No. 20-444

IN THE
SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner,

v.

Michael Andrew Gary,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Michael Andrew Gary was charged with possessing a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). At his guilty plea colloquy, the district court told him that this charge required proof that he had a prior felony conviction. But, in line with the unanimous view of the federal courts of appeals at the time, the court did not advise Mr. Gary that the charge required proof that he knew that his prior conviction barred him from possessing a firearm. While this case was pending on direct appeal, this Court rejected the circuits' unanimous understanding of the felon-in-possession statute, holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that an element of the felon-in-possession offense is the defendant's "know[ledge] of his status as a person barred from possessing a firearm," *id.* at 2195. Mr. Gary then asked the Fourth Circuit to vacate his guilty plea. Although he had not objected at his plea colloquy to the district court's omission of the knowledge-of-status element, Mr. Gary argued that the district court's *Rehaif* error rendered his plea invalid. The court of appeals agreed and vacated his plea.

The question presented is whether the court of appeals correctly held that the *Rehaif* error in Mr. Gary's case entitles him to relief, irrespective of whether he could show a reasonable probability that, but for the error, he would have gone to trial.

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STATEMENT OF THE CASE

1. In January of 2017, police officers in South Carolina conducted a traffic stop of respondent Michael Andrew Gary and found a gun in his car. Pet. App. 3a. The State of South Carolina subsequently charged him with the misdemeanor offense of violating S.C. Code Ann. § 16-23-20. That provision forbids "anyone to carry about the person any handgun" unless the person falls into a specific class of exempted persons, including police officers and fishermen. S.C. Code Ann. § 16-23-20.[1]

Five months later, after another vehicle search by local law enforcement, Mr. Gary admitted to possessing a second gun. Pet. App. 2a-3a. This time around, state authorities charged him with violating a different provision of South Carolina law: S.C. Code Ann. § 16-23-30(C). That provision forbids any person from possessing "any stolen handgun or one from which the original serial number has been removed or obliterated." S.C. Code Ann. § 16-23-30(C).

2. Based on the same events underlying these state charges, a federal grand jury in the District of South Carolina indicted Mr. Gary on two counts of possessing a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Pet. App. 3a. As relevant here, the Government alleged that he was forbidden from possessing a firearm because he had been convicted in 2014 of second-degree burglary. *Id.* 6a-7a

[1] The Fourth Circuit mistakenly characterized this as a "charge[] under state law with possession of a firearm by a convicted felon," Pet. App. 2a, perhaps because the Presentence Report (PSR) made the same mistake. *See* PSR ¶ 37; C.A. J.A. 114. The Government repeats this error in its petition. Pet. 2, 11. Counsel for Mr. Gary has now obtained the original state court records and confirmed that he was charged with violating Section 16-23-20, not any felon-in-possession statute.

& n.5. Mr. Gary had spent 691 days in pretrial detention in connection with that charge. *Id.* 7a n.5. After pleading guilty, he was immediately released under the terms of an eight-year suspended sentence. *Id.*; PSR ¶ 30; C.A. J.A. 111-112.

Mr. Gary opted to plead guilty to the two federal charges without a plea agreement. Pet. App. 3a. During his Rule 11 plea colloquy, the district court told Mr. Gary—consistent with "uniform" precedent in the federal courts of appeals at the time, Pet. 3—that, if he went to trial, the Government would have to prove the following elements: "(1) that Gary had been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) that he possessed a firearm; (3) that the firearm travelled in interstate or foreign commerce; and (4) that he did so knowingly; that is that [he] knew the item was a firearm and [his] possession of that firearm was voluntarily [sic] and intentional." Pet. App. 3a (punctuation omitted); *see also* Pet. 3. Mr. Gary acknowledged that he understood those elements and that his conduct satisfied them. C.A. J.A. 30-32, 47.

The district court accepted Mr. Gary's plea and sentenced him to 84 months in prison per count, to run concurrently. Pet. App. 3a. Local prosecutors later dismissed the state-law charges. *Id.* 3a n.1.

