No. 21-470

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to plain-error relief from his conviction for attempting to operate an aircraft eligible for registration, knowing the aircraft was not registered, in order to facilitate a felony controlled substance offense, in violation of 49 U.S.C. 46306(b)(6)(A) and (c)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 855 Fed. Appx. 659.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2021. The petition for a writ of certiorari was filed on September 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Georgia, petitioner was convicted of attempting to operate an aircraft eligible for registration, knowing the aircraft was not registered, in order to facilitate a felony controlled substance offense, in violation of 49 U.S.C. 46306(b)(6)(A) and (c)(2). Pet. App. 1a, 7a; Judgment 1. The district court

sentenced him to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-11a.

1. In March 2018, law enforcement officers stopped petitioner's vehicle on a dirt road near a state prison in Georgia. Pet. App. 2a. In the back seat, the officers saw a drone and two plastic bags containing marijuana. *Ibid.* A subsequent search of the car revealed plastic vacuum wrap, clear plastic bags, rolling paper, five cell phones, and an iPad. *Ibid.* A search of petitioner's person revealed a kind of tape often used to bind packages of contraband. *Ibid.*

Officers obtained search warrants for the data contained in the cell phones, iPad, and drone. Pet. App. 13a. The drone was linked to petitioner's iPad, and both the drone and the iPad contained videos of petitioner practicing drone flights. *Id.* at 2a. The cell phones contained text messages indicating that petitioner planned to use the drone to deliver marijuana to a prisoner. *Id.* at 2a-3a.

2. A federal grand jury in the Middle District of Georgia charged petitioner with possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); owning an aircraft eligible for registration and operating or attempting to operate that aircraft, when it was not registered, to facilitate a felony controlled substance offense, in violation of 49 U.S.C. 46306(b)(5)(A) and (c)(2); and operating or attempting to operate an aircraft eligible for registration, knowing it was not registered, to facilitate a felony controlled substance offense, in violation of 49 U.S.C. 46306(b)(6) and (c)(2). Indictment 1-3.

As relevant here, Section 46306(b)(6)(A) 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)(A). Title 49 elsewhere defines "aircraft" to include "any contrivance invented, used, or designed to navigate, or fly in, the air," 49 U.S.C. 40102(a)(6), and authorizes the Administrator of the Federal Aviation Administration (FAA) to register any aircraft owned by a United States citizen that is not registered in a foreign country, 49 U.S.C. 44102(a)(1)(A), 44103(a)(1)(A). And Section 46306(c)(2) prescribes enhanced penalties for a violation of Section 46306(b) related to "aiding or facilitating a controlled substance violation" punishable by more than one year of imprisonment. 49 U.S.C. 46306(c)(2).

Petitioner pleaded guilty to the Section 46306(b)(6) count pursuant to a plea agreement. Pet. App. 3a. As part of that agreement, petitioner admitted that he had owned an unregistered drone that was eligible for registration; that he had knowingly and willfully operated and attempted to operate the drone when it was not registered; and that he had intended to use the drone to deliver marijuana into a prison. *Ibid.*; Plea Agreement 3, 11-12, 15-17. The plea agreement also contained "evidence showing" that petitioner "would have seen several instructions to visit [an] FAA website for requirements to register the drone." Pet. App. 3a. The plea agreement stated that petitioner had visited a Best Buy website for the drone that warned customers to "[s]ee the FAA website for registration requirements and information about flying a drone safely." Plea Agreement 14. In addition, to control the drone via iPad, a user was required to accept terms of service that advised the user to familiarize himself with "no-fly zones" and to visit an FAA website, which would enable the user to register

the drone. *Id.* at 16; see *id.* at 15-16. The browser history on petitioner's devices indicated that he had searched online for "no-fly zones" but did not indicate that he had visited the FAA website. *Id.* at 16.

At the change-of-plea hearing, the district court advised petitioner that the elements of the offense included (*inter alia*) "knowingly and willfully * * * attempt[ing] to operate an aircraft * * * knowing that the aircraft was not registered." C.A. App. 57-58. The court did not state that the government would be required to prove that petitioner knew the unregistered aircraft he attempted to operate was eligible for registration. See *ibid.* Petitioner did not object. The district court accepted the plea and sentenced petitioner to 48 months of imprisonment, to be followed by three years of supervised release. Pet. App. 5a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-11a.

