy website, although he purchased the drone in person at a Best Buy store. App. 14a-15a. The agreement further stated that an officer would testify that the iPad app associated with the drone contained terms of service that also pointed the user to the FAA website. App. 3a, 14a-16a. The government stipulated that petitioner's browser history contained no evidence that he had visited the FAA's website. App. 16a. The factual stipulation contained no other evidence suggesting that petitioner knew the drone needed to be registered. *Id.*

At the plea hearing, the district court walked petitioner through the elements of the offense. In explaining the indictment's use of the phrase "knowingly and willfully," the court told petitioner: "the thing that they say you did knowingly and willfully was to operate and attempt to operate an aircraft." App. 19a. The district

court stated that the government further had to "prove that that aircraft was eligible for [FAA] registration," and "that you operated or attempted to operate that aircraft that was eligible for registration knowing that the aircraft was not registered." *Id.* The court did not advise that the government needed to prove petitioner knew about the FAA's registration requirement. And the government's factual proffer, like the fact stipulation in the plea agreement, did not identify any evidence that petitioner knew of the registration requirement. C.A. App. 75-82.

The court accepted petitioner's plea and later sentenced him to 48 months of imprisonment and 3 years of supervised release. App. 5a.

2. On appeal, petitioner argued that there was no factual basis for his plea because there was no evidence that he knew the drone was eligible for FAA registration. The crime to which he pled guilty, 49 U.S.C. § 46306(b)(6), criminalizes "knowingly and willfully operat[ing] or attempt[ing] to operate an aircraft eligible for registration under section 44102 of this title knowing that … the aircraft is not registered." Petitioner argued that "knowingly" operating "an aircraft eligible for registration" requires knowledge that the aircraft was eligible for registration. Petitioner further argued that the district court's failure to instruct him on this knowledge requirement—and its acceptance of his plea even though there was no evidence of that knowledge—was plainly erroneous in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which held that "knowingly" "normally" applies "to all the subsequently listed elements of the crime," *id.* at 2196 (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009)); *see* App. 8a-10a.

3. The court of appeals affirmed. The court acknowledged "some merit" to petitioner's argument that § 46306(b)(6) requires proof that the defendant

knew "that his drone was eligible for registration." App. 8a (citing *Rehaif*, 149 S. Ct. at 2196). The court explained that "[s]imilar to the way in which [*Rehaif*] read 18 U.S.C. § 922(g), § 46306(b)(6) 'simply lists the elements that make a defendant's behavior criminal.'" *Id.* (quoting *Rehaif*, 149 S. Ct. at 2196). The court also observed that § 46306(b)(6), like § 922(g), was "a relatively short statute," and that with relatively short statutes "we 'read the statutory term "knowingly" as applying to all the subsequently listed elements of the crime.'" *Id.* (quoting *Rehaif*, 139 S. Ct. at 2196). And the court agreed that there was no evidence that petitioner actually knew that his drone was eligible for FAA registration. App. 9a-10a.

The court, nonetheless, found that any error was not plain under Rule 52(b). App. 9a. "[B]ecause *Rehaif* interpreted § 922(g), not § 46306(b)(6), and no other court has applied the analysis in *Rehaif* to § 46306(b)(6), we cannot hold the district court plainly erred in its explanation of the elements of Brown's charge." *Id.* The court applied circuit precedent holding that "there [is] no plain error when '[n]o precedent from the Supreme Court or this Court, or explicit language of a statute or rule, directly resolve[s] the issue in [the defendant's] favor." *Id.* (quoting *United States v. Innocent*, 977 F.3d 1077, 1085 (11th Cir. 2020)). Although there is no circuit split on how to interpret § 46306(b)(6), the court also noted Eleventh Circuit precedent holding that "[w]hen neither the Supreme Court nor this Court has resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue." *Id.* (quoting *United States v. Moriarty*, 429 F.3d 1012, 1018 (11th Cir. 2005)).

REASONS FOR GRANTING THE PETITION

A. The Circuits are Intractably Divided on the Standard for Deciding Whether an Error is "Plain"

This case presents an ideal opportunity for the Court to resolve an entrenched, 5-5 split over whether an error can be "plain" in the absence of directly on-point precedent interpreting the statute at issue.

1. Five Circuits—the Second, Third, Seventh, Eighth, and D.C. Circuits—hold that a court can deem an error "plain" even in the absence of direct, on-point, binding precedent. The Second Circuit has explained that, while "[t]he most obvious example of plain error is a trial court decision in direct contravention of governing case law," "it is not always necessary for the party alleging plain error to cite a circuit or Supreme Court precedent precisely on point." *United States v. Brown*, 352 F.3d 654, 664 (2003). To the contrary, "[p]lain error review is considerably more flexible." *Id.* In particular, the Second Circuit has acknowledged, "the 'plainness' of the error can depend on well-settled legal *principles* as much as well-settled legal *precedents*." *Id.* And that means that courts can "notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking." *Id.*

Applying this rule, the Second Circuit concluded that a district court plainly erred in accepting a guilty plea under 18 U.S.C. § 2243(a) without advising the defendant that knowledge of the victim's age was an element, even though the Second Circuit had not previously interpreted that statute. *United States v. Murphy*, 942 F.3d 73, 86 (2019). *Murphy* explained: "[N]either the absence of circuit precedent nor the lack of consideration of the issue by another court prevents the clearly erroneous application of statutory law from being plain error."

Id. (quoting *United States v. Evans*, 155 F.3d 245, 252 (3d Cir. 1998)).

The Third Circuit has likewise repeatedly held that "lack of precedent alone will not prevent us from finding plain error." *United States v. Stinson*, 734 F.3d 180, 184-85 (2013) (holding that application of sentencing enhancement was plain error even though "no court has specifically considered the question we address here"); *Evans*, 155 F.3d at 252 (plain error in imposing reimbursement of counsel fees under supervised release statute even though neither Third Circuit nor any other had "yet addressed" the issue); *United States v. Tann*, 577 F.3d 533, 537 (3d Cir. 2009) (finding plain error in "matter of first impression for this Court" in light of opinions concerning "analogous statutes," among other things); *United States v. Cole*, 567 F.3d 110, 117 (3d Cir. 2009) (finding plain error "[e]ven though the District Court had no precedent from our court to guide its decision").

The Seventh, Eighth, and D.C. Circuits agree. Indeed, the D.C. Circuit has found that a district court committed plain error in interpreting a statute "[e]ven absent binding case law" and where other circuits were split on the proper interpretation. *In re Sealed Case*, 573 F.3d 844, 851-52 (2009); *see also United States v. Long*, 997 F.3d 342, 357 (D.C. Cir. 2021) (pointing to multiple D.C. Circuit precedents finding plain error in the absence of on-point precedent and "even though other circuits had taken the opposite view"); *United States v. Seals*, 813 F.3d 1038, 1047 (7th Cir. 2016) (finding plain error in application of sentencing enhancements and noting that "the fact that this court rarely finds plain error" on a "matter of first impression" does "not mean that such a conclusion is never warranted"); *United States v. Lachowski*, 405 F.3d 696, 698-99 (8th Cir. 2005) (conducting independent analysis and finding plain error despite

"no pertinent authority concerning the scope" of the statute). In these circuits, the lack of "either Supreme Court or controlling circuit precedent … does not prevent a finding of plain error if the error was, in fact, clear or obvious based on the materials available to the district court." *Lachowski*, 405 F.3d at 698.

2. By contrast, five courts of appeals hold that the absence of a binding precedent interpreting the statute at issue categorically precludes a finding of plain error, even where the error is obvious under principles articulated by this Court.