3. Mr. Gary appealed. While his appeal was pending, this Court held in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that in a federal prosecution for illegal possession of a firearm, the Government must prove that the defendant "kn[ew] of his status as a person barred from possessing a firearm." *Id.* at 2195. Mr. Gary then filed a letter under Federal Rule of Appellate Procedure 28(j) asserting that his guilty

plea should be vacated in light of *Rehaif* because he was not informed at his plea colloquy of "all the elements of the offenses." Pet. 5.

After supplemental briefing, the Fourth Circuit vacated Mr. Gary's convictions and remanded to the district court for further proceedings. Pet. App. 1a-23a. It began by presuming that "[b]ecause Gary did not attempt to withdraw his guilty plea in the district court," his claim was reviewable only for "plain error." Pet. App. 5a. The plain-error doctrine requires the defendant to show that "(1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights." *Id.* (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). If these showings are made and (4) the error "seriously affects the fairness, integrity or public reputation of judicial proceedings," the appellate court may grant relief. *Id.* 5a-6a (quoting *Olano*, 507 U.S. at 732).

The parties agreed (as did the court of appeals) that the first two prongs of this test were met: "[A]n error occurred," and "it was plain." Pet. App. 6a, 8a-9a.

The Fourth Circuit accordingly turned to the third prong of the plain error inquiry—whether "the error affected [Mr. Gary's] substantial rights." Pet. App. 10a. As Judge Luttig explained in an earlier opinion, this prong of the *Olano* test derives from the same language in Federal Rule of Criminal Procedure 52 as does the test for structural error: "affects substantial rights." *See United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996). Thus, under longstanding Fourth Circuit precedent, an error necessarily affects substantial rights if it is "structural" in nature. Pet. App. 15a-16a.

The Fourth Circuit then concluded that a guilty plea taken in violation of *Rehaif* meets each of the three independent tests for structural error. First, the error "violated Gary's right to make a fundamental choice regarding his own defense." Pet.

App. 16a. This violation of his "autonomy" rendered the strength of the prosecution's case "irrelevant." *Id.* 16a-17a. Second, the court of appeals found that a guilty plea taken in violation of *Rehaif* "has consequences that are necessarily unquantifiable and indeterminate." *Id.* 17a (internal quotation marks and citation omitted). Third, the court of appeals ruled that "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea." *Id.* 18a.

Finally, the Fourth Circuit held that a guilty plea taken in violation of *Rehaif* satisfies the fourth prong of the *Olano* framework. Having "acknowledge[d] that not every Rule 11 violation resulting in a constitutional error requires the automatic reversal of a conviction," Pet. App. 15a n.7, the court of appeals emphasized that "the structural integrity of the judicial process is not only at stake but undermined" when a defendant is not made aware of a *mens rea* element of an offense to which he pleads guilty. *Id.* 21a. Where "life and liberty are at stake," defendants must be "fully informed" of the charge, "[e]ven where evidence in the record might tend to prove a defendant's guilt." *Id.* 21a-22a.

5. The Government filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. 24a. Judge Wilkinson wrote a concurrence, joined by four other judges. He maintained that the panel's decision was incorrect but said that he voted to deny en banc to speed the case's path to this Court. *Id.* 25a. Judge Wilkinson noted the circuits are split over the issue in this case. *Id.* And without citing any statistics or any other empirical evidence, he asserted that the panel's decision would affect "[m]any, many cases" and "strain the resources" of prosecutors and district courts. *Id.* 25a, 31a.

REASONS FOR DENYING THE WRIT

The circuits admittedly are divided over whether the plain-error standard requires a defendant asserting a *Rehaif* error at his plea colloquy to show that, if properly advised, he would potentially have gone to trial. But that conflict is not enough to justify a spot on this Court's docket. The Fourth Circuit's decision affects only a small slice of felon-in-possession convictions, and it has no ongoing significance beyond that closed set of cases. Furthermore, the *Rehaif* error here provides a poor setting in which to elaborate on the plain-error doctrine—in part because the doctrine should not apply to the error here in the first place. Finally, the Fourth Circuit's decision is well-grounded in this Court's precedent. In particular, a defendant has a fundamental autonomy interest in knowing, before surrendering himself to years behind bars, every element that the Government would have to prove against him at trial. A violation of that interest, in and of itself, necessitates relief.