As relevant here, petitioner argued—for the first time on appeal—that a conviction under Section 46306(b)(6) requires proof that the defendant knew that the aircraft he operated or attempted to operate was eligible for registration. Pet. App. 8a-11a. Relying on *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), petitioner asserted that the district court had plainly erred during the plea colloquy by failing to state that the government would be required to prove petitioner's knowledge that the unregistered aircraft he attempted to operate was eligible for registration, Pet. App. 8a; Pet. C.A. Br. 37-45.

The court of appeals rejected that argument. In doing so, it stated that "[a]n error is plain if it is clear or obvious," Pet. App. 6a, and cited circuit precedent that had found 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,'" *id.* at 9a (quoting *United States* v. *Innocent*, 977 F.3d 1077, 1085 (11th Cir. 2020), cert. denied, 141 S. Ct. 2827 (2021)) (brackets in original). And the court stated that, in this case, "we cannot hold the district court plainly erred in its explanation of the elements of [petitioner's] charge" because "*Rehaif* interpreted [18 U.S.C.] § 922(g), not § 46306(b)(6), and no other court has applied the analysis in *Rehaif* to § 46306(b)(6)." Pet. App. 9a.

The court of appeals then rejected, on related grounds, petitioner's arguments that the factual basis for his plea had been insufficient and that his plea was constitutionally involuntary because he was not advised that "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)." Pet. App. 11a; see *id.* at 9a-10a. The court determined that petitioner'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." *Id.* at 11a.

ARGUMENT

Petitioner contends (Pet. 9-26) that the court of appeals misapplied the plain-error standard in affirming his conviction. The court correctly denied plain-error relief, and its unpublished per curiam decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. Because petitioner did not challenge the district court's interpretation of Section 46306(b)(6) in that court, he may obtain relief on that forfeited claim only by satisfying the requirements of plain-error review. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507

U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner would have to demonstrate (1) error; (2) that is clear or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Olano*, 507 U.S. at 732-736. "Meeting all four prongs is difficult, 'as it should be.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

Petitioner contends (Pet. 9-26) that the court of appeals misapplied the second element of plain-error review. To satisfy that element, a defendant must show that an error was "clear or obvious, rather than subject to reasonable dispute." *Puckett*, 556 U.S. at 135. The decision below cites circuit precedent identifying and providing a formulation of that standard. In particular, the court of appeals has stated that "[a]n error is plain if it is 'clear' or 'obvious,' *United States* v. *Olano*, 507 U.S. 725, 734 (1993)—that is, if the explicit language of a statute or rule or precedent from the Supreme Court or this Court directly resolv[es] the issue." *United States* v. *Innocent*, 977 F.3d 1077, 1081 (11th Cir. 2020) (citation and some internal quotation marks omitted; second set of brackets in original). That formulation is consistent with this Court's precedent.

As this Court has explained, a court reviewing for plain error must assess whether an error is "so 'plain'" that a court would be "derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see *United States* v. *Kushmaul*, 984 F.3d 1359, 1363 (11th Cir. 2021) (per curiam) ("[S]uch error must be 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.") (citation omitted). In making that determination, the reviewing court necessarily considers whether the error is clear "under current law." *Olano*, 507 U.S. at 734; see *United States* v. *Fontenot*, 611 F.3d 734, 737 (11th Cir. 2010) (same), cert. denied, 562 U.S. 1273 (2011). And because nearly every error can be traced to some well-established rule at a high level of generality, see *Henderson* v. *United States*, 568 U.S. 266, 278 (2013), the court of appeals requires that either the language of the relevant statute or existing precedent "directly" resolve the question presented, *Kushmaul*, 984 F.3d at 1364 (citation omitted). A contrary rule would effectively collapse the first and second prongs of the plain-error standard, eliding the distinction between rulings that are "wrong" and those that are "*plainly* wrong." *Henderson*, 568 U.S. at 278.

