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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government's novel theory for denying review is, in essence, that the law is too incoherent to support a split. The government argues that ten different circuits just apply different standards for "plain" error depending on which panel hears the case, sometimes requiring on-point controlling authority and refusing to analyze the statute or extend the reasoning of prior precedent, and sometimes finding plain error based on straightforward statutory analysis or analogous cases.

To be clear: there is a 5-5 split. The Eleventh Circuit and four others routinely deny relief solely based on the absence of binding precedent. Five other circuits are willing to extend precedent or engage in fresh statutory analysis. But accepting the government's theory that all circuits have cases going both ways only confirms the need for review. Ten circuits will not take this issue en banc and uniformly conclude that errors can be plain in the absence of controlling precedent, especially as the government continues to urge courts of appeals to demand controlling precedent—as it did below in this case. Resolving pervasive confusion is precisely the role of this Court.

That is especially so in a case of such enormous practical significance. The government does not dispute that this issue affects hundreds of criminal and civil cases every year. The government does not dispute that this Court's precedents provide little concrete guidance on the meaning of "plain." And the government no longer defends the standard actually applied by the court below—a rigid form of plain-error review requiring "perfect correspondence" with a previously identified error, regardless of the clarity of the statutory text. Opp. 8.

The Court should grant the petition.

A. The Decision Below Is Wrong

An error is plain when "clear" or "obvious" under existing law, even if the precise issue has not been resolved by controlling precedent. Pet. 19. The rigid categorical rule applied below violates Rule 52(b)'s text, history, and precedent, and the government seems to agree. Under the correct standard, the error here was plain. Pet. 19-28.

1. The government does not defend the standard applied below. It agrees that courts applying Rule 52(b) cannot require "perfect correspondence between the claim presented in the instant appeal and the claim decided in a prior appeal." Opp. 7. And it does not dispute that standard interpretive tools, including the plain meaning of the word "plain" and this Court's precedent, foreclose such a rigid analysis. Pet. 19-26.

The government suggests that the court below would have found plain error if the "explicit language of a statute" resolved the issue, Opp. 7, but the court's analysis proves this purported exception illusory. *Rehaif* held that the word "knowingly" establishes the *mens rea* for elements that follow it. Ordinary statutory analysis would compel the conclusion that 49 U.S.C. § 46306, with its materially identical formulation, requires knowledge in the same manner. The Eleventh Circuit indeed examined § 46306's text and found it supported relief under *Rehaif*. But the court treated its statutory analysis as an academic exercise. The text was irrelevant "because" there was no controlling authority. Pet. App. 9a.[1] In other words, because *Rehaif* concerned a different statute, the court wouldn't even consider *Rehaif*'s interpretive principle in evaluating whether § 46306's text was explicit. Examining

[1] The court's statement elsewhere that "the district court did not err, plainly or otherwise, by failing to inform [petitioner] of any elements of his offense," Opp. 9 n.* (quoting Pet. App. 11a), did not concern whether § 46306(b)(6) contains a knowledge requirement.

"explicit language" is meaningless—and contrary to Rule 52—when courts categorically ignore precedent that dictates *how* to interpret a statute's words.

And make no mistake: this wrong rule is *the* rule in the Eleventh Circuit. The court routinely denies plain error solely for lack of controlling authority, without even purporting to examine the actual text of a governing statute. Pet. 16 (citing cases); *United States v. Pendleton*, 665 Fed. Appx. 836, 840 (2016) (in "matter of first impression," "there can be no error that is plain or obvious"). Just since August 2021, the court has applied its rule requiring directly on-point precedent to deny relief at least 12 times. Pet. 16; *United States v. Wright*, 2021 WL 5969544, at *4 (Dec. 16, 2021) ("Wright doesn't identify any case holding that a district court must specifically inform the defendant that he can still be held responsible for all relevant conduct when he pleads guilty to a lesser-included offense"); *United States v. Rebolledo-Estupinan*, 2021 WL 5626351, at *2 (Dec. 1, 2021) ("Because neither the Supreme Court nor we have stated that 'supervision' in this context includes all of the conditions of supervision and that such a clause waives all other terms of release, the district court did not plainly err."); *United States v. Grady*, 18 F.4th 1275 (2021) ("no precedent exists at this time that instructs district courts to consider RFRA at sentencing"); *United States v. Valdez*, 2021 WL 5121129, at *2 (Nov. 4, 2021) ("neither this Court nor the Supreme Court has decided" the question); *United States v. Barnes*, 2021 WL 4427727, at *2 (Sept. 27, 2021) ("the [statute] is silent as to this unpreserved issue, and there is no precedent on the matter"). The implausible premise of the government's opposition is that all these cases would have come out the same way regardless of the standard applied.