I. The question presented has minimal practical import.

The Government in this case does not ask this Court to mint any new rule of law. Instead, its argument for certiorari is primarily a consequentialist one. The Government asks this Court to resolve how two prongs of the well-established plain-error framework apply to guilty pleas taken in violation of *Rehaif*, asserting that the matter presents "a frequently arising issue of significant practical importance." Pet. 21. Neither part of the Government's assertion is correct.

A. This issue arises in only a narrow sliver of felon-in-possession prosecutions.

Felon-in-possession is no doubt "one of the most frequently prosecuted federal offenses." Pet. 23. But the question presented arises in only a narrow—and now closed—slice of such prosecutions.

1. The question presented potentially affects only a narrow sliver of defendants in the federal system—namely, those who entered guilty pleas and were sentenced before June 21, 2019 (the day *Rehaif* was decided), and whose cases are still on direct review. This is because the plain-error doctrine does not apply to defendants whose convictions have become final. *United States v. Frady*, 456 U.S. 152, 166 (1982); *see also, e.g.*, *United States v. Asmer*, 2020 WL 6827829, at *2-10 (D.S.C. Nov. 20, 2020) (refusing to extend decision below to collateral review). And in the wake of *Rehaif*, the error that occurred below—the failure to advise a defendant of the knowledge-of-status element of 18 U.S.C. § 922(g)—has long stopped occurring. For the past eighteen months, all defendants charged with felon-in-possession have presumably been receiving adequate advisements at plea hearings.

2. Even within the group of felon-in-possession cases that are still on direct review, the question presented seldom arises. To begin, the question presented affects only defendants "who pleaded guilty," not those who were convicted in trials. Pet. (I). In fact, the Fourth Circuit recently granted rehearing en banc in a separate case to address the distinct question how the plain-error doctrine applies to *Rehaif* errors at trial. *See United States v. Medley*, 972 F.3d 399 (4th Cir.), *reh'g en banc granted*, 828 Fed. Appx. 923 (2020). A judge who sat on the panel in that case explained that

convictions obtained at trial pose a different issue than this case, and the Government has never claimed otherwise. *See* 972 F.3d at 424 n.2 (Quattlebaum, J., dissenting); *see also United States v. Collins*, ___ F.3d ___, 2020 WL 7062467, at *3 (4th Cir. 2020) (denying plain-error relief on claim that jury instructions at the close of trial violated *Rehaif*); *infra* at 19-26 (explaining how the guilty plea context is critical to decision below).

Yes, most people charged with federal crimes plead guilty instead of going to trial. But the Government, like Judge Wilkinson, overlooks the fact that the vast majority of defendants who plead guilty also waive their right to appeal. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005). Indeed, a recent analysis found that nearly 80% of standard plea agreements contain such appellate waivers. Susan R. Klein, et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87 (2015). And beyond such boilerplate language, the Government can—and often does—insist on case-specific waivers.

The predominance of appeal waivers appears to be especially pronounced within the Fourth Circuit. Many U.S. Attorney's Offices in the jurisdiction have firm policies of insisting upon appeal waivers. For example, in the Eastern District of North Carolina, appeal waivers attached to guilty pleas are robust, and contain no language that indicates a change in law can provide grounds to challenge a guilty

plea.[2] Courts have held that waivers like this are enforceable even when an intervening decision from this Court makes clear that the defendant's constitutional rights were violated, *see United States v. Blick*, 408 F.3d 162, 170-71 (4th Cir. 2005), and have enforced waivers specifically with respect to *Rehaif* claims, *see, e.g.*, *United States v. Marc*, 806 Fed. Appx. 820, 823-24 (11th Cir. 2020).