Contrary to petitioner's assertion (Pet. 3, 11, 19), the court of appeals does not require perfect correspondence between the claim presented in the instant appeal and the claim decided in a prior appeal. Instead, the court recognizes that the "explicit language of a statute or rule" may provide the requisite clarity. Pet. App. 9a (quoting *Innocent*, 977 F.3d at 1085); see *Kushmaul*, 984 F.3d at 1367 ("Of course, precedent is not always necessary to establish plain error."); see, *e.g.*, *United States* v. *Mangaroo*, 504 F.3d 1350, 1354 (11th Cir. 2007) (finding "plain" error in the district court's imposition of a probationary sentence based on the "plain language" of the relevant statute); *United States* v. *Chandler*, 996 F.2d 1073, 1087 (11th Cir. 1993) (finding "plain" error in the district court's jury instructions based on the court of appeals' interpretation of the relevant statute); *United States* v. *Ulbrik*, 625 Fed. Appx.

446, 449 (11th Cir. 2015) (per curiam) (finding a Sentencing Guidelines error "plain" based on the court of appeals' interpretation of the provision's "clear language").

Similarly, the court of appeals has repeatedly deemed an error "plain," so as to satisfy the second requirement of plain-error review, based on clear or obvious inferences from prior decisions. See, *e.g.*, *United States* v. *Perry*, 14 F.4th 1253, 1265-1266 (11th Cir. 2021) (finding "plain" error in the admission of expert testimony concerning certain terms based on prior cases involving different terms); *United States* v. *Russell*, 957 F.3d 1249, 1253 (11th Cir. 2020) (finding an evidentiary error "plain" in light of *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), which did not address the rules of evidence); *United States* v. *Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005) (per curiam) (finding "plain" error in the district court's imposition of a condition of supervised release based on decisions that did not arise in the same "context"); *United States* v. *Hines*, 853 Fed. Appx. 507, 510 (11th Cir. 2021) (per curiam) (finding a Sentencing Guidelines error "plain" based on a prior decision's "reasoning" even though the prior "holding" "d[id] not apply").

To the extent that the unpublished decision below may have required a closer analytical match in the case law than prior circuit decisions, or did not explicitly undertake a direct textual analysis, any such case-specific tension with circuit precedent would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). And contrary to petitioner's contention (Pet. 19-26), any error in accepting petitioner's guilty plea or

describing the elements of Section 46306(b)(6) was not "plain" under *Rehaif*, 139 S. Ct. 2191. Pet. App. 9a-11a. In *Rehaif*, this Court interpreted a federal statute that criminalizes "knowingly violat[ing]" a restriction on the possession of firearms by certain categories of persons (such as felons), 18 U.S.C. 924(a)(2), to require proof that the defendant knew that he belonged to the relevant category of persons, 139 S. Ct. at 2194. In so holding, the Court stated that it "normally read[s] the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime." *Id.* at 2196 (citation omitted). But the Court explained that whether the term "knowingly" applies to all subsequently listed elements in a particular statute depends on a contextual assessment of "congressional intent." *Id.* at 2195. And the text and structure of the statute here contain indications, absent from the statute in *Rehaif*, that point toward a different result.*

Section 46306(b)(6), as relevant here, prohibits "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 under section 44103 of this title." 49 U.S.C. 46306(b)(6)(A). Congress thus used a variant of the word "know" twice to describe two specific aspects of the crime: 1.) the defendant must have "knowingly

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* Petitioner asserts (Pet. 11) that "[t]he Eleventh Circuit acknowledged that the district court's decision was erroneous under a straightforward application of the rule this Court announced in *Rehaif*," but that is not correct: while the court of appeals suggested that there was "some merit" to petitioner's argument, Pet. App. 8a, it did not purport to decide that petitioner's argument was correct. See, *e.g.*, *id.* at 11a ("[T]he district court did not err, plainly or otherwise, by failing to inform [petitioner] of any elements of his offense.").

and willfully operate[d] * * * an aircraft," and 2.) the defendant must have done so "knowing that * * * the aircraft is not registered." *Ibid.* A third aspect of the crime—that the "aircraft [was] eligible for registration under section 44102 of this title," *ibid.*—is set forth immediately in between those two other clauses. Unlike them, however, the "eligible for registration" clause does not contain a variant of "know." Congress's express repetition of a "knowing" requirement for *one* of the elements listed after the first use of the word at the very least makes it reasonable to infer that Congress did not intend the initial term "knowingly" to apply to the other subsequently listed elements. *Ibid.* Indeed, if the word "knowingly" in Section 46306(b)(6)(A) applied to "all the subsequently listed elements of the crime," *Rehaif*, 139 S. Ct. at 2196 (citation omitted), then the word "knowing" would have been unnecessary. But see *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014) (describing "the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'") (citation omitted).

