No. 21-7876

IN THE

Supreme Court of the United States

MATTHEW ALEXANDER, III,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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This Court should grant this petition to resolve an entrenched and extensive conflict in the Circuits over whether Federal Rule of Criminal Procedure 12(c)(3)'s "good cause" requirement applies to an argument that was not raised in the defendant's timely-filed pretrial motion, but was raised for the first time in an appeal from the denial of that timely motion. The government acknowledges the Circuit split, but asks this Court not to resolve it. According to the government, the Circuit split has little practical relevance, BIO 18-20, the Tenth Circuit is on the right side of the split, BIO 7-17, and this petition is "an unsuitable vehicle for resolving the question presented," BIO 20-23. None of these arguments are persuasive.

I. There is an extensive Circuit split on an important question.

"One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018) (Thomas, J., dissenting from the denial of certiorari) (joined by Justices Alito and Gorsuch) (quoting Sup. Ct. Rule 10(a)). As the government acknowledges, the question presented has caused a significant conflict in the Circuits. BIO 16-17.

This extensive disagreement is not going away. *See*, *e.g.*, *United States v. Mullins*, 2022 WL 3082059, at *1 (4th Cir. Aug. 3, 2022) (plain error review applies to "distinct suppression arguments or new claims on appeal"); *United States v. Banks*, 29 F.4th 168, 181 n.7 (4th Cir. 2022) (similar; government conceded the point); *United States v. Cabello*, 33 F.4th 281, 285 (5th Cir. 2022) (similar); *United States v. Russell*, 31

F.4th 1009, 1011 (6th Cir. 2022) (Bush, J., statement respecting the denial of rehearing en banc) (acknowledging that the Sixth Circuit reviews *the government's* forfeited pretrial-motion standing argument for plain error); *contra United States v. Scarfo*, 41 F.4th 136, 169 (3d Cir. 2022) (refusing to review forfeited claim for plain error).

Moreover, in our petition, we identified the split as 5-4 in the government's favor. Pet. 14-18. In light of recent decisions, however, the government's position appears to be the minority position. That's because: (1) the D.C. Circuit recently employed plain error to review a forfeited challenge to the sufficiency of an indictment, *United States v. Abou-Khatwa*, 40 F.4th 666, 674 (D.C. Cir. 2022); (2) the Second Circuit recently employed plain error to review an unpreserved argument not raised in the defendant's timely motion to suppress (the exact scenario here), *United States v. Donziger*, 38 F.4th 290, 302-303 (2d Cir. 2022);[1] (3) in a recent Seventh Circuit case, the government agreed that plain-error review applied to new Fourth Amendment claims not raised in the defendant's timely pretrial suppression motion (again, the exact scenario here), and the Seventh Circuit reviewed for plain error, *United States v. Radford*, 39 F.4th 377, 387 (7th Cir. 2022); and (4) the Eighth Circuit continues to apply plain-error review in this context (although leaving the question open for resolution), *United States v. Nunez-Hernandez*, __ F.4th __, 2022 WL 3149525, at *1

[1] The government claims that the Second Circuit falls on its side of the split, BIO 17, but the two cases it cites for that proposition don't hold that plain-error review is inapplicable to new arguments raised in an appeal from a timely motion to suppress. *United States v. O'Brien*, 926 F.3d 57, 72, 82-84 (2d Cir. 2019) (affirming district court's denial of untimely post-trial motion for a judgment of acquittal; at no point discussing plain-error review); *United States v. Diaz*, 967 F.3d 107, 111 n.4 (2d Cir. 2020) (affirming district court's denial of motion to dismiss for improper venue as untimely because the defendant did not address the issue in the opening brief).

n.2 (8th Cir. Aug. 8, 2022).

Despite the acknowledged conflict, the government doesn't believe that this Court should resolve the conflict because "it is not clear that applying the good-cause standard as opposed to the plain-error standard affects the outcome in a meaningful number of cases." BIO 18. The government tells us that "many claims precluded by Rule 12(c)(3) would also fail under plain-error review." BIO 19-20. And in the "hypothetical case" where the result would differ, the government tells us not to worry: "the defendant may pursue a remedy in post-conviction proceedings based on a claim of ineffective assistance of counsel." BIO 20.