Start with the decision below. The Eleventh Circuit acknowledged that the district court's decision was erroneous under a straightforward application of the rule this Court announced in *Rehaif*. The Eleventh Circuit acknowledged that the statute under which petitioner was convicted, 49 U.S.C. § 46306(b)(6), was in relevant respects identical to the criminal statute at issue in *Rehaif*: it prohibits "knowingly" engaging in certain conduct, and after the word knowingly, it "simply lists the elements that make a defendant's behavior criminal." App. 8a (quoting *Rehaif*, 139 S. Ct. at 2196). And the Eleventh Circuit then acknowledged that *Rehaif*'s rule—that "we read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime"—applied to § 46306(b)(6) because it was a "relatively short statute." *Id.* Despite expressing no doubt at all that the phrase "knowingly" applied to § 46306(b)(6)'s registration requirement, the Eleventh Circuit found that the district court's error was not plain for the sole reason that "*Rehaif* interpreted § 922(g), not § 46306(b)(6), and no other court has applied the analysis in *Rehaif* to § 46306(b)(6)." App. 9a.

Indeed, the court observed that, under longstanding Eleventh Circuit precedent, the result would have been the same even if other circuits *had* applied *Rehaif* to

§ 46306(b)(6), so long as the Eleventh Circuit had not. *See* App. 9a (citing *Innocent*, 977 F.3d at 1085).

The Eleventh Circuit has steadfastly adhered to this rule, including in multiple decisions issued after the one below, both criminal and civil. *See Harris*, 7 F.4th at 1298 ("In order to show plain error, the defendants must point to some precedent from the Supreme Court or our Court directly resolving the issue."); *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300 (11th Cir. 2021).

The First, Fourth, Fifth, and Sixth Circuits agree with the Eleventh. For example, in *Lestage v. Coloplast Corp.*, 982 F.3d 37 (2020), the First Circuit applied a civil plain-error rule to hold that, in light of Supreme Court precedent interpreting the word "because" in Title VII's anti-retaliation provision to require a showing of "but-for causation," the "nearly identical statutory language" in the False Claims Act anti-retaliation provision also required but-for causation. *Id.* at 46. Though the First Circuit regarded that conclusion as compelled by Supreme Court precedent, it nonetheless held that the district court's error was not "plain error because this circuit had never decided the question" in the False Claims Act context. *Id.*

Likewise, the Fourth Circuit has repeatedly explained that there can be no plain error where "there is no controlling precedent [] either in the Supreme Court or in our court" interpreting the specific statute at issue. *United States v. Beasley*, 495 F.3d 142, 149 (2007); *accord, e.g.*, *United States v. Bird*, 409 Fed. Appx. 681, 688 (4th Cir. 2011) (because "there was no controlling Supreme Court or circuit precedent," "[t]herefore, we cannot conclude that the district court plainly erred").

And the Fifth Circuit holds that circuit precedent must be so directly on-point for purposes of plain-error review that "[e]ven where the argument requires only extending authoritative precedent, the failure of the dis-

trict court to do so cannot be plain error." *United States v. Evans*, 587 F.3d 667, 671 (2009) (cleaned up). Thus, where a sentencing statute stated that a defendant's mental health treatment must be "specified by the court," and where "every circuit court to review a sentence" under that statute concluded it was error to delegate authority to a probation officer to determine treatment, the Fifth Circuit held that there was no plain error, solely because the Fifth Circuit itself had not "previously addressed" the specific question in the context of the specific statute. *United States v. Lomas*, 304 Fed. Appx. 300, 300-01 (5th Cir. 2008); *see also United States v. Acevedo-Tolentino*, 788 Fed. Appx. 247, 249 (5th Cir. 2019) (no plain error where brief "characterizes the issue as one of first impression," regardless of statutory language).

The Sixth Circuit is in accord: "For an error to be plain, it must be clear and obvious—which it cannot be if it involves a question of first impression in this Circuit." *Potts*, 947 F.3d at 367; *see United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) ("A lack of binding case law that answers the question presented will also preclude our finding of plain error."). The Sixth Circuit has applied this rule to conclude that a district court did not plainly err when it applied a statutory monetary assessment limited to "non-indigent persons" to an individual with a "monthly income of $1100 and a negative net worth of over $100,000." *United States v. Kent*, 765 Fed. Appx. 126 (6th Cir. 2019). Though it was indisputably obvious that the individual was indigent, the court held that there was no plain error because no prior Sixth Circuit decision had interpreted the word "non-indigent" in that specific statute. *Id.*

3. In short, there is deep and entrenched disagreement among the courts of appeals on the meaning of "plain" in the "plain error" test applicable in criminal

and civil cases. Five circuits hold that the absence of controlling precedent directly resolving the issue categorically precludes a finding of plain error, no matter how clear the relevant legal principles or how obvious their application to the question at hand. Five other circuits hold that the absence of directly-on-point precedent is not fatal, and that plain error can arise on the basis of established "principles," including case law interpreting similar language in other statutes. In those circuits, petitioner's guilty plea would have been vacated.

B. The Question Presented is Important

The plain-error standard affects hundreds if not thousands of cases each year and has significant practical consequences in both civil and criminal contexts. The Court should not tolerate ongoing and entrenched disagreement in the courts of appeals about the most basic element of plain error—the word "plain." That is especially so because the lower court disagreement unfairly penalizes defendants based on the happenstance of whether they have been charged under a new or obscure statute. This Court's intervention is urgently needed.

1. This Court for over a century has emphasized the importance of plain-error review to fair and efficient criminal justice. Long before Rule 52(b), this Court applied the principle that "although [a] question was not properly raised," "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." *Wiborg v. United States*, 163 U.S. 632, 658 (1896). Rule 52(b), like that longstanding principle it codified, is "a fairness-based exception to the general requirement that an objection be made at trial," *Henderson v. United States*, 568 U.S. 266, 276 (2013), and also embodies "principles of … integrity[] and public reputation," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). The Rule strikes a "careful balancing of our need to encourage all trial participants

to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)).

This Court frequently grants review to correct decisions that upset this balance. Among its many plain-error decisions, this Court has granted review to repudiate "unduly restrictive" standards for certain categories of errors. *Rosales-Mireles*, 138 S. Ct. at 1906; *see Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). It has granted review to abolish atextual, categorical exceptions to plain-error review. *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020); *Puckett v. United States*, 556 U.S. 129, 135 (2009); *Johnson v. United States*, 520 U.S. 461, 466 (1997). And it has granted review to overturn interpretations of Rule 52 that cause "unjustifiably different treatment of similarly situated individuals." *Henderson*, 568 U.S. at 274.

Yet aside from two decisions resolving *when* to assess an error's plainness, *Henderson*, 568 U.S. at 273; *Johnson*, 520 U.S. at 468, none of this Court's modern plain-error cases have provided guidance on what it means for an error to be "plain." The sheer number of decisions applying plain-error review shows that this Court's guidance is sorely needed. There were 1,847 federal court of appeals cases using the phrase "plain error" in 2020 alone. There were 901 cases that year using the phrase three times, and 437 cases using the phrase five times. And that was just a single year. The standard for deciding whether an error is in fact "plain" affects all of these decisions.

And circuits applying the more restrictive standard have frequently found that errors are not plain based on a lack of controlling on-point precedent. *See* pp. 9-14, *supra*. Indeed, in the month of August 2021 alone, the

Eleventh Circuit in seven separate cases has denied plain error on the basis of its rule requiring directly on-point "precedent from the Supreme Court or this Court." *United States v. De La Fe*, 2021 WL 3877862, at *3 (Aug. 31, 2021); *United States v. Varela*, 2021 WL 3732267, at *3 (Aug. 24, 2021); *United States v. Jeune*, 2021 WL 3716406, at *10 (Aug. 23, 2021); *United States v. Harrison*, 2021 WL 3720052, at *1 (Aug. 23, 2021); *Fullard v. Thomas*, 2021 WL 3701125, at *3 n.4 (Aug. 20, 2021); *27th Ave. Caraf*, 9 F.4th 1300; *Harris*, 7 F.4th at 1298.