2. Though the government disavows the Eleventh Circuit's methodology, it defends the court's ultimate conclusion. Opp. 8-11. Both of its arguments only confirm the plain error.

First, while conceding that "normally" this Court "reads the statutory term 'knowingly' as applying to all the subsequently listed elements," the government asserts that § 46306 is not subject to this presumption because it uses "a variant of the word 'know' twice" rather than once. Opp. 9-10. But repetition of the knowledge requirement only makes the *Rehaif* error more flagrant. Section 46306(b)(6) requires *both* (1) "knowingly and willfully operat[ing] or attempt[ing] to operate an aircraft eligible for registration" *and* (2) "knowing that … the aircraft is not registered." One need not even make the inferences that this Court made in *Rehaif*; each clause expressly requires knowledge that the aircraft is eligible.

Second, the government contends that because § 46306(b) independently requires acting "willfully," knowledge of registrability "is not necessary to separate wrongful from innocent acts." Opp. 10. But the government immediately admits the opposite is true. "[W]illfully," the government explains, means "with knowledge that [the] conduct was unlawful." *Id.* Operating an unregistered craft that need not be registered is *not* "unlawful." Thus, if a defendant lacks knowledge of registrability, he has not acted "knowingly" *or* "willfully," eliminating any textual ambiguity that could justify breaking from *Rehaif*.

B. The Circuits Are Intractably Divided

The government does not dispute that five circuits, including the Eleventh, regularly state in published decisions that there can be no plain error absent directly on-point precedent interpreting the statute at issue. Pet. 11-13. A Westlaw search reveals hundreds of cases citing variations of the controlling-precedent rule in the

Eleventh Circuit alone. Nor does the government dispute that five circuits have published decisions rejecting this controlling precedent rule, stating that "plain error review is considerably more flexible" and that settled "principles" are as good as settled "precedents." Pet. 9-11.

The government's efforts to deny the split fall flat.

First, as noted, the Eleventh Circuit's occasionally-stated exception for when the "explicit language of a statute" directly resolves an issue, *see* Opp. 7, is nominal. In many cases, like this one, the court states that statutory language is irrelevant. *Supra* p.2. The few cases the government cites analyzing statutory language (Opp. 7), didn't acknowledge the relevant plain-error rule. Regardless, analyzing "explicit" statutory text while refusing to consider precedent instructing how to interpret such language amounts to a charade version of statutory interpretation that inevitably endorses obvious errors. And other cases the government cites actually reinforce the controlling-precedent rule. *United States v. Mangaroo*, 504 F.3d 1350, 1354 (11th Cir. 2007).

Circuits on the Eleventh Circuit's side likewise take an approach to the "explicit language of the statute" caveat that renders it meaningless. The Fifth Circuit has found no plain error in delegating authority over mental health treatment to a probation officer despite statutory text stating that such treatment must be "specified by the court." Pet. 13 (citing *United States v. Lomas*, 304 Fed. Appx. 300, 300-01 (2008)). And the Sixth Circuit found no plain error in applying a statutory penalty limited to "non-indigent persons" to someone who was indigent. *Id.* (citing *United States v. Kent*, 765 Fed. Appx. 126 (2019)).

Second, the government purports to identify a few cases in the Eleventh Circuit that find plain error based on the reasoning of a non-directly-on-point authority. Opp. 8, 11-12. But the government's cases are not

statutory cases, which is where the perfect-correspondence rule is consistently applied. Regardless, most *did* rely on direct, binding precedent. *United States v. Perry*, 14 F.4th 1253, 1265-1266 (2021), identified on-point precedent barring summary witnesses. *United States v. Russell*, 957 F.3d 1249, 1253 (2020), held that *Rehaif*'s conclusion that § 922(g) defendants must know their immigration status made it plain error to exclude evidence on knowledge of immigration status—not remotely an "extension" of *Rehaif*. And *United States v. Heath*, 419 F.3d 1312, 1315 (2005), held that a judge's delegation of sentencing conditions to a probation officer violated Article III, citing this Court's broad ruling that all sentencing is "a judicial function."

The Court need not take petitioner's word for it. Here's how the government explained the law of the Eleventh Circuit to the Eleventh Circuit below: "Brown cannot show that either this Court or the Supreme Court have interpreted this statute in the way that Brown does here and, because he cannot, he cannot show plain error." C.A. Br. 37. *Rehaif*, the government continued, "is only a general principle, and Brown has not shown that this Court has made that finding about this particular statute." *Id.* at 38.[2] The government knows that the Eleventh Circuit does not actually engage in independent statutory analysis or extend analogous precedent, and secured affirmance on that basis.

The government concedes that the Fourth, Fifth, and Sixth Circuits also apply the "directly on-point statutory precedent" rule, including in exceedingly rigid ways the government does not defend. Opp. 12; *see, e.g.*, *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009) (no plain error where "extending authoritative precedent" is

[2] *Available* at 2020 WL 7333488.

required, even if statutory language is undisputedly unambiguous and every circuit has agreed). The government identifies a single Fifth Circuit decision finding plain error on the basis of statutory text and jury instructions even without on-point precedent,[3] but one outlier decision from 2007 where the court did not reference the relevant controlling-precedent rule does not render the Fifth Circuit's rule unclear. *See United States v. Blount*, 906 F.3d 381, 385 (2018) (no plain error "given the lack of authoritative precedent"); *United States v. Tinney*, 3 F.4th 147, 151 (2021) ("fatal" that "our court has not extended *Iverson* to a case like this"); *United States v. Carranza-Raudales*, 605 Fed. Appx. 325, 329 (2015) (no plain error "[e]ven where the argument requires only extending authoritative precedent"); *United States v. Gonzalez-Pina*, 675 Fed. Appx. 482, 483 (2017) (same); *United States v. Rubio-Sorto*, 760 Fed. Appx. 258, 260 & n.1 (2019) (same); *United States v. Carapia Hernandez*, 742 Fed. Appx. 28, 29 (2018) (cases "do not speak directly to the issue presented here"). These are just examples.

The government likewise identifies a single outlier Fourth Circuit case from 2002, but the court's modern precedent is clear in its repeated endorsement of the Eleventh Circuit's rule. *See* Pet. 12; *United States v. Osiomwan*, 593 Fed. Appx. 194, 195 (2014); *United States v. Faraz*, 626 Fed. Appx. 395, 398 (2015); *United States v. Shepperson*, 739 F.3d 176, 181 (2014); *United States v. McNeill*, 589 Fed. Appx. 128 (2014); *United States v. Mitchell*, 584 Fed. Appx. 44, 46 (2014).

None of the Sixth Circuit cases the government cites suggest any internal disagreement about that Court's clear rule that statutory questions of "first impression"

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[3] *United States v. Medina-Torres*, 703 F.3d 770, 776 (5th Cir. 2012), found plain error based on Fifth Circuit precedent addressing "the same issue we face here." *Contra* Opp. 12.

cannot constitute clear error. *United States v. Potts*, 947 F.3d 357, 367 (2020). In *United States v. Price*, the "government concede[d]" plain error. 901 F.3d 746, 751 & n.2 (2018). *United States v. Lantz*, 443 Fed. Appx. 135 (2011) involved First Amendment vagueness standards, not statutory interpretation. And *United States v. Fowler*, 956 F.3d 431 (2020), supports petitioner's point. The court distinguished its own prior precedent finding no plain error in applying a financial penalty reserved for "non-indigent" defendants to an indigent defendant, explaining that "this issue was one of first impression at that time," but "the law has changed." *Id.* at 438-39.

Finally, the government does not dispute that the First Circuit has refused to extend a holding of this Court interpreting statutory language in a "nearly identical" context for the sole reason that there was no identical precedent. *Lestage v. Coloplast Corp.*, 982 F.3d 37 (2020). It cites two decisions stating in dicta that there need not be directly-on-point precedent, but in both cases, there was. *United States v. Perez-Rodriguez*, 13 F.4th 1, 29 (2021) ("our precedents" "obviously foreclosed" the government's position); *United States v. Morales*, 801 F.3d 1, 10 (2015) (precedent "settled the matter definitively").

In short, the mere fact that an occasional panel in some of these circuits has occasionally neglected to mention the circuit's controlling-precedent rule does not undermine what is obvious from the bulk of the courts' recent opinions.

As for the five circuits with a less rigid rule, Pet. 9-11, the government merely cites cases acknowledging that the existence of controlling precedent can be an important clue to whether errors are plain. Opp. 13. None suggest it is *required*. The government makes no effort to dispute that this case would have come out differently for example, in the Second Circuit, which recently applied its rule

rejecting a "controlling precedent" requirement to find plain error because the word "knowingly" in 18 U.S.C. § 2443(a) applied to the subsequently-listed element of victim age. Pet. 9-10.

At minimum, the current regime is chaotic, arbitrary, and intractable without this Court's intervention. Under the government's theory, defendants nationwide are granted plain-error relief essentially at random. Some panels apply the "perfect correspondence" rule and refuse to extend precedent or analyze the statute. Others within the same circuits, on the government's view, do extend precedent, do engage in textual analysis, and do not treat the absence of precedent as fatal. The government diagnoses the randomness as stemming from the absence of settled rules on this topic, and in opposing review advocates for that haphazard regime going forward. But that approach is untenable. The confusion and misapplication of the plain error rule will not resolve with time; 10 courts will not conduct en banc reviews, much less anytime soon. Even if they did, the government does not suggest they all would reject the "perfect correspondence" rule—-particularly when the government in courts of appeals continues to press that stringent standard. *Supra* p.6. Lower courts, and especially criminal defendants, urgently need confirmation that "directly controlling precedent" is not a categorical requirement.

C. The Question Presented Is Important

The government doesn't deny that the plain-error standard is enormously consequential to fair and efficient judicial administration. Pet. 14-19. When courts demand perfect correspondence between controlling precedent and the case at hand, they disadvantage defendants like petitioner who are charged with obscure crimes. Pet. 17-18. Hundreds of appeals if not more each year, civil and criminal, depend on the standard for finding errors

plain—which, unlike the other requirements of Rule 52(b), this Court has not recently addressed. Pet. 15-16. The government disputes none of this.

Indeed, the consequences just in the Eleventh Circuit warrant review. Pet. 16; *supra* p.3. This Court should once again grant review to stop courts from applying an arbitrary, categorical exception to plain-error review. Pet. 15; *see Davis v. United States*, 140 S. Ct. 1060, 1061 (2020).

D. This Case Is a Good Vehicle

The government identifies no impediments to this Court's review. Its only so-called "vehicle" argument—that petitioner "could not satisfy the third and fourth elements of plain-error review" (Opp. 14)—doesn't complicate review of the question presented. This Court grants review to resolve the standard governing one element of the plain-error test even when the court on remand could deny relief under another element. *E.g.*, *Davis*, 140 S. Ct. at 1062 (granting review to halt "the Fifth Circuit's outlier practice of refusing to review certain unpreserved factual arguments for plain error," remanding, and "express[ing] no opinion on whether Davis has satisfied the plain-error standard"); *Olano*, 507 U.S. at 731 (declining to "consider whether the error, if prejudicial, would have warranted correction" under the fourth prong).

In any event, [t]he "conviction or sentencing of an actually innocent defendant" is the *paradigm* case for relief under Rule 52(b). *Olano*, 507 U.S. at 736. And none of the evidence to which the government points remotely suggests that it could prove beyond a reasonable doubt that petitioner knew about the registration requirement, given the undisputed evidence that there is no record of petitioner ever visiting the FAA website describing the requirement. Pet. App. 16a. The mere presence of a link on a Best Buy website or app does not prove beyond a

reasonable doubt that a user has actual knowledge of information accessible using the link.

Appropriately, the court below did not suggest that it could sustain the guilty plea if knowledge were required. The court accepted that "there [wa]s no evidence that [petitioner] knew the drone was an aircraft eligible for registration," disagreeing only that knowledge was legally necessary. Pet. App. 9a-10a. There is at least a "reasonable probability" that petitioner would not have pled guilty had he understood that actual knowledge was required. Opp. 15.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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