This reasoning is unsound. True, this Court generally resolves a conflict in the Circuits only if that conflict concerns an "important matter." Sup. Ct. Rule 10(a). But we fail to see how the resolution of this conflict – and whether Rule 12(c)(3) or Rule 52 (at most) applies to forfeited arguments not raised in timely pretrial motions – does not involve an "important matter." Even assuming that the answer to this question wouldn't matter in "many" cases, it would certainly matter in some cases (like this one, Pet. 26-28). This Court has previously resolved circuit splits even where doing so didn't matter in any future case. *See*, *e.g.*, *Nichols v. United States*, 578 U.S. 104, 112 (2016) (noting recent amendment to statute under consideration).

And a "good cause" showing is something entirely different than a "plain error" showing. That the courts of appeals use entirely different standards when determining whether to consider a claim of error has to raise an "important matter." As we've explained, this Court often resolves such standard-of-review issues because

standards of review matter. Pet. 18-20; Deanelle Tacha, Harry T. Edwards & Linda A. Elliott, FEDERAL COURTS STANDARD OF REVIEW v (2007) ("Take 'standard of review.' Now to the normal reader that is legalese. To the judge, it is everything.").

Nor should this Court consider the question presented unimportant merely because any defendant could file a habeas petition raising an ineffective-assistance-of-counsel claim for his attorney's failure to raise a timely argument in the district court. As long as the Circuit split lingers, only some defendants will be forced into filing pro se habeas petitions, while others will be able to pursue such claims on appeal with appointed counsel. That geographic disparity is unacceptable.

Moreover, the government's position is administratively burdensome. Criminal defendants who file § 2255 motions typically do so pro se because the right to counsel doesn't extend to the habeas context. *See Price v. Johnson*, 334 U.S. 266, 292 (1948) (recognizing that prisoners "act so often as their own counsel in habeas corpus proceedings"). And pro se criminal defendants can't be expected to competently litigate complex Fourth Amendment issues. *See Neitzke v. Williams*, 490 U.S. 319, 330 (1989) (noting that pro se litigants are "less capable of formulating legally competent initial pleadings"); *Price*, 334 U.S. at 292 ("Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading."); *Tomkins v. Missouri*, 323 U.S. 485, 487 (1945) ("we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law"). It makes much more sense (especially for the courts) that those issues be litigated by competent counsel on direct appeal rather than in a pro se habeas petition. *See*

Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 542-543 (2007) (Scalia, J., concurring in part and dissenting in part) ("Since pro se complaints are prosecuted essentially for free, without screening by knowledgeable attorneys, they are much more likely to be unmeritorious. And for courts to figure them out without the assistance of plaintiff's counsel is much more difficult and time consuming."). The government's position would "increase, rather than [] alleviate, the caseload burdens on" federal courts. *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (Blackmun, J., concurring).

Finally, for two reasons, the government's point that this Court has denied certiorari with respect to the question presented in prior cases does not help the government. BIO 7. First, the government is wrong to imply that this Court's denial of certiorari in other cases has any significance. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1404 n.56 (2020) ("[T]he significance of a denial of a petition for certiorari ought no longer . . . require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim."). And second, the repeated denials of certiorari support the need to grant this petition to resolve this recurring question. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959) ("Since the question is important and recurring we granted certiorari.").

In the end, there's an entrenched, extensive conflict on an important and recurring question over Rule 12(c)(3)'s reach to appellate courts. That conflict is in need of resolution, and only this Court can resolve it. Review is necessary.

II. The Tenth Circuit erred.

The government primarily defends the Tenth Circuit's decision. BIO 7-17. But this

is the certiorari stage, not the merits stage. The question is whether to grant certiorari to resolve the Circuit conflict, not whether the Tenth Circuit erred below. Merits aside, review is necessary to resolve an entrenched, extensive Circuit split.

In any event, the answer to the question presented isn't as clear-cut as the government portrays. After all, at least four Circuits (and arguably more, as explained above) disagree with the government's merits-based arguments. Pet. 16-17. We've provided four reasons why these courts of appeals are correct. Pet. 20-26. The government's counterarguments are unpersuasive.

First, Rule 12(c)(3) can't possibly apply to appellate courts because that rule governs **pretrial** motions, and appellate courts don't hear or resolve **pretrial** motions. Pet. 3, 20. The government essentially ignores this point. The government hasn't even attempted to explain why a rule aimed at the litigation of **pretrial** motions would apply to appellate courts. Second, we've explained that Rule 12(c)(3)'s good-cause requirement is aimed at untimely "motions," not untimely arguments, and here, Mr. Alexander filed a timely motion to suppress in the district court. Pet. 22. As far as we can tell, the government ignores this point as well.

The government instead claims that, because Rule 12(c)(3) refers to "a court," not "the court," it must apply to both appellate courts and district courts. BIO 8-9. But we've already explained why this reasoning doesn't hold. Pet. 20-22. In response, the government makes two points, but both are meritless.

First, the government posits an imaginary ordinance that prohibits "visitors from bringing 'a vehicle' into the park" and surmises that this ordinance "would be

naturally understood to forbid bringing a car, a motorcycle, or both." BIO 9. But if the ordinance were aimed at four-wheeled vehicles, then it wouldn't "be naturally understood to forbid bringing . . . a motorcycle" into the park. And here, Rule 12 concerns pretrial motions. Pet. 3. So it makes sense that "a court" is one that deals with pretrial motions, just as it would make sense that an ordinance governing four-wheeled vehicles would deal with four-wheeled vehicles (not motorcycles). The government's inapt hypothetical ignores the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quotations omitted).

Second, the government notes that Rule 52 applies to appellate courts even though its language doesn't "explicitly refer to appellate courts." BIO 9. That's true, but beside the point. Unlike Rule 12, Rule 52 is not found within Title IV ("Arraignment and *Preparation for Trial*)," in a rule entitled "Pleadings and *Pretrial Motions*," in a provision governing procedures for motions "that must be made *before trial*." Pet. 3. Rule 52 is found within Title IX ("General Provisions"), and its title, "Harmless and Plain Error," is very much aimed at the functions of appellate courts. *See*, *e.g.*, 28 U.S.C. § 2111 (entitled "Harmless error") ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); *Kotteakos v. United States*, 328 U.S. 750, 758-764 (1946) (discussing the historical underpinnings of harmless-error review on appeal); *Russell*, 31 F.4th 1009,

1011 (6th Cir. 2022) (Bush, J., statement respecting the denial of rehearing en banc) (discussing the historical underpinnings of plain-error review on appeal). As we've already explained, Rule 12 has everything to do with pretrial motions and nothing to do with appellate practice (and, thus, appellate courts). Pet. 21-22. That's not true with respect to Rule 52.

The government further notes that Rule 52's "neighboring provisions appear to apply exclusively to district courts." BIO 9. (citing Rules 43, 55, and 57). From this, the government summarily concludes that "[p]rovision titles and neighboring rules therefore cannot be determinative as to whether an appellate court applies any particular Federal Rule of Criminal Procedure." BIO 10. We don't follow. We've relied on Rule 12's plain text, not just the provision's "title[] and neighboring rules." Pet. 20. That three "General Provisions" (Rules 43, 55, and 57) "appear to apply exclusively to district courts," BIO 9, can't possibly shed light on whether Rule 12's pretrial-motions procedures apply to appellate courts.

Without textual support, the government turns to "sound practical considerations." BIO 10. We don't dispute that appellate courts are generally "not well-suited to consider" new claims, BIO 10, but that's why Rule 52 requires an appellant to establish plain error on appeal. It doesn't follow from "sound practical considerations" that an appellate court should be precluded from addressing an unpreserved, but plain error. Appellate courts have corrected plain errors for over a century. *See*, *e.g.*, *Crawford v. United States*, 212 U.S. 183, 194 (1909). This Court just reversed an appellate court for refusing to apply plain-error review to a forfeited

claim of "factual error." *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020). A claim of "factual error" could certainly be "illuminated with a hearing and decision if timely raised in the district court." BIO 10. But that didn't stop this Court from holding that plain-error review still applies on appeal. So too here.

The government further implies that our position would encourage sandbagging by defense attorneys. BIO 10. That's not a serious argument. In this Court's words: "If there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for 'plain error' later, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom." *Henderson v. United States*, 568 U.S. 266, 276 (2013).

The government further claims that our argument "rests on" Rule 12's history, and in particular, "the elimination of the term 'waiver' from Rule 12 in 2014." BIO 11. That's inaccurate in two respects. First, our argument "rests on" Rule 12's text, not its history. Pet. 20-22. True, we've explained (as our third of four points) that the history supports our textual arguments, Pet. 22-23, but that's not our primary argument. And second, our historical argument is that the rules drafters considered an express directive that "Rule 52 does not apply," but did not adopt that express directive, instead deleting the term "waiver" from Rule 12's text. Pet. 23-24. It is not just the deletion of the word "waiver" that matters here. It is much more so the drafters' considered decision not to eliminate plain-error appellate review.