That is just one circuit over the course of a single month. The restrictive categorical rule that five circuits apply prevents countless defendants from even gaining the opportunity to convince a court that error in the case was plain, and preserves many unjust convictions of people whose conduct does not actually render them guilty of a crime.

2. The restrictive rule applied below also strikes at the heart of the fairness-based rationale for permitting plain-error review in the first place. The intractable division over the plain-error standard leads to arbitrary differential treatment of defendants across circuits. *See* pp. 9-14, *supra*. But the test applied by the First, Fourth, Fifth, Sixth, and Eleventh Circuits also leads to arbitrary differential treatment of another sort: defendants *within* those circuits are unfairly penalized for being convicted of new or uncommon offenses.

Petitioner's conviction is a prime example. Between 1994 (the year § 46306 was enacted) and 2018 (the most recent year of available charging statistics), only 35 defendants total were charged under any of the statute's numerous prohibitions. *See* Bureau of Justice Stats., *Federal Criminal Case Processing Statistics: FY 1994-2018—Title 49, Section 46306*, https://www.bjs.gov/fjsrc/tsec.cfm (last visited Sept. 23, 2021). Given the tiny number of prosecutions, it is unsurprising that there ap-

pear to be no judicial opinions (besides the decision below) discussing what sort of knowledge is required to violate § 46306(b)(6) or its predecessor statute, 49 U.S.C. App. § 1742(b)(1)(D)—or indeed discussing the elements of the offense *at all*. With the court below being the very first to interpret the statute, petitioner could not possibly have prevailed under the more restrictive standard, no matter how obvious the error under precedent construing materially identical statutes.

The federal criminal code is packed with obscure provisions like § 46306(b). Hundreds of statutes have at most a couple prosecutions in any given year.[1] And with Congress enacting some 70 new crimes annually, the problem only continues to grow. Cong. Res. Serv., *Criminal Offenses Enacted from 2008-2013*, at 1 (June 23, 2014), https://www.hsdl.org/?abstract&did=757175 (439 new offenses in 6 years).

Under the rule applied below, defendants charged under these rarely prosecuted statutes have a severe disadvantage on appeal relative to defendants charged with offenses under more commonly invoked statutes that likely will have been construed in a previous decision. This disparity serves none of the purposes of Rule 52(b). As this case shows, an "injustice" can be "obvious" even if the precise error has not previously been identified. *Frady*, 456 U.S. at 163. And concerns about "sandbagging," *Rosales-Mireles*, 138 S. Ct. at 1913 (Thomas, J., dissenting), are *less* salient when there is no on-point controlling precedent of which defendant or his counsel

[1] For example, according to Bureau of Justice Statistics data from 2018, over 250 separate provisions of Title 18 had zero prosecutions. Dozens more statutes had only one or two prosecutions. *See* Bureau of Justice Stats., *Federal Criminal Case Processing Statistics—Title 18*, https://www.bjs.gov/fjsrc/tsec.cfm (last visited Sept. 23, 2021).

could feign ignorance. Rather, the requirement of on-point controlling precedent—like other misinterpretations of the plain-error rule this Court has granted review to correct—causes "unjustifiably different treatment of similarly situated individuals." *Henderson*, 568 U.S. at 274.

3. The question presented also has significant civil consequences. Under Federal Rule of Civil Procedure 51(d)(2), courts may "consider a plain error in" civil jury instructions if the party did not properly object. There is a similar rule for unpreserved evidentiary objections. Fed. R. Evid. 103(e). Both of these rules were modeled on Rule 52(b), and courts apply the same standards to determine the obviousness of errors in civil and criminal cases. *See Jimenez v. Wood Cty.*, 660 F.3d 841, 847 (5th Cir. 2011). Similarly, this Court's Rule 24.1(a), the predecessor of which inspired Rule 52(b), allows the Court to "consider a plain error not among the questions presented but evident from the record." *See*, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 238 & n.9 (1976) (applying predecessor rule to correct plain constitutional error in Title VII case); *Vachon v. New Hampshire*, 414 U.S. 478, 479 & n.3 (1974) (same for state criminal conviction). And appellate courts exercise discretion to review civil errors not specifically identified by rule, again applying the same standard as under Rule 52(b). *E.g.*, *27th Ave. Caraf*, 9 F.4th 1300; *Minnifield v. Wells Fargo Bank, N.A.*, 786 Fed. Appx. 979, 982 (11th Cir. 2019); *Brusch v. United States*, 823 Fed. Appx. 409, 411 (6th Cir. 2020); *Crowley v. CCAIR, Inc.*, 98 Fed. Appx. 930, 931-32 (4th Cir. 2004).

In these civil contexts, like in criminal ones, courts on the restrictive side of the split have refused to find obvious errors "plain" solely for lack of on-point controlling precedent. As mentioned, the First Circuit in a recent employment case found a causation instruction er-

roneous under Supreme Court precedent interpreting "nearly identical statutory language" in Title VII, and yet held that the instruction was not *plainly* erroneous "because this circuit had never decided the question" in the (relatively uncommon) context of the False Claims Act. *Coloplast*, 982 F.3d at 46. Likewise, the Eleventh Circuit in a recent civil case found that it was not plainly erroneous to conduct a civil deliberate-indifference trial where the plaintiff wore a prison uniform and shackles because he did "not cite any case from this Circuit or the Supreme Court addressing the use of prison attire or shackles during a civil trial." *Fullard*, 2021 WL 3701125, at *3 n.4; *see also Minnifield*, 786 F. App'x at 982; *27th Ave. Caraf*, 9 F.4th 1300. The significance of this restrictive approach to hundreds of criminal defendants each year alone warrants review; these civil consequences confirm that review is urgently needed.

C. The Decision Below Is Wrong

The Eleventh Circuit's rigid categorical rule—that an error cannot be "plain" unless controlling precedent directly resolves the precise issue in the defendant's favor—is wrong. That rule appears nowhere in the text of Rule 52(b) and is contrary to this Court's decisions finding errors plain absent controlling precedent.

1. *Text.* Rule 52(b)'s text is not limited to errors directly resolved by controlling precedent. The Rule states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Rule does not define "plain." Its ordinary meaning is "clear" or "obvious." *Rosales-Mireles*, 138 S. Ct. at 1904; Webster's Second International Dictionary 1878 (1948) ("manifest"; "clear"); Oxford English Dictionary (3d ed. 2006) ("Evident, obvious, straightforward"; "Clear to the senses or the mind; evident, manifest, obvious; easily perceivable or recognizable").

None of these definitions suggests that controlling precedent must directly address the error for it to be plain. In ordinary English, something can be "clear" or "obvious" without having been specifically identified in the past. Statutory text, for example, can be "clear" and "unambiguous" under standard principles of construction, even if no prior case has construed the specific text at issue. *Sebelius v. Cloer*, 569 U.S. 369, 380 (2013). So too for legal errors: As Judge Calabresi explained in rejecting a categorical rule like the Eleventh Circuit's, "the 'plainness' of the error can depend on well-settled legal *principles* as much as well-settled legal *precedents*." *Brown*, 352 F.3d at 664.