Also unlike in *Rehaif*, applying the term "knowingly" to the eligibility requirement is not necessary to "separate wrongful from innocent acts." *Rehaif*, 139 S. Ct. at 2197. Unlike Section 924(a)(2), Section 46306(b)(6) requires proof not only that the defendant acted "knowingly," but also "willfully." 49 U.S.C. 46306(b)(6). A defendant therefore may be convicted under Section 46306(b)(6) only if he operated or attempted to operate an aircraft "with knowledge that his conduct was unlawful." *Bryan* v. *United States*, 524 U.S. 184, 191-192 (1998) (citation omitted); see 7/25/19 Tr. 17, 52 (petitioner admitting that he acted "not only knowingly but intentionally with a specific purpose to do something

that the law prohibits"). Thus, whether or not the term "knowingly" applies to the eligibility requirement, a defendant cannot be convicted under Section 46306(b)(6) while "lack[ing] the intent needed to make his behavior wrongful." *Rehaif*, 139 S. Ct. at 2197. That difference, in combination with the distinct text and structure of Section 46306(b)(6)(A), refutes petitioner's claim that an error in his case was "clear or obvious," *Puckett*, 556 U.S. at 135, based on current statutory and decisional law.

2. Petitioner contends (Pet. 9-14) that the courts of appeals are divided as to the circumstances in which an error may be deemed "plain." Pet. 9. In particular, he asserts (Pet. 11) that the First, Fourth, Fifth, Sixth, and Eleventh Circuits "categorically preclude[] a finding of plain error" absent "binding precedent interpreting the statute at issue * * * , even where the error is obvious under principles articulated by this Court."

As explained above, see pp. 6-8, *supra*, that is not the rule in the Eleventh Circuit. Nor is it the rule in the remaining courts of appeals. The First Circuit, for example, recently explained that although "[t]he second prong [of plain-error review] requires that the error identified in the first prong is not 'open to doubt or question,' * * * an appellant can meet this requirement even in the 'absence of a decision directly on point.'" *United States* v. *Pérez-Rodriguez*, 13 F.4th 1, 16 (2021) (citation omitted); see, *e.g.*, *United States* v. *Morales*, 801 F.3d 1, 10 (1st Cir. 2015) (finding an error "plain" even though the court of appeals had not previously considered the relevant statutory language in the same context).

Similarly, although petitioner cites (Pet. 12-13) decisions of the Fourth, Fifth, and Sixth Circuits in which

those courts have declined to find plain error in the absence of controlling precedent on the particular issue before them, each of those courts has elsewhere deemed an error "plain" without requiring a directly on-point prior decision. See, *e.g.*, *United States* v. *Maxwell*, 285 F.3d 336, 340-342 (4th Cir. 2002) (finding "plain" error on an "issue of first impression" because the statute at issue was "not reasonably susceptible" to a contrary interpretation); *United States* v. *Leshen*, 453 Fed. Appx. 408, 412-416 (4th Cir. 2011) (per curiam) (finding "plain" error in district court's treatment of state offenses as "crimes of violence" under the Sentencing Guidelines despite the absence of on-point precedent); *United States* v. *Medina-Torres*, 703 F.3d 770, 777-778 (5th Cir. 2012) (per curiam) (finding "plain" error in the district court's interpretation and application of statutory cross-reference in the Sentencing Guidelines based on "well-settled principles" despite the absence of on-point precedent); *United States* v. *Maturin*, 488 F.3d 657, 663 (5th Cir. 2007) (finding "plain" error based on "plain statutory language" and pattern jury instructions even though the court of appeals had "never expressly" addressed the question presented); *United States* v. *Fowler*, 956 F.3d 431, 439-440 (6th Cir. 2020) (finding "plain" error based on an "extension" of a prior holding that did not "squarely answer" the question presented); *United States* v. *Price*, 901 F.3d 746, 751 (6th Cir. 2018) (finding "plain" error on a matter of first impression because the statute at issue was "susceptible of only one reasonable interpretation"); *United States* v. *Lantz*, 443 Fed. Appx. 135, 141 (6th Cir. 2011) (finding "plain" error in district court's imposition of overly broad conditions of supervised release despite the absence of "case[s] on point in this circuit").