Moreover, we agree with the government, BIO 13-14, that "waiver" within the previous version of Rule 12's good-cause provision was not "a true waiver rule" and

that the elimination of the word "waiver" in 2014 was meant to clarify this point. Pet. 4. But it doesn't follow that, by deleting the word "waiver," the rules drafters meant to eliminate plain-error *appellate* review. What follows is that the rules drafters clarified that a defendant who seeks to file an untimely pretrial motion *in the district court* must show good cause *in the district court* regardless whether the failure to file the motion in a timely fashion was intentional or unintentional. That fix has nothing to do with the application of plain-error review to newly raised arguments *on appeal*.

Finally, the government puts much weight in *Davis v. United States*, 411 U.S. 233 (1973). BIO 10-14. We don't understand why. *Davis* asked about Rule 12's effect on a new claim raised in a federal habeas petition, and this Court held that the new claim couldn't be raised in the habeas petition. *Id.* at 234, 245. But our case is on direct appeal, not collateral review. And we didn't raise an entirely new claim on direct appeal (just a new argument in support of the same claim raised below – that the vehicle protective search was unconstitutional). *Davis* couldn't have held that a defendant waives a new argument raised on appeal in support of a timely-filed suppression motion because *Davis* had nothing to do with a direct appeal or a new argument raised on appeal in support of a timely-filed suppression motion.

True, *Davis* stated that "a claim once waived pursuant to [Rule 12] may not later be resurrected, *either in the criminal proceedings* or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Id.* at 242 (emphasis added). The government latches onto the highlighted dicta to imply that *Davis* held that plain-error review doesn't apply when a defendant raises a new argument on appeal that

the defendant did not raise in his timely-filed suppression motion. But the decision makes plain that the "criminal proceedings" reference had to do with an untimely motion filed in the district court. *Id.* ("foreclosed the raising of a claim such as this after the commencement of trial"). And again, *Davis* says nothing at all about new claims raised on direct appeal. The case is inapposite.

Our fourth point is that de novo review should apply under the circumstances of this case. Pet. 24-25. In its response, the government misunderstands the argument by claiming that it's our position that de novo review would apply to any new argument on appeal. BIO 16-17. That's untrue. As we've explained, plain-error review would typically apply to any new "defense, objection, or request." Pet. 20-24. But here, Mr. Alexander did not raise a new "defense, objection, or request" on appeal. In the district court, Mr. Alexander moved to suppress because of an unconstitutional vehicle protective search. On appeal, he did not raise a new basis to suppress. He has consistently argued that the vehicle protective search was unconstitutional. Pet. 12-14. Any arguments in support of that claim should be reviewed de novo (and certainly not considered waived under Rule 12(c)(3)). Pet. 24.

In the end, this is not a case where the merits of the underlying issue are so clear that the resolution of the Circuit split is unnecessary. That much is obvious from the nature of the split. At a minimum, four Circuits agree with the government, and four disagree with the government. BIO 17-18. At most, three agree and eight disagree. Either way, review is necessary.

III. This is an excellent vehicle to resolve the split.

Finally, the government claims that this is an "unsuitable vehicle" to resolve the acknowledged Circuit split. BIO 20-23. But there are no procedural hurdles to relief. We argued in the court of appeals that the vehicle protective search was unconstitutional because Officer Thompson (and not the officers collectively) did not have reasonable suspicion to search the vehicle for dangerous weapons. Pet. 13. When the government invoked Rule 12(c)(3)'s good-cause requirement because we did not argue in the district court that the collective knowledge doctrine was inapplicable, we acknowledged binding Circuit precedent that foreclosed any appellate review. Pet. 13. We noted the Circuit split on the issue and "'reserve[d] the right to petition for further review.'" Pet. 14. If this Court granted this petition, it could resolve a Circuit split that is in serious need of resolution.

The government does not actually identify any vehicle problems. *See*, *e.g.*, *Howell v. Mississippi*, 543 U.S. 440, 443-446 (2005) (certiorari improvidently granted because petitioner did not properly present claim in lower courts). Rather, the government asserts that Mr. Alexander would likely lose on remand in the district court. BIO 20-23. This speculation is not a basis to deny this petition. This Court often resolves legal issues, leaving to the lower courts to sort out the application of those legal principles on remand. *See*, *e.g.*, *Johnson v. California*, 543 U.S. 499, 515 (2005) (resolving threshold legal issue and remanding for the lower courts to address the merits); *Thacker v. Tennessee Valley Auth.*, 139 S. Ct. 1435, 1443 (2019) (similar); *McLane Co. v. EEOC*, 137 S.Ct. 1159, 1170 (2017) (similar); *Consolidated Rail Corp. v. Gottshall*,

512 U.S. 532, 557-558 (1994) (similar); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031-1032 (1992) (similar). In *Ornelas v. United States*, for instance, this Court granted certiorari to resolve a Fourth Amendment standard of review issue, then remanded to the lower courts to resolve the case under the appropriate standard. 517 U.S. 690, 700 (1996). On remand, the Seventh Circuit affirmed in a one-paragraph unpublished opinion. *United States v. Ornelas*, 1996 WL 508569 (7th Cir. Sept. 4, 1996). If the underlying merits made a case a poor vehicle, it is difficult to understand why this Court would have granted certiorari in *Ornelas*.

Similarly, the government's criticism that we have not argued all four prongs of plain-error review, BIO 21, ignores the fact that we haven't asked this Court to resolve the underlying merits. We've asked this Court to reverse the Tenth Circuit's good-cause-requirement precedent and remand for a merits determination in the Tenth Circuit (and preferably under de novo review). Pet. 26.

In doing so, we've previewed why Mr. Alexander would likely prevail on the merits. Pet. 26-28. That's because there is nothing in the record that indicates that Officer Henry instructed Officer Thompson (either verbally or non-verbally) to conduct the search, and, thus, the collective-knowledge doctrine doesn't apply. Pet. 26-28. And because Officer Thompson did not have reasonable suspicion to search, the warrantless search was unconstitutional. Pet. 26-28.

The government does not dispute that Officer Thompson lacked reasonable suspicion to search the vehicle. The government instead claims that Officer Thompson conducted the search based on Officer Henry's knowledge of Mr.

Alexander's past. BIO 22. There are two problems with this argument. First, it has no factual support. The record plainly reveals that Officer Thompson searched the vehicle because she mistakenly believed that Mr. Alexander was a violent felon who had previously discarded a gun during a car chase. Pet. 9. In Officer Thompson's words, "at that point that Officer Henry advised me that it was Matt Alexander, . . . *I decided to do a protective sweep* of the vehicle for dangerous weapons." R1.140 (emphasis added). It was at that point that Officer Thompson "recognized that name *from prior contact with him*." R1.138 (emphasis added).

The government does not grapple with this testimony, but instead claims that we've inaccurately portrayed Officer Thompson's testimony on cross-examination. BIO 20. That argument is a red herring. Regardless of the testimony on cross-examination, Officer Thompson's testimony on direct examination confirms that she searched the vehicle based on her mistaken belief that Mr. Alexander was somebody else. R1.138-140.

It is true that Officer Thompson also testified that she found it odd ("not normal") that Officer Henry asked Mr. Alexander to exit the vehicle and that she "presume[d]" from this that Officer Henry "recognized Matt Alexander at that point and knew we needed to sweep this area and this person for weapons because he's a dangerous felon." R1.140-141, 149. The government claims that this testimony indicates the real reason Officer Thompson searched the vehicle: because Officer Henry removed Mr. Alexander from the vehicle. BIO 22. That's wrong. This testimony involved Officer Thompson's attempts to "presume[]" what Officer Henry was thinking at that time.

R1.149. This testimony had nothing to do with the reasons why Officer Thompson conducted the search (just her speculative (and factually inaccurate) belief that Officer Henry also thought a vehicle protective search was necessary).

Second, it's not enough under the collective knowledge doctrine that Officer Thompson "presume[d]" that Officer Henry "knew [the officers] needed to" search the car. Pet. 26-28. Henry must have "'convey[ed] [his] suspicions through nonverbal [or] verbal cues.'" BIO 22 (quoting *United States v. Shareef*, 100 F.3d 1491, 1504 n.6 (10th Cir. 1996)). The government doesn't even attempt to show that Officer Henry conveyed his suspicions via nonverbal or verbal cues. Nor does the government dispute our point that Officer Thompson's presumptions about Officer Henry's knowledge were incorrect. Pet. 8-9. Officer Thompson conducted the warrantless search on her own, and she did so without any particularized suspicion to do so.

In the end, this petition is not an "unsuitable vehicle." There is an extensive, entrenched Circuit split that only this Court can resolve. Review is necessary.

Respectfully submitted,

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