Finally, only a fraction of those defendants who pleaded guilty before *Rehaif* but still can appeal their convictions on *Rehaif* grounds have chosen to do so. Some defendants have simply failed to raise *Rehaif* on appeal in a timely manner. *See, e.g.*, *United States v. Johnson*, 812 Fed. Appx. 126, 127 n.* (4th Cir. 2020). Others have elected for personal reasons to expressly renounce the issue. *See, e.g.*, *United States v. Speight*, 812 Fed. Appx. 160, 161 (4th Cir. 2020). "Most people who have spent any length of time incarcerated prefer prison to jail." James William Kilgore, *Understanding Mass Incarceration* 106 (2015). And having one's guilty plea vacated typically results in being removed from ongoing prison programming and transported back to crowded local jails. Accordingly, many defendants who are unlikely to obtain meaningful relief in the end from a *Rehaif* claim (because they will simply be convicted again and given the same or a similar sentence as before) have seemingly concluded that the personal and psychological toll of reopening their cases outweighs any possible benefit.

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[2] The only exceptions given in the general appeal waiver are "an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to [the defendant] at the time of [the defendant's] guilty plea." *Powell v. United States*, 2020 WL 2199622, at *1 (E.D.N.C. May 6, 2020).

B. The Fourth Circuit's holding imposes no significant burden on the federal courts.

The Government concedes that defendants are entitled to plain-error relief where they can show "a reasonable probability" that, but for *Rehaif* errors in their cases, they "would not have entered" their guilty pleas. Pet. 10 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). So the practical impact of the question presented is limited to cases currently pending on direct review in which defendants cannot satisfy the Government's proposed test. That impact is slight.

1. According to the Government, defendants "will rarely view the knowledge-of-status element as a reason to go to trial." Pet. 11. If that is correct, virtually all of the defendants whose pleas are subject to vacatur under the decision below, but who cannot satisfy the Government's proposed test, will presumably readily plead guilty on remand anyway. Put another way, if the Government is right that the evidence against most of the defendants in Mr. Gary's position is so strong that no reasonable person would insist on a trial, then one must assume that the Government will easily procure guilty pleas on remand in this finite group of cases.

2. The Government argues that the Fourth Circuit's holding below "potentially" has implications "beyond *Rehaif*-related error." Pet. 23. But in the nearly thirty years that the plain-error framework has existed, the lower courts have never before had to apply it to guilty pleas taken in violation of an intervening decision like *Rehaif*—that is, a decision where this Court did not simply construe a criminal statute more narrowly than lower courts had, but declared that lower courts unanimously had overlooked an entire element of an offense. If the Fourth Circuit's

decision ever turns out to have relevance beyond *Rehaif*, and the circumstances otherwise warrant review, the Court could step in then. At this point, that prospect appears highly unlikely.

That leaves the Government's short discussion of a more general question that this Court has previously reserved—namely, whether structural error automatically satisfies prong three of the plain-error test. Pet. 15 (citing *Puckett v. United States*, 556 U.S. 129, 140 (2009)). Because the Government's primary argument is that the error here is not structural at all, this case would not be an appropriate vehicle for addressing that general question. In any event, that general question is not worthy of this Court's attention. There is no split on the issue. Every court of appeals to consider it has agreed with the Fourth Circuit's position that "if an error is determined to be structural, the third prong of [the plain-error framework] is satisfied." Pet. App. 16a; *see also United States v. Barnett*, 398 F.3d 516, 526-27 (6th Cir. 2005); *United States v. Wyles*, 102 F.3d 1043, 1057 (10th Cir. 1996); *United States v. Colon-Pagan*, 1 F.3d 80, 81-82 (1st Cir. 1993) (Breyer, C.J.). That consensus is clearly correct. *See infra* at 24-25.

II. The *Rehaif* error here is a poor setting in which to expound upon the plain-error doctrine.

The Government's petition also falters because the small category of cases at issue here does not present an appropriate platform for elaborating on the plain-error doctrine. The doctrine should not apply under the circumstances here at all. And even if it did, Mr. Gary would satisfy the Government's proposed standard.

A. The plain-error standard should not apply here at all.

The Government's question presented asks whether Mr. Gary is "entitled to plain-error relief" under the circumstances here. Pet. (I). But a "prior issue," fairly included in that question, is whether plain error review applies at all. *See LeBron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-83 (1995) (logically antecedent issue was fairly included within the question presented); *see also e.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009) (same); *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) (same); *Ballard v. Commissioner,* 544 U.S. 40, 47 n.2 (2005) (same). In *Grubbs*, for instance, the Court observed that "[i]t ma[de] little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all." 547 U.S. at 93 n.1. So too here; it would make little sense to address how the plain-error doctrine applies to guilty pleas taken in violation of *Rehaif* (but before *Rehaif* was decided) if the doctrine does not apply to this scenario at all.[3]

The answer to that threshold question is no: The strictures of plain-error review should not apply where every court of appeals with criminal jurisdiction had already rejected the argument. And here, as the Government itself is at pains to emphasize (Pet. 3), every such court had indeed held at the time of Mr. Gary's plea

[3] Even if this threshold issue were not fairly included within the question presented, Mr. Gary, as respondent, would still be entitled to "defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982); *see also, e.g.*, *Salinas v. Texas*, 570 U.S. 178, 183 (2013) (plurality opinion) *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

that the felon-in-possession statute did not contain a *mens rea* element respecting the relevant status.[4]

Courts have recognized that a defendant should "not be stuck with plain error review for having failed to voice an objection when doing so would have been futile." *United States v. Uscanga-Mora*, 562 F.3d 1289, 1294 (10th Cir. 2009) (Gorsuch, J.); *see also, e.g.*, *United States v. Kyle*, 734 F.3d 956, 962 n.3 (9th Cir. 2013) ("A failure to raise a futile objection does not waive the objection."). "[T]o require a defendant to raise all possible objections at trial despite settled law to the contrary would encourage frivolous arguments, impeding the proceeding and wasting judicial resources." *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996). It would also place the defendant in a predicament "with no good options." *United States v. Baker*, 489 F.3d 366, 372 (D.C. Cir. 2007). "If he objects," he may "risk[] angering the judge" and "possibly encourage[] the court to impose a more severe sentence." *Id.* But if he does not object, the defendant would consign himself to the restricted scope of appellate review for plain error.

Where the circuits uniformly agreed that the defendant's legal position was wrong, the futility exception should apply. As Justice Scalia put it in a related

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[4] Pet. 3; *see also United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States v. Belk*, 346 F.3d 305, 311 (2d Cir. 2003); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012); *United States v. Langley*, 62 F.3d 602, 604-08 (4th Cir. 1995) (en banc); *United States v. Rose*, 587 F.3d 695, 705-06 & n.9 (5th Cir. 2009); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999); *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997); *United States v. Games-Perez*, 667 F.3d 1136, 1142-43 (10th Cir. 2012); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008).

context, "[w]hen the law is settled against a defendant at trial he is not remiss for failing to bring his claim of error to the court's attention. It would be futile." *Henderson v. United States*, 568 U.S. 266, 284 (2013) (Scalia, J., dissenting on other grounds). In fact, public defenders might properly be praised for *declining* in every single criminal case to make dozens, if not hundreds, of seemingly frivolous, boilerplate objections—all based on the faintest flicker of hope that this Court might reject an overwhelming body of precedent before the case becomes final. Nor should defendants be required to be clairvoyant; "plain error review should not be like a hidden mantrap, encountered without warning yet often deadly." *Uscanga-Mora*, 562 F.3d at 1294 (Gorsuch, J.).

In fact, this Court has already established a similar futility exception in an analogous area of law. Under the habeas "cause" standard—which, like plain error review, is designed to protect interests in the "accuracy and efficiency" of trial proceedings—a defendant's failure to raise an objection is excused when the he faced a "'near-unanimous body'" of adverse lower court decisions. *Reed v. Ross*, 468 U.S. 1, 10, 16-17 (1984) (citation omitted). All the more so under the even more extreme circumstances here, where the body of lower court decisions was not just "near-unanimous" but entirely unanimous—and where the defendant is still on direct review, rather than raising a collateral attack on a conviction that has become final.

Notwithstanding this reasoning, some courts of appeals have held, even when defendants were faced with "solid wall[s] of circuit authority," that plain-error review applied in the absence of objections. *See, e.g.*, *United States v. Knoll*, 116 F.3d 994, 1000 (2d Cir. 1997); *see also United States v. Wilkinson*, 137 F.3d 214, 229 (4th Cir.

1998) (citing *Knoll*, 116 F.3d at 1001). In so holding, those courts have relied primarily on *Johnson v. United States*, 520 U.S. 461 (1997), a case in which the Court applied the plain-error doctrine even though circuit precedent at the time of trial foreclosed the defendant's claim. But the facts of *Johnson* were different from the situation Mr. Gary faced. At the time of Johnson's trial, the circuits were split on the underlying question of law at issue. *See United States v. Gaudin*, 515 U.S. 506, 527 (1995) (Rehnquist, C.J., concurring) (noting conflict). Where there is an active circuit split on an issue, defendants are fairly on notice that the issue is debatable and that this Court might take it up and resolve it. Thus, they should be expected to raise salient objections. Where, by contrast, every single circuit has weighed in and rejected the argument, it makes no sense to saddle defendants with the plain-error standard.

B. Mr. Gary would satisfy the Government's proposed standard.

Even if this case were governed by the plain-error framework—and even if the Government were correct that the determinative question under that framework is whether there is "a reasonable probability that, but for the error, [Mr. Gary] would not have entered the plea," Pet. 10 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004))—Mr. Gary would still meet any fair application of that standard.

1. Section 922(g) requires a defendant charged with possessing a firearm as a felon to know that he was previously convicted of a crime "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1); *see also Rehaif*, 139 S. Ct. at 2194. In the Fourth Circuit, the Government briefly referenced "several [previous] convictions for which Gary faced a maximum penalty in excess of one year." Gov't C.A. Supp. Br. 4. In this Court, the Government likewise makes a variety of

assertions about Mr. Gary's criminal history, including two convictions in November of 2015 for assault and battery. Pet. 4, 11. But when asked directly at oral argument in the Fourth Circuit for its evidence regarding Section 922(g)'s knowledge-of-status element, the Government pinned its argument exclusively on Mr. Gary's prior conviction in 2014 for second-degree burglary, for which he spent 691 days in jail. The Government's "no prejudice" argument consequently turns solely on that prior conviction.[5]

Mr. Gary's knowledge regarding that 2014 conviction does not definitively establish that he knew he had previously been convicted of a crime punishable by

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[5] When the Fourth Circuit asked what evidence supported Mr. Gary's knowledge of his status as a felon, the Government responded: "In this case, the 691 days Mr. Gary spent in jail on a prior offense." CA4 Oral Arg. Recording 26:25-26:39. A few minutes later, the court asked the Government to clarify the extent of its evidence on the knowledge-of-status element: "So the Government, in these cases now, in order to prove the *Rehaif* element, is simply, um, putting in evidence of incarceration beyond one year. And that's it . . . the Government's not [putting in a] probation document that he signed that says 'and as a felon you're prohibited from owning, uh, or possessing a firearm?'" The Government admitted that documentary evidence of that kind, if it existed, would be superior: "Your Honor, that is absolutely the better evidence." "But that is not what the Government is doing?" repeated the court. The Government replied that it had no other evidence. "We don't have that in Mr. Gary's case, and so we're falling back on the amount of time that he did in fact serve." CA4 Oral Arg. Recording 29:22-30:05.

In any event, the charges that resulted in the 2015 plea would not make any difference here. Those charges led to two three-year sentences and a three-year probation revocation sentence, all of which ran concurrently. But Mr. Gary served less than one year in custody following his guilty plea to those offenses. PSR ¶ 33. Even if one also accounts for time he may have spent in pretrial detention (the PSR does not say whether he was detained between his arrest and plea), Mr. Gary would still have spent less than three years in custody. *Id.* He could have understood that overall period of time in custody as three separate one-year sentences, none of which exceeded one year in length.

more than one year in prison. All of the 691 days Mr. Gary spent in jail in connection with that charge were in pretrial detention, not following his conviction. PSR ¶ 30. And it is common for people to spend a significantly "longer" period of time in jail awaiting completion of their prosecution than conviction on the pending charge(s) would allow in terms of a prison sentence. Jenny E. Carroll, *Pretrial Detention in the Time of Covid-19*, 115 Nw. U. L. Rev. Online 59, 67 (2020); *see also* Lindsay Street, *Some Say It's Time to Review the Efficacy of Jail Bonds*, Statehouse Rep't (Dec. 3, 2020) (describing South Carolina practices).[6] When accepting Mr. Gary's guilty plea in 2014, the court counted his nearly two years of pretrial detention toward an eight-year suspended sentence. But Mr. Gary—who did not complete high school and has no legal training—could reasonably have understood this series of events to mean that his conviction in 2014 carried no prison time at all. Particularly from his standpoint, a suspended sentence was not the same as serving time in prison.

2. In its petition, the Government relies on three further aspects of the record to argue that the district court's failure to advise Mr. Gary of the knowledge-of-status plea element could not have "affected his plea decision." Pet. 11. In light of the Government's representations in the court of appeals, these arguments are waived. At any rate, none of the material the Government cites demonstrates overwhelming evidence of guilt.

First, the Government asserts that "by the time of the second arrest at issue here," Mr. Gary "had already been charged as a felon-in-possession under state law

[6] https://www.statehousereport.com/2018/11/02/news-some-say-its-time-to-reevaluate-efficacy-of-jail-bonds/.

as a result of the arrest five months earlier." Pet. 11. That is incorrect. Mr. Gary was charged after his first arrest with violating S.C. Code Ann. § 16-23-20. That statute is not a felon-in-possession statute; in fact, it does not refer to prior offenses at all. *See supra* at 1 & n.1. That charge, therefore, could not have put Mr. Gary on notice about his relevant status.

Second, the Government references Mr. Gary's statement during his allocution that "'I know I was wrong for having the firearm.'" Pet. 5. Yet this after-the-fact expression of remorse—made after he had been arrested, charged, and repeatedly told by the Government and the court that he had acted illegally—reveals nothing about what Mr. Gary knew *at the time of the offense*. This is especially true given that the district court never told him that the crime to which he was pleading guilty required knowledge of relevant status.

Third, the Government points to the statement in Mr. Gary's sentencing memorandum that he "'was aware that he was not supposed to have a weapon.'" Pet. 5. This after-the-fact statement is no more relevant than the one in his allocution. A belief that one is "not supposed" to have a weapon—for whatever reason—is not sufficient to satisfy Section 922(g)'s requirement that a person know specifically that he "belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. Mr. Gary's statement likely referred to nothing more than his awareness of his two (dismissed) gun charges under South Carolina state law, neither of which was based on having previously been convicted of a crime punishable by more than one year in prison. *See supra* at 1 & n.1.

III. The Fourth Circuit's decision is correct.

In *United States v. Olano*, 507 U.S. 725 (1993), this Court established a four-part framework for granting plain-error relief. To find plain error, there must first "indeed be an error." *Id.* at 732 (internal quotation marks omitted). Second, that error must be "plain," or "obvious." *Id.* at 734. Third, the error must "affect [the] substantial rights" of the defendant. *Id.* If all three of these criteria are met, then a court is entitled at the fourth step to use its discretion to correct such errors when they "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736 (citation omitted).

The Government acknowledges that a guilty plea taken in violation of *Rehaif* satisfies the first two prongs of this test. Pet. 9. The Government thus focuses solely on *Olano*'s third and fourth prongs, arguing that the Fourth Circuit incorrectly determined that those prongs also are necