No. _____

In the Supreme Court of the United States

SAMUEL JESUS AVILA, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In *Henderson v. United States*, this Court held that "it is enough that an error be plain at the time of appellate consideration" to meet the second prong of the plain error standard, even if the law was unsettled at the time of trial. 568 U.S. 266, 279 (2013) (cleaned up). While Petitioner's direct appeal was pending, this Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, which held that the Second Amendment protects an individual's right to carry a handgun for self-defense outside the home; adopted a methodological framework for testing the constitutionality of a statute under the Second Amendment; and invalidated a New York licensing statute. 142 S. Ct. 2111, 2122, 2127, 2156 (2022). Applying *Bruen*'s test, Petitioner argued that his crime of conviction—receipt of a firearm while under indictment—was facially unconstitutional under the Second Amendment. But the Fifth Circuit Court of Appeals held that Petitioner failed to meet the "plainness" standard "because there is no binding precedent holding § 922(n) unconstitutional."

The question presented is: Is an error "plain" within the meaning of Federal Rule of Criminal Procedure 52(b) only if controlling precedent has recognized the exact same error in precisely the same context?

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Petitioner Samuel Jesus Avila asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 21, 2023.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Avila*, No. 7:21-cr-00280-DC (W.D. Tex. Feb. 8, 2022) (judgment)
- *United States v. Avila*, No. 22-50088 (5th Cir. Dec. 21, 2022) (per curiam) (unpublished)

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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Avila*, No. 22-50088 (5th Cir. Dec. 21, 2022) (per curiam), is reproduced at Pet. App. 1a–6a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on December 21, 2022. Justice Alito granted Petitioner's motion to extend the time for filing a petition for writ of certiorari to April 20, 2023. *See Avila v. United States*, No. 22A770. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Second Amendment to the U.S. Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

FEDERAL STATUTE AND RULE INVOLVED

18 U.S.C. § 922(n)

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to … receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Federal Rule of Criminal Procedure 52

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

STATEMENT

1. On the night of August 22, 2021, police officers watched Petitioner and his friends go to a night club and smoke marijuana. Officers followed the group when they drove to a nearby apartment complex. There, officers looked inside their car and saw a handgun on the front-passenger side of the car where Petitioner had been riding. They also saw a bottle of alcohol with a broken seal and a second firearm in the back seat. The rear window was rolled down and officers smelled marijuana. The officers detained Petitioner and his friends and obtained a search warrant for the car.

The search uncovered 1.05 ounces of marijuana and a digital scale in the car's glove box, as well as the handgun and a 31-round magazine in the front-passenger footwell where Petitioner had been riding. Petitioner claimed possession of these items. A records-check revealed that Petitioner had pleaded guilty to Texas burglary of a habitation on July 26, 2021, and received a deferred adjudication and eight years' probation.

2. Petitioner was charged with and pleaded guilty to 18 U.S.C. § 922(n). Section 922(n), which Congress enacted in 1968, prohibits a person who is under indictment for a crime punishable by imprisonment for a term exceeding one year from receiving any firearm that has been shipped or transported in interstate or foreign commerce. A person who receives a "deferred adjudication" in Texas remains "under indictment" for the purposes of § 922(n) throughout the term of his probation. *See United States v. Valentine*, 401 F.3d 609, 611 (5th Cir. 2005). The district court sentenced Petitioner to 60 months' imprisonment, followed by three years' supervised release.

3. On June 23, 2022, while Petitioner's direct appeal was pending, the Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). *Bruen* did three things. First, it held that an individual's right to carry a handgun for self-defense extends outside of the home. *Id*. at 2122. Second, it adopted and clarified the analytical framework first endorsed by *District of Columbia v. Heller*, 554 U.S. 570 (2008), as the proper test for evaluating constitutional challenges under the Second Amendment, abrogating the "means-end" analysis most circuits, including the Fifth Circuit, had adopted after *Heller*. *Id*. at 2126–27. The test for applying the Second Amendment is this:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulations. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2129–30 (cleaned up). Finally, the Court applied its newly-clarified test and held New York's longstanding, proper-cause licensing regime unconstitutional. *Id*. at 2156.

4. On appeal, Petitioner argued that § 922(n) was facially unconstitutional under the Second Amendment. *Bruen* plainly established the test for analyzing the constitutionality of § 922(n). Under the first step of the analysis, the conduct prohibited by § 922(n)—receipt of a firearm—falls within the plain text of the Second Amendment's right to "possess and bear arms." And a person accused—but not convicted—of a felony crime remains part of the "the people" protected by the Second Amendment. Thus, § 922(n) was presumptively unconstitutional, and the burden shifted to the government to prove that the law is consistent with the Nation's historical traditions of firearm regulation.

This the government could not do. It failed to identify any founding-era examples of laws that similarly prohibited an accused person's right to receive a firearm.[1] Instead, it relied on restrictions imposed on general categories of "unvirtuous or dangerous" persons—although it provided no historical citation to laws that considered persons under indictment "unvirtuous or dangerous." It also relied on the same 19th-century surety laws the Court discounted as relevant evidence, *see Bruen*, 142 S. Ct. at 2148–50 & n.25, as well as laws first enacted in the 20th century. Thus, § 922(n)'s prohibition of receipt while under indictment was unconstitutional under the plain language of the Second Amendment and the absence of evidence that a historical tradition regulated this conduct. The wrongful conviction affected Petitioner's substantial rights and warranted relief.

5. The Fifth Circuit affirmed. It did not apply *Bruen* to determine whether § 922(n) was unconstitutional. It foreclosed Rule

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[1] In a separate appeal pending before the Fifth Circuit, the government conceded—with the Solicitor General's approval—that § 922(n) "lacks a 'historical twin,'" and it is "unaware of historical English or American laws that specifically forbade criminal defendants from possessing or buying firearms while awaiting trial." Supplemental Brief for the United States, *United States v. Quiroz*, No. 22-50834, at 11 (5th Cir.).

52(b)'s first-prong analysis by holding that no error can be "plain" because "[t]here is no binding precedent holding § 922(n) unconstitutional." Pet. App. 3a. The application of *Bruen* would have required the court to apply it "to an entirely new context," and "[t]o do so, this court would have to (a) survey the historical pedigree of similar laws and (b) adopt the defendant's interpretation of that history." Pet. App. 3a. And holding § 922(n) unconstitutional would have put the Fifth Circuit at odds with a magistrate judge's recommended order in the Southern District of California and a district court in the Western District of Oklahoma.[2] Pet. App. 3a.

Petitioner respectfully submits that the Fifth Circuit applied a reformulated and heightened standard for the second prong of plain error review that conflicts with decisions of this Court and other circuit courts of appeals.

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[2] The Fifth Circuit ignored that the same judge in the Western District of Texas who sentenced Petitioner held § 922(n) to be facially unconstitutional. Memorandum Opinion, *United States v. Quiroz*, 4:22-cr-00104 (W.D. Tex. Sept. 19, 2022). The government's appeal is pending. *United States v. Quiroz*, No. 22-50834 (5th Cir.).

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit Court of Appeals applied a reformulated and heightened standard for the second prong of plain error review in Petitioner's case, which involved an important constitutional question. By deciding "plainness" based on whether controlling precedent recognized the exact same error in precisely the same context, the Fifth Circuit's second-prong test conflicts with decisions by this Court and stands on the extreme end of a circuit split. This Court should grant certiorari to clarify the correct second-prong standard to be used by a court of appeals when this Court decides a new constitutional test.

2. "A plain error that affects substantial rights may be considered, even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725 (1993), this Court articulated the familiar four-prong approach to plain error review under Rule 52(b). The first two prongs are relevant here: there must be (1) an "error" (2) that is "plain." *Id.* at 733–34. *Olano* did not consider the "special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 724. "At a minimum," the error must be "clear under current law." *Id.*

That "special case" was first considered in *Johnson v. United States*, which clarified that "where the law at the time of trial was

settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." 520 U.S. 461, 468 (1997). A contrary rule "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent" at the time of trial. *Id.*

In *Henderson v. United States*, the Court applied the same rule where the law was unsettled at the time of error but plain at the time of review. 568 U.S. 266, 274, 279 (2013). In so holding, the Court reversed the Fifth Circuit, which had defined "plainness" at the time of trial. *Id.* at 270. The Court rejected the Fifth Circuit's reasoning that, because there had been a circuit split at the time of trial (before this Court settled the issue) and the Fifth Circuit had "not pronounced on the question," there could be no "plain" error on appeal. *Id.*

The second-prong holdings in *Johnson* and *Henderson* are firmly rooted in the important legal principle that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases … pending on direct review …, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Johnson*, 520 U.S. at 467 (quoting *Griffith v. Kentucky*, 479 U.S. 314, (1987)); *see also Henderson*, 568 U.S. at 276. Applying

new rules on direct appeal upholds the "integrity of judicial review." *Griffith*, 479 U.S. at 323; *see also Henderson*, 568 U.S. at 278. It prevents courts from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule," which would violate the principle of treating similarly situated defendants the same." *Griffith,* 479 U.S. at 323; *see also Henderson*, 568 U.S. at 274. By applying current law to determine, first, whether an error occurred helps a court determine, second, what errors may "fall outside" the scope of Rule 52(b). *Henderson*, 568 U.S. at 278. These constitutional norms persuaded the Court to define plainness at the "time of review." *See Johnson*, 520 U.S. at 467; *Henderson*, 568 U.S. at 271–77.

3. The Fifth Circuit's approach to the second prong is out of step with the clear holdings of *Johnson* and *Henderson* and the legal principles on which they are based. It continues to apply the reasoning *Henderson* rejected—that plainness requires precedent on the exact same error in precisely the same context. *See* Pet. App. 3a; *see also Henderson*, 568 U.S. at 270, 279–80. The effect of the Fifth Circuit's rule is that the second prong becomes the threshold for Rule 52(b)—the court will not apply a new constitutional test

to determine error unless the precedent that decided the new test applied it to the same statute at issue on direct appeal. This is a "rigid and undeviating judicially declared practice" under which the Fifth Circuit can "invariably and under all circumstances decline to consider all questions which had not previously been specifically urged." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). The Fifth Circuit is again "out of harmony" with the policy that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Id.*; *see also Henderson*, 568 U.S. at 276–77.

4. The Fifth Circuit's rigid second-prong standard stands on the extreme end of a circuit split. Five circuits have held, contrary to the Fifth Circuit, that to be "plain," an error "need not be clear or obvious under a perfectly analogous case, or even under the case law of the circuit, especially where … the error is one of textual interpretation." *United States v. Scott*, 14 F.4th 190, 198 (3d Cir. 2021). In these circuits, plainness "can depend on well-settled legal principles as much as well-settled precedents." *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003); *see also United States v. Long*, 997 F.3d 342, 357 (D.C. Cir. 2021) (collecting D.C. Circuit cases 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) ("Even in the absence of binding precedent, an error can be plain if it violates an absolutely clear legal norm, for example, because of the clarity of a statutory provision.") (cleaned up); *United States v. Lachowski*, 405 F.3d 696, 698–99 (8th Cir. 2005) (finding plain error despite "no pertinent authority concerning the scope" of the statute).

While the Fifth Circuit is not alone in requiring perfectly on-point precedent at the second prong,[3] this Court has repeatedly

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[3] *See, e.g., United States v. Harbin*, 56 F.4th 843, 845 (10th Cir. 2022) ("In the absence of Supreme Court or circuit precedent directly addressing a particular issue, a circuit split on that issue weighs against a finding of plain error."); *United States v. Harris*, 7 F.4th 1276, 1298 (11th Cir. 2021) ("In order 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. 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."); *United States v. Carthorne*, 726 F.3d 503, 511, 515–17 (4th Cir. 2013) (applying *Taylor*'s categorical approach to determine error, but holding it was not plain because "neither the Supreme Court nor this Circuit has yet addressed" the particular statute); *see also Lestage v. Coloplast Corp.*, 982 F.3d 37 (1st Cir. 2020) (holding that the district court's civil error was not "plain error because this circuit had never decided the question" in the False Claims Act context).

rejected the Fifth Circuit's attempts to impose threshold requirements that foreclose plain-error review. *See, e.g., Davis v. United States*, 140 S. Ct. 1060, 1061 (2020) (per curiam) (rejecting view that "questions of fact ... can never constitute plain error" as having "no legal basis"); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (rejecting "shock the conscience" standard for the fourth prong); *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016) (rejecting "additional evidence" standard for the third prong); *Henderson*, 568 U.S. at 279 (rejecting "time of trial" rule for the second prong).

5. Petitioner's case presents an ideal vehicle to resolve this important question because it vividly illustrates how errors can be "plain" even if not identical to controlling precedent. There is no doubt that, at the time of Petitioner's appeal, *Bruen* controlled the "standard for applying the Second Amendment," *Bruen*, 142 S. Ct. at 2129–30, and was "to be applied retroactively to all cases … pending on direct review," *Griffith*, 479 U.S. at 328. Shortly after the court affirmed Petitioner's conviction, two-thirds of the same panel acknowledged that *Bruen* "clearly fundamentally changed [courts'] analysis of laws that implicate the Second Amendment, rendering our [ ] precedent obsolete." *United States v. Rahimi*, 61 F.4th 443, 450–51 (5th Cir. 2023) (holding 18 U.S.C. § 922(g)(8)

unconstitutional), *petition for cert. filed*, No. 21-11001 (U.S. Mar. 2, 2023).

But for Petitioner, who did not have the benefit of *Bruen* before the trial court, the Fifth Circuit applied the second prong, first. Because *Bruen* did not apply its test to § 922(n), neither would the Fifth Circuit. It held Petitioner fell outside the scope of Rule 52(b) without deciding, first, whether there was a constitutional error. Pet. App. 3a. If the Fifth Circuit had followed the approach taken by five of its sister circuits that plainness can be determined by legal principle, there is no question that *Bruen*'s test would have plainly invalidated § 922(n) based on the Second Amendment's plain text and the absence of a historical tradition of regulation.

Clarification from this Court is necessary to rebuke the Fifth Circuit's rigid test that allows it to withhold relief afforded by a new constitutional test merely because, in deciding the new test, this Court did not apply it to the exact same error in precisely the same context.

CONCLUSION

FOR THESE REASONS, Petitioner asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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