2. *History.* Rule 52's history confirms that an error can be plain even if not specifically resolved by controlling precedent. Rule 52 was enacted in 1944 as "a restatement of existing law." Fed. R. Crim. P. 52 advisory committee note to subsection (b). This "existing law" was the principle that "although [a] question was not properly raised," "if a plain error was committed in a matter so absolutely vital to defendants," this Court is "at liberty to correct it." *Wiborg*, 163 U.S. at 658 (cited in advisory committee note); *see also Clyatt v. United States*, 197 U.S. 207, 222 (1905) (*Wiborg* "justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant"). The Advisory Committee also noted that this Court's rules permitted it to correct "a plain error not assigned or specified."

This Court frequently applied this "existing law" to correct plain errors that it expressly recognized were not resolved by controlling precedent. These decisions would not have been possible under the Eleventh Circuit's rule.

For example, in *Weems v. United States*, 217 U.S. 349 (1910), a leading plain-error case, a U.S. official in

the Philippines was sentenced to fifteen years of hard labor for falsifying a public document. This Court found that the sentence was cruel and unusual under a provision in the Philippine Bill of Rights parallel to the Eighth Amendment. The petitioner had not asserted this argument in the court below, and so the Court reviewed the argument under its former rule allowing it to "notice a plain error not assigned." *Id.* at 362.

The Court recognized that the question presented was *terra nova*, yet found the error plain. "What constitutes a cruel and unusual punishment ha[d] not been exactly decided." *Id.* at 368. "No case ha[d] occurred in this court which ha[d] called for an exhaustive definition." *Id.* at 369. The drafting and ratification history, too, was "indefinite." *Id.* at 371. Indeed, there was not even precedent resolving the *general* question whether a punishment could be constitutionally excessive if "greatly disproportioned" to the crime. *Id.* at 371; *see Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) ("We first interpreted the Eighth Amendment to prohibit 'greatly disproportioned' sentences in *Weems* ...."). But, canvassing the Eighth Amendment's history, constitutional commentary, and state-court precedent, the Court concluded that the Eighth Amendment does prohibit disproportionate sentences and that the petitioner's penalty was unconstitutionally disproportionate. *See id.* at 377-81. Had on-point controlling precedent been required, this Court could not possibly have found the error plain.

The same was true in *Brasfield v. United States*, 272 U.S. 448 (1926), where the trial judge had asked a jury unable to reach consensus to reveal its numerical division. In a previous case, the Court in passing had "condemned the practice of inquiring of a jury, unable to agree, the extent of its numerical division." *Id.* at 449 (citing *Burton v. United States*, 196 U.S. 283, 307 (1905)).

Though it was unsettled "whether noncompliance with the rule as stated in the Burton Case is reversible error," this Court under the plain-error standard resolved that unsettled question, holding it "essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal." *Id.* at 450. "The failure of petitioners' counsel to particularize an exception to the court's inquiry d[id] not preclude this court from correcting the error." *Id.* (citing *Wiborg*; *Clyatt*; and *Weems*).

3. *Rule 52 precedent.* Consistent with the existing law codified in Rule 52, this Court has never interpreted Rule 52 to require on-point controlling precedent. This Court's articulations of the standard are consistent: to be plain, an error must be "clear" or "obvious," nothing more. *United States v. Marcus*, 560 U.S. 258, 262 (2010) ("clear or obvious, rather than subject to reasonable dispute"); *Puckett*, 556 U.S. at 135 (same); *Johnson*, 520 U.S. at 467 ("'clear' or, equivalently, 'obvious'"); *Olano*, 507 U.S. at 734 (same); *Young*, 470 U.S. at 16 n.14 ("obvious or readily apparent"). That these articulations do not impose any strict requirement of controlling precedent accords with the general principle that the plain-error rule "is not a rigid one." *Weems*, 217 U.S. at 362. And it accords with this Court's recognition that errors, even plain ones, often involve "matter[s] of legal degree, not kind." *Henderson*, 568 U.S. at 275.

Indeed, this Court's applications of Rule 52(b) cannot be squared with a controlling-precedent requirement. In *Olano*, this Court assumed (and the government "essentially concede[d]") that it was a plain error to allow an alternate juror to be present during deliberations with the defendant's consent, even though the relevant rule's explicit text and governing precedent did not address the "consent" question. 507 U.S. at 737. In *Giordenello v. United States*, 357 U.S. 480 (1958), this

Court held a complaint supporting an arrest warrant plainly insufficient, not under any directly controlling precedent, but rather under a fact-specific application of the general principle that a complaint must "enable the appropriate magistrate … to determine whether the 'probable cause' required to support a warrant exists." *Id.* at 486. And in *Puckett*, this Court held that the government's violations of plea agreements are subject to plain-error review, despite recognizing that such review will require case-by-case evaluation of "the scope of the Government's commitments." 556 U.S. at 143; *see also United States v. Moody*, 915 F.3d 425, 431 (7th Cir. 2019) (Barrett, J.) (imposition of sentencing enhancement plainly erroneous because district court's "inferential leap required by common sense [was] too great"). Not one of these cases, nor any other from this Court, has suggested that errors are plain only if identified in on-point controlling precedent.

This Court, moreover, has rejected analogous attempts to impose threshold requirements that foreclose plain-error review in certain categories of cases. The Fifth Circuit, for example, previously took the view that "questions of fact … can never constitute plain error." *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020) (per curiam) (quotation marks omitted). This Court unanimously repudiated that approach as having "no legal basis." *Id.* at 1062. "The text of Rule 52(b) does not immunize factual errors from plain-error review," and the Court's "cases likewise do not purport to shield any category of errors from plain-error review." *Id.* at 1061. Just the same, the approach adopted below insulates one category of obvious legal error from review—those not directly identified in a controlling case involving the exact same context.

4. *Purpose*. Requiring on-point controlling precedent also thwarts the policies animating plain-error re-

view. "[P]lain-error review is not a grading system for trial judges." *Henderson*, 568 U.S. at 278 (errors can become plain after trial). Its application does not depend on whether the trial court or the parties "should have known" of the error. *Id.* at 277. Rather, Rule 52(b), like the existing law it codified, "balanc[es] … our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Frady*, 456 U.S. at 163.

That "balance[]" counsels strongly in favor of recognizing that errors can be plain even if not dictated by controlling precedent. Under that approach, criminal defendants still have every incentive to object to errors the first time around. That is because in addition to showing that the error was obvious, a defendant who fails to object to an error at trial must surmount Rule 52(b)'s "other screening criteria"—that the error "affected [his] substantial rights" and "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Henderson*, 568 U.S. at 278 (quoting *Olano*, 507 U.S. at 732). These requirements are stringent, and they have nothing to do with Rule 52(b)'s obviousness requirement, as is evident from the many cases denying relief even when the error was clear. *Olano*, 507 U.S. at 737-41; *Johnson*, 520 U.S. at 468-70.

On the other side of the balance, criminal convictions can produce "obvious injustice" whether or not controlling precedent has already identified the particular injustice. This Court, for example, did not need a controlling case to tell it that fifteen years of hard labor for falsifying a document is manifestly cruel and unusual. *See Weems*, 217 U.S. at 381. Nor did the Second Circuit need directly controlling precedent to tell it that a statute prohibiting intentional sexual abuse of a minor obviously requires proof that the defendant knew the intend-

ed victim's age. *Murphy*, 942 F.3d at 80-86. Categorically forbidding courts from reversing convictions in those sorts of situations does not serve justice, but rather penalizes defendants for the sole reason that the error has not yet arisen in their particular circumstance.

The circuits that have adopted the controlling-precedent requirement erroneously treat plain-error review as interchangeable with qualified immunity and with AEDPA review of state-court convictions. For example, the Eleventh Circuit restricts plain errors to those "so clearly established and obvious that it should not have been permitted by the trial court even absent the defendant's timely assistance in detecting it." *United States v. Kushmaul*, 984 F.3d 1359, 1363 (2021); *compare Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ("Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); 28 U.S.C. § 2254(d)(1) (habeas available only if state court violated "clearly established Federal law, as determined by the Supreme Court of the United States").

Rule 52(b)'s text, of course, imposes no analogous requirement that the law be clearly established by existing precedent—it requires only that an error be "plain." And conflating it with these other doctrines ignores that they serve fundamentally different purposes. Qualified immunity reflects that personal liability for damages can chill vigorous law enforcement; the doctrine ordinarily requires controlling precedent to ensure that officers are not penalized for "reasonable but mistaken judgments." *Carroll v. Carman*, 574 U.S. 13, 17 (2014).[2] AEDPA

[2] And even so, on-point precedent is not always necessary: "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."

strictly limits the ability of federal courts to reverse state-court judgments because those reversals "intrude[] on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Plain-error review, by contrast, is "more flexible," because it "is concerned with efficient administration of justice *within* the federal court system, rather than issues of federalism or the conduct of executive and state officials." *Brown*, 352 F.3d at 665 n.9. When a court of appeals finds an error plain in a criminal appeal, no one pays damages, and no state judgments are disrupted. At most, reversal under Rule 52(d) spares defendants from convictions resting on obvious legal errors and requires retrial.

And confirming that errors can be plain even absent directly controlling precedent "will not open any 'plain error' floodgates." *Henderson*, 568 U.S. at 278. Again, "the Rule itself contains other screening criteria." *Id.* Correcting the approach adopted below will ensure only that courts do not impose an invented threshold requirement that forecloses plain-error review in situations where that review is needed most.

D. This Case is a Good Vehicle

This case presents an ideal vehicle to resolve this important question. Petitioner's plain error argument was squarely raised in the court of appeals, and the court rejected the argument based exclusively on prior circuit precedent requiring an existing, on-point decision specifically interpreting § 46306(b)(6) or specifically applying the reasoning of *Rehaif* to § 46306(b)(6). App. 9a.

This case also vividly illustrates how errors can be clear even if not preordained by controlling precedent. If the Eleventh Circuit had followed the approach taken

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Taylor v. Riojas, 141 S. Ct. 52, 53-54 (2020) (per curiam) (quotation marks omitted).

by five of its sister circuits and simply asked whether it was "clear" or "obvious" that the principle articulated in *Rehaif* applied to § 46306(b)(6), it would have answered yes.

The statute in *Rehaif*, 18 U.S.C. § 924(a), prohibits "knowingly" possessing a firearm while being of a certain status. 139 S. Ct. at 2194. The statute in this case prohibits "knowingly and willfully operat[ing] or attempt[ing] to operate an aircraft eligible for registration … knowing that … the aircraft is not registered." 49 U.S.C. § 46306(b)(6). *Rehaif*, applying ordinary principles of construction, held that "knowingly" applied to all elements of the offense. The unmistakable textual and structural parallels between § 924(a) and § 46306(b) make clear that *Rehaif* demands the same result:

- Under the "presumption in favor of scienter," criminal statutes generally "require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S. Ct. at 2195.
- Section 46306(b)'s text "supports the presumption" because it "simply lists the elements that make a defendant's behavior criminal," *id.*, and, as the court below noted, is "relatively short," App. 8a.
- Section 46306(b)'s text in fact presents a far *stronger* case for requiring knowledge of all elements than the statute in *Rehaif*, because it specifically requires that the defendant "know[] that … the aircraft is not registered." 49 U.S.C. § 46306(b)(6).
- That a drone is eligible for registration is not a mere "jurisdictional element." *Rehaif*, 139 S. Ct. at 2196.
- Reading § 46306(b) as requiring knowledge of eligibility for registration "helps to separate wrongful from innocent acts" because, "[a]ssuming compliance with ordinary licensing requirements," operat-

ing a drone "can be entirely innocent." *Id.* at 2197. In other words, registration status is not a "collateral" legal question but rather "the 'crucial element' separating innocent from wrongful conduct." *Id.* at 2197-98.

- Section 46306(b) is a felony provision, not a "regulatory or public welfare program … carry[ing] only minor penalties." *Id.* (cleaned up).

Rehaif could well have been written about § 46306(b)(6), and its consequences for that statute are clear: A defendant cannot be convicted under § 46306(b)(6) unless he *knows* that the unregistered aircraft he operates is "eligible for registration."

Moreover, there is no question that if the error in this case qualifies as plain, petitioner's guilty plea would be vacated because the other elements of the *Olano* test are satisfied. The government offered (and had) no evidence that petitioner knew about the registration requirement, and accordingly offered (and had) no evidence that petitioner is actually guilty of violating § 46306(b)(6). *See* pp. 6-7, *supra*. The error was therefore not only substantially prejudicial, but "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Olano*, 507 U.S. at 736-37 (a "court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant").

This case thus perfectly illustrates the problem with the Eleventh Circuit's approach. Absent this Court's review, petitioner will serve a prison sentence for a crime of which he is not guilty, merely because the government chose to charge him under an unusual statute as to which the court of appeals lacked prior precedent.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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SEPTEMBER 2021

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14607

Non-Argument Calendar

D.C. Docket No. 1:19-cr-00002-WLS-TQL-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERIC LEE BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(May 17, 2021)

Before MARTIN, NEWSOM, and ANDERSON, Circuit Judges.

PER CURIAM:

Eric Lee Brown appeals his conviction by guilty plea for knowingly and willfully operating and attempting to operate an aircraft eligible for registration by the Federal Aviation Administration ("FAA"), while knowing that the aircraft was not registered, in relation to facilitating the felony of possessing marijuana with the intent to distribute, in violation of 49 U.S.C. § 46306(b)(6)(A) and (c)(2). He argues that, at his plea hearing, the district court plainly erred by failing to ensure that he understood the

nature of the charge against him, which rendered his guilty plea constitutionally involuntary. After careful review, we affirm the district court's acceptance of Brown's guilty plea.[1]

I.

On March 29, 2018, at around 10:30 p.m., law enforcement officers responded to a call about a vehicle on a dirt road near a state prison in Georgia. Officers stopped the vehicle and asked Brown to step out. In the passenger area of the backseat, officers could see two clear plastic bags containing what was later confirmed to be marijuana. They also saw a drone. Further search of the vehicle revealed a roll of plastic vacuum wrap, several clear plastic bags, rolling papers for cigars or cigarettes, five cell phones, and an iPad. A pat-down of Brown's person revealed a large roll of tape commonly used to bind contraband packages.

The drone's programming revealed that it was first activated on March 23, 2018, and that it was registered to work with the iPad in Brown's possession. The drone and iPad both contained videos of Brown practicing drone flights. Officers also obtained surveillance video from a Best Buy store, which showed Brown purchasing the drone about a week before the traffic stop. Search of the

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[1] As a preliminary matter, we reject the government's invitation to hold that we are precluded from reviewing any of Brown's claims because he invited any error in the district court's acceptance of his plea by his statements at the plea hearing and by ultimately entering the plea. Brown's agreements and concessions during the plea hearing did not constitute an affirmative or strategic decision that invited the district court to accept his plea or to explain the relevant law in the manner he alleges was error. See United States v. Jernigan, 341 F.3d 1273, 1290 (11th Cir. 2003) (explaining, in applying invited-error doctrine, that "a criminal defendant may not make an affirmative, apparently strategic decision at trial and then complain on appeal that the result of that decision constitutes reversible error").

cell phones revealed text messages between Brown and a person identified in the phone as "Brah$$$," which discussed a plan for Brown to get a drone, package marijuana, and fly the drone with the marijuana as cargo in exchange for $3,000. Brown also sent Brah$$$ a message with a screenshot of the drone he was considering purchasing, which showed that he was shopping at Best Buy's online store.

A grand jury charged Brown with a drug offense and two offenses related to his ownership and operation of a drone. Brown ultimately agreed to plead guilty to Count Three, regarding his ownership and operation of the drone, in exchange for the government dropping the other two charges. Specifically, Count Three charged Brown with "knowingly and willfully operat[ing] and attempt[ing] to operate an aircraft eligible for registration" by the FAA, "knowing that the aircraft was not registered and said operation related to the facilitating of a controlled substance offense punishable by more than one year imprisonment," in this case, possession with intent to distribute marijuana, in violation of 49 U.S.C. § 46306(b)(6) and (c)(2).

The plea agreement set forth the relevant facts described above. It also described evidence showing Brown would have seen several instructions to check the FAA website for requirements to register the drone. Despite this, Brown did not register the drone found in his possession and did not have a valid aircraft operating license.

Brown stipulated to these facts and therefore admitted: (1) he owned an unregistered drone; (2) the drone was an aircraft eligible for registration under Title 49; (3) he knowingly and willfully operated, and attempted to operate the drone, when the drone was not registered and when he did not have an airman's license; and (4) he operated the drone with the intent to deliver marijuana into a Georgia state prison. He signed the plea agreement,

which certified that he read it, discussed it with his counsel, fully understood it, and agreed to its terms. Brown also initialed each page of the plea agreement, which included its factual proffer.

At the plea hearing, the government summarized the terms of Brown's agreement to plead guilty to Count Three. The government noted the offense was punishable by a maximum of 5 years' imprisonment and/or a fine of up to $250,000, a maximum supervised-release term of 3 years, and a $100 mandatory assessment fee.

Brown was sworn in and testified that he received a copy of the indictment, that his counsel reviewed it with him and explained it to him, and that he was fully satisfied with his counsel's representation up to that point. The district court verified that Brown had a copy of the plea agreement in front of him, and when it asked him if he had the opportunity to review and discuss it fully with his counsel, Brown responded, "[t]horoughly." The district court then reviewed the indictment with Brown and read Count Three aloud. Brown expressed confusion at his five-year maximum sentence imposed under the penalty provision in 49 U.S.C. § 46306(c)(2), in light of Count Three's requirement that the offense he facilitated be punishable by a minimum of one year's imprisonment. However, Brown said he understood after clarification from the court. The court told Brown to ask a question any time "it's something you are not clear on," so that the court could explain it.

The court then told Brown that it would describe the elements the government would have to prove beyond a reasonable doubt before Brown could be found guilty of Count Three. Brown said he understood each of these elements and said he did not have any questions about what the government would have to prove. After the district court addressed the consequences of Brown's guilty plea, the government recounted the evidence it was prepared

to present at trial, which was substantially the same as the plea agreement's factual basis. Brown acknowledged that the government's description was a fair statement of the facts. However, when the court asked Brown if there was anything he wished "to correct or add," this sparked a lengthy colloquy about Brown's intent.

Brown said: "I didn't intend to do it, and I was just kind of just out there trying to just get the money out of the prison. … I mean, I just had to act and go along as if I was going to actually do it. … I was actually leaving." The district court found that because Brown acquired the marijuana—and even if he did not intend to fly it into the prison—that qualified as a "substantial step" to completing the offense. The court said that was legally sufficient to prove intent, and Brown said he understood. Brown confirmed his understanding.

Based on these facts, the district court found there was a sufficient basis to support Brown's guilty plea. Brown confirmed he was pleading guilty because he believed he was guilty. The court accepted Brown's plea and sentenced him to 48 months' imprisonment and 3 years' supervised release. Brown timely appealed the judgment.

II.

A guilty plea involves relinquishment of several constitutional rights and privileges. United States v. Presendieu, 880 F.3d 1228, 1238 (11th Cir. 2018). It must therefore be entered voluntarily and knowingly. Id. We ordinarily review de novo the voluntariness of a guilty plea. United States v. Bushert, 997 F.2d 1343, 1352 (11th Cir. 1993). However, when a defendant neither objects to plea proceedings nor moves to withdraw the plea in the district court, we review for plain error only. United States v. Monroe, 353 F.3d 1346, 1349 & n.2 (11th Cir. 2003). We may reverse an error that was plain and that affects the defendant's substantial rights, provided it also seriously

affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Innocent, 977 F.3d 1077, 1081 (11th Cir. 2020). An error is plain if it is clear or obvious. Monroe, 353 F.3d at 1352.

We ordinarily review de novo questions of constitutional law. United States v. Brown, 364 F.3d 1266, 1268 (11th Cir. 2004). However, we review constitutional challenges not raised before the district court for plain error only. United States v. Moriarty, 429 F.3d 1012, 1018 (11th Cir. 2005) (per curiam).

III.

Brown makes three arguments on appeal. First, he says that the district court violated Federal Rule of Criminal Procedure 11(b)(1)(G) by misstating the law of attempt and failing to explain that Brown must have had actual knowledge that the aircraft was eligible for FAA registration. Second, he argues the factual basis for his guilty plea was insufficient under Rule 11(b)(3). Finally, he claims that because he did not know the mens rea applicable to attempt when he was pleading guilty, his guilty plea is involuntary, in violation of his constitutional rights.

A. KNOWING AND VOLUNTARY PLEA

Before a court accepts a guilty plea, it must find that the defendant understands the nature of the charge to which he is pleading. Fed. R. Crim. P. 11(b)(1)(G). This inquiry turns on a variety of factors, "including the complexity of the offense and the defendant's intelligence and education." United States v. Telemaque, 244 F.3d 1247, 1249 (11th Cir. 2001) (per curiam).

The charge to which Brown pled guilty required him to admit he "knowingly and willfully operate[d] or attempt[ed] to operate an aircraft eligible for registration" under 49 U.S.C. § 44102, "knowing that" (1) the aircraft is not registered under 49 U.S.C. § 44103; or (2) the certificate of registration is suspended or revoked; or (3) he did

not "have proper authorization to operate or navigate the aircraft without registration for a period of time after transfer of ownership."[2] 49 U.S.C. § 46306(b)(6). Brown was convicted for attempt under the statute because there was no proof he actually operated the drone to deliver marijuana. To sustain a conviction for attempt, the government must prove that the defendant: (1) had the specific intent to engage in the criminal conduct for which he is charged; and (2) took a substantial step toward commission of the offense. United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004).

Brown argues the district court plainly erred by misstating the law when it told him he would be guilty of attempt because he took a substantial step towards completing the offense. He says this misstatement led him to plead guilty "under the mistaken impression that it didn't matter whether he intended to complete the offense," because if he did not intend to follow through with the plan to use the drone to deliver drugs to the prison, he acted neither knowingly nor willfully.

Brown's argument fails. He reads the penalty provision in 49 U.S.C. § 46306(c)(2) as requiring proof that he intended to complete the controlled substance offense. But the plain language of the statute under which Brown was charged criminalizes only the knowing and willful attempt to operate an aircraft knowing that the aircraft was not authorized under the FAA. See 49 U.S.C. § 46306(b)(6). Section 46306(b)(6) does not impute any mens rea for facilitating a controlled substance violation. And here the district court explained what the government would have to prove at trial to convict Brown under § 46306(b)(6). Brown confirmed that he understood the explanation and had no questions about the government's

[2] That Brown possessed marijuana, a controlled substance, impacted the penalty he faced. See 49 U.S.C. § 46306(c)(2).

burden of proof. Contra Telemaque, 244 F.3d at 1249 (holding that the district court plainly erred when, among other things, it did not refer to the elements of the offense). Therefore, the district court did not plainly err in explaining the conduct necessary to prove an attempt to violate this statute. See Monroe, 353 F.3d at 1356 (describing Telemaque as a case in which there was "a total failure" to explain the charge).

B. FACTUAL BASIS FOR THE PLEA

Next, Brown argues that the District Court plainly erred when it did not explain that Brown must have had actual knowledge that the aircraft was eligible for registration. Relatedly, Brown says the government's factual proffer was not sufficient to establish actual knowledge in violation of Federal Rule of Criminal Procedure 11(b)(3).

First, Brown argues that the term "knowingly" applies to all elements of the crime and the district court failed to explain that, in order to plead guilty under § 46306(b)(6), Brown "had to know that his drone was eligible for registration" under the FAA. See Rehaif v. United States, 588 U.S. ___, 139 S. Ct. 2191, 2196 (2019). Brown would thus read § 46306(b)(6) as prohibiting "knowingly and willfully operat[ing] or attempt[ing] to operate an aircraft [knowing it was] eligible" for FAA registration.

Brown's argument has some merit. Similar to the way in which the Supreme Court read 18 U.S.C. § 922(g), § 46306(b)(6) "simply lists the elements that make a defendant's behavior criminal." Rehaif, 139 S. Ct. at 2196. When reading a relatively short statute such as § 46306(b)(6), we "read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime." Id. (quotation marks omitted); see id. ("This is notably not a case where the modifier 'knowingly' introduces a long statutory phrase, such that questions may

reasonably arise about how far into the statute the modifier extends."). But we must not forget that we are required to review Brown's claim for plain error. And, because Rehaif interpreted § 922(g), not § 46306(b)(6), and no other court has applied the analysis in Rehaif to § 46306(b)(6), we cannot hold the district court plainly erred in its explanation of the elements of Brown's charge. See Moriarty, 429 F.3d at 1019 ("When neither the Supreme Court nor this Court has resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue."); Innocent, 977 F.3d at 1085 (holding there was no plain error when "[n]o precedent from the Supreme Court or this Court, or explicit language of a statute or rule, directly resolved the issue in [the defendant's] favor" (quotation marks omitted and alteration adopted)).

Brown next argues, based on the same "knowledge of eligibility" theory, that the factual proffer for his guilty plea was insufficient under Rule 11(b)(3). He says the government admitted there was no evidence he visited the FAA's website, such that there is no evidence he knew the drone was an aircraft eligible for registration.

Before entering judgment on a guilty plea, a district court must determine that there is a factual basis for the plea. Fed. R. Crim. P. 11(b)(3). The court must determine whether the conduct to which the defendant admits constitutes the offense to which the defendant has pled guilty. United States v. Lopez, 907 F.2d 1096, 1100 (11th Cir. 1990). The standard is whether the court was presented with evidence from which it could reasonably find that the defendant was guilty. Id.

Here the district court's decision to accept Brown's plea was not so insufficient as to constitute plain error. As described above, the district court did not plainly err by not attributing the "knowingly" element of § 46306(b)(6) to its eligibility element. As such, the court did not plainly

err by failing to tell Brown he needed to know that the aircraft was eligible for registration to ensure Brown understood he violated § 46306(b)(6). The factual proffer—which showed that Brown knowingly attempted to operate an unlicensed drone, an aircraft eligible for FAA registration—combined with Brown's admission of these facts, was sufficient to establish a factual basis for the plea. The district court did not plainly err by accepting the government's factual proffer.

C. DUE PROCESS

Finally, Brown argues that his due process rights were violated when he pled guilty without knowing the mens rea applicable to attempt and without knowing the requirement that he knowingly failed to register the drone. Brown says the failure to notify him of a critical element of his crime is a structural error that renders his guilty plea constitutionally involuntary.

Brown relies on Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253 (1976), to show the district court's error satisfies the plain-error standard and that the error is structural. In Boykin, the Supreme Court held that a trial judge plainly erred by accepting a guilty plea without an affirmative showing that it was intelligent and voluntary, and that it could not presume from a silent record that a defendant waived his trial rights. 395 U.S. at 239-40, 242-43, 89 S. Ct. at 1710-12. In Henderson, the Court held the defendant's guilty plea to second-degree murder was involuntary where the record did not reflect any discussion of the elements or nature of the offense or any reference at all to the required element of intent. 426 U.S. at 642-45, 96 S. Ct. at 2256–58.

Brown's reliance on these cases, however, is misplaced. As discussed above, Brown admitted to actually operating, and thus intending to operate, the drone by engaging in practice flights before he went to the prison.

And, on plain error review, he cannot show he was required to know that his drone was eligible for registration to plead guilty to 49 U.S.C. § 46306(b)(6)(A) and (c)(2). See 49 U.S.C. § 46306(b)(6)(A), (c)(2). This being the case, the district court did not omit any elements of the offense at the plea hearing. Brown's case is thus distinct from Boykin, where the trial court failed to ensure that the guilty plea was voluntary and knowing at all, and distinct from Henderson, where the plea was not voluntary because the defendant was not informed of any of the elements of his offense. See Boykin, 395 U.S. at 242–43, 89 S. Ct. at 1711–12; Henderson, 426 U.S. at 642–46, 96 S. Ct. at 2256–58. Brown's constitutional error claim fails because the district court did not err, plainly or otherwise, by failing to inform him of any elements of his offense.

Further, even if the district court erred, any error was not structural. Moriarty, 429 F.3d at 1018 (applying plain error review to claim not raised before the district court). Under plain-error review, a defendant must also show the error affected his substantial rights, which is where the question of whether "the failure to submit an element of the offense to the jury is 'structural error' becomes relevant." Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997). Structural errors have only been found in "a very limited class of cases" involving "a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. (quotation marks omitted). Neither this Court nor the Supreme Court have found that element-related errors fall within this limited class of cases. See id. at 468–69, 117 S. Ct. at 1549–50 (collecting cases); see also United States v. Reed, 941 F.3d 1018, 1020, 1022 (11th Cir. 2019) (holding that defendant could not show a Rehaif error affected his substantial rights because the record established that defendant knew he was a felon).

AFFIRMED.

APPENDIX B

EXCERPT OF PLEA AGREEMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

UNITED STATES OF AMERICA v. ERIC LEE BROWN	FILED at 3:17 PM 7/25, 2019 [signature] Courtroom Deputy/ Scheduling Clerk U.S. District Court Middle District of Georgia CRIM. NO. 1:19-CR-2-WLS-TQL

PLEA AGREEMENT

* * *

(8)

As an aid to this Court, the United States Attorney and Defendant, by and through Defendant's counsel, enter into the following Stipulation of Fact. This stipulation is entered into in good faith with all parties understanding that the stipulation is not binding on the Court. Under U.S.S.G. Policy Statement Section 6B1.4(d), this Court may accept this stipulation as written or in its discretion, with the aid of the Pre-Sentence Report, determine the facts relevant to sentencing.

Subject to the above paragraph, the United States Attorney and Defendant stipulate and agree that the following facts could be proved at trial beyond a reasonable doubt:

On March 29, 2018, at approximately 10:30 p.m., Mitchell County Sheriff's Office deputies responded to a call regarding a vehicle on a dirt road near Jimmy Autry State Prison, in Pelham, Mitchell County, Georgia. Law enforcement officers initiated a traffic stop of the vehicle.

The officer asked Mr. Brown to step out of the vehicle. The officer observed a drone in the floorboard of the vehicle in the backseat. When the law enforcement officer shined their flashlights into the passenger area of the backseat, they could see two (2) clear plastic bags containing a green, leafy substance that appeared to be marijuana on the passenger side of the vehicle. While Mr. Brown was speaking to one of the officers outside of his vehicle, another law enforcement officer began to search the vehicle. Later, testing confirmed the substance was marijuana, and it weighed 294.36 grams.

A pat-down of Brown's person revealed a large roll of black electrical tape of the type commonly used to bind the outer layer of contraband packages. A further search of the vehicle revealed the following items of evidentiary value: (i) one (1) roll plastic vacuum wrap; (ii) one (1) plastic bag containing loose tobacco; (iii) several clear plastic bags; (iv) cigar and cigarette rolling papers; (v) five (5) cellular phones; and (vi) one (1) iPad. Search warrants were obtained and executed for the cell phones, iPad, and SD card(s) for the drone.

The drone's programming revealed that it had been first activated on March 23, 2018, in Macon, Georgia, and it was registered to work in conjunction with the iPad found in Brown's possession. The drone's SD card contained videos depicting Defendant Brown practicing drone flights at a Macon apartment complex. The iPad

also contained videos Defendant Brown had made in which he practiced flying his drone. As a further step in the investigation, law enforcement obtained surveillance video from a Best Buy in Henry County, Georgia, which showed Defendant Brown purchased the drone approximately one week prior to the traffic stop.

When the cellphones were searched, law enforcement officers learned that Defendant Brown exchanged text messages with someone identified in his phone as "Brah$$$" about getting the drone, financing, packaging the marijuana, and flying the drone with marijuana as cargo. For example, on March 20, 2018, Brah$$$ sent Brown the following by text message: "Call him [identity unknown] as soon as u can cuz if he like what ur talking about we can have his drone in our hands ASAP and u can have another $3000 play! He tryna give u $1500 now and the other $1500 as soon as u drop it from the drone. Hit him bra." Based upon their training and experience, law enforcement officers would testify that the term "play" is often used to describe a drug transaction, and that Brah$$$ is explaining to Brown that this transaction is one from which he could earn $3000.

Also on March 20, 2018, Brah$$$ sent Defendant Brown the following text message: "searching different drone's now. It's in the DJI Phantom 3 carries up to 3 lb easily in the DJI Phantom 4 bearly carries 2 lb [sic]." On March 22, 2018, Defendant Brown sent a text message to Brah$$$ with a screenshot of a drone he was considering for purchase. The screenshot shows that Defendant Brown was shopping at Best Buy's online store for drones. A review of the Best Buy website associated with the drone Defendant Brown was considering and the drone Defendant Brown purchased shows there is a warning listed on the Best Buy website for each drone. This warning provided:

> Fly Responsibly: Before takeoff, update all software and firmware, and read the instructions thoroughly. See the FAA website for registration requirements and information about flying a drone safely: https://www.faa.gov/uas/getting started/. Additional state or local requirements may apply. Check your local jurisdiction. The following websites may help you make informed decisions about flying your drone: www.knowbeforeyoutly.org and www.modelaircraft.org.

A review of archival web data indicates that this warning was on the Best Buy website during the time in which Defendant Brown was shopping for drones.

On March 24, 2018, Brown and Brah$$$ exchanged the following messages:

> Brah$$$: How much we shout on purchasing drone & accessories.
>
> Brown: I have 1240$ .. without anything added. 150$ on the line for the phone. 460$ from the last play
>
> Brown: Drone 1604$
>
> Brown: 182$ extra battery

Based upon their training and experience, law enforcement officers would testify that the word "shout" contained in the question sent by Brah$$$ is a misspelling of "short."

The drone seized from Defendant Brown weighs approximately three (3) pounds. United States Department of Transportation Office of Inspector General Special Agent Ryan Fletcher made contact with Special Agent Steve Tochterman, of the Federal Aviation Administration (FAA), who advised that Defendant Brown had not registered the DJI Phantom 4 drone which was found in

his possession, and Brown did not have a valid FAA Airman's Certificate or Remote Pilot Certificate.

Furthermore, a federal law enforcement agent would testify that drones such as the one seized in this case require the use of an iPad or similar device which is equipped with the application ("app") which allows the user to control the drone. When the app in question is first loaded onto the user's iPad, the user receives a computer generated screen that instructs the user to review the terms of service and privacy policy associated with the drone. The terms of service advise the user to go to a website sponsored by the FAA for rules and regulations governing the use of the drone in the United States. Users must accept the terms and conditions prior to being able to operate the drone. Going to this website enabled Defendant Brown to register his drone with the FAA as required under Title 49. Furthermore, the terms of service specifically suggest that the user familiarize him/herself with no-fly zones and avoid sensitive infrastructure including correctional facilities. Browser history files from Defendant Brown's various devices indicate that he used Google to search "no-fly zones," but there is no search history of him visiting the FAA's website. Finally, the terms of service advise the user that if the drone's intended use is commercial, then additional action may be necessary. Going to the FAA website would have also enabled Brown to seek the proper airman's certificate or remote pilot's certificate in order to legally operate the drone for commercial purposes.

In conclusion, Defendant Brown now admits that on or about March 29, 2018: (i) he owned an unregistered drone as described in detail above; (ii) the drone was an aircraft eligible for registration under Title 49; (iii) he knowingly and willfully operated, and attempted to operate the drone, when the drone was not registered and when he did not have an airman's license; and (iv) he

operated the drone with the intent to use the drone to deliver a quantity of marijuana, a Schedule I controlled substance, into the Jimmy Autry State Prison, in Pelham, Mitchell County, Georgia.

APPENDIX C

EXCERPT OF PLEA HEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

UNITED STATES OF AMERICA v. ERIC LEE BROWN, DEFENDANT	Case No. 1:19-CR-2 (WLS/TQL) July 25, 2019 Albany, Georgia

CHANGE OF PLEA HEARING

BEFORE THE HONORABLE W. LEWIS SANDS

UNITED STATES DISTRICT JUDGE, PRESIDING

[Tr. 16:17-18:25]

THE COURT: All right. Now, it says that you as the defendant did certain things and they allege that they were done knowingly and willfully, and the government would have to prove that beyond a reasonable doubt. By knowingly it means they have to prove that you did that with knowledge and understanding and not because of mistake or accident or for some innocent reason. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And by willfully they have to prove that it was done not only knowingly but intentionally with a

specific purpose to do something that the law prohibits or forbids you to do. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And the thing that they say you did knowingly and willfully was to operate and attempt to operate an aircraft. Now, the government does not have to prove that you operated and attempted to operate it. They could prove that if they're able to do so, but if they prove either that you operated beyond a reasonable doubt or that you beyond a reasonable doubt attempted to operate, either one of those if proved beyond a reasonable doubt would be sufficient. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And the thing that they would have to prove that you either operated or attempted to operate was an aircraft, and that aircraft is defined under the laws of the United States, do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: They have to prove that it was in fact an aircraft. And they further have to prove that that aircraft was eligible for registration by the Federal Aviation Administration under Title 49 of the United States Code, that too would have to be proved beyond a reasonable doubt, and they further would have to prove that you operated or attempted to operate that aircraft that was eligible for registration knowing that the aircraft was not registered and prove that you did not—that you did so knowingly, again, beyond a reasonable doubt. And they further—as this is alleged in this charge, because to operate or attempt to operate an aircraft that could be registered itself, those facts that I've explain to you so far could be a violation. But they have alleged a further violation here, and as they allege it, in order to prove this as

alleged, they'd have to also prove that the operation of that aircraft related to the facilitating of a controlled substance offense. And they are talking about the controlled substance offense that's alleged in Count 1, they are saying that that's the controlled substance offense that you operated or attempted to operate the aircraft in connection with, and that's an allegation of possession with intent to distribute marijuana. Do you understand?

THE DEFENDANT: Yes, sir.

* * *