At the same time, the courts that petitioner describes (Pet. 9-11) as on the other side of the asserted conflict—the Second, Third, Seventh, Eighth, and D.C. Circuits—all in fact consider the absence of controlling precedent significant in assessing whether an error is "plain." See, *e.g.*, *United States* v. *Napout*, 963 F.3d 163, 183 (2d Cir. 2020) ("'[F]or an error to be plain, it must, at a minimum, be clear under current law,' which means that '[w]e typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court.'") (citation omitted; second set of brackets in original); *United States* v. *Harris*, 471 F.3d 507, 512 (3d Cir. 2006) (declining to find an error "plain" where "[t]he Supreme Court has never ruled on the propriety of these questions, and, until now, neither had this Court in a precedential opinion"); *United States* v. *Hopper*, 11 F.4th 561, 572 (7th Cir. 2021) (explaining that it is "difficult" for an appellant to establish "plain" error where the court of appeals "has not yet had the occasion to address the interpretive issue," and rejecting the appellant's argument because of a "lack of controlling precedent" and "disagreement among the other courts of appeals"); *United States* v. *Solis*, 915 F.3d 1172, 1177 (8th Cir. 2019) (per curiam) ("Usually, for an error to be plain, it must be in contravention of either Supreme Court or controlling circuit precedent.") (citation omitted); *United States* v. *Pyles*, 862 F.3d 82, 88 (D.C. Cir. 2017) ("[A]bsent controlling precedent on the issue or some other 'absolutely clear' legal norm, the district court committed no plain error.") (citation omitted), cert. denied, 138 S. Ct. 1033 (2018).

The courts of appeals thus apply corresponding standards, derived from this Court's precedents, to

assess whether the plain language of the relevant provision or established legal principles clearly or obviously resolve an appellant's claim. And to the extent that they might differ in some degree in some circumstances, this case would not implicate any such disagreement. Because neither the text of Section 46306(b)(6)(A) nor the principles articulated in *Rehaif* clearly or obviously resolve petitioner's claim, see pp. 8-11, *supra*, petitioner cannot establish that his guilty plea "would have been vacated" in any court of appeals, Pet. 14.

3. In any event, this case would be a poor vehicle in which to address the question presented. Even if petitioner could establish both that the district court erred and that the error was "plain," he still could not satisfy the third and fourth elements of plain-error review. Resolution of the question presented therefore would not be outcome determinative.

The record supports an inference that petitioner either knew or intentionally avoided learning that the drone he purchased was eligible for registration. As part of his plea agreement, petitioner stipulated to evidence showing that he "would have seen several instructions to check the FAA website for requirements to register the drone." Pet. App. 3a. He admitted that the website he had visited to review drones for purchase had warned customers to "[s]ee the FAA website for registration requirements and information about flying a drone safely." Plea Agreement 14. And he admitted that he had registered the drone to work with his iPad, *id.* at 12; that the iPad application used to operate the drone advised users to visit an FAA website that "enabled [the user] to register his drone with the FAA as required under Title 49," *id.* at 16; that the application warned users to familiarize themselves with "no-fly

zones," *ibid.*; and that he had used Google to search for the phrase "no-fly zones," *ibid.* Petitioner's apparent attention to at least one of the iPad application's warnings would have significantly undermined any claim he might have raised during his plea colloquy that he lacked knowledge concerning his drone's eligibility for registration. Petitioner therefore cannot show that the error affected his "'substantial rights,'" *i.e.*, that there is "'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Greer* v. *United States*, 141 S. Ct. 2090, 2096 (2021) (quoting *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1904-1905 (2018)). Nor can petitioner show that any "error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 2096-2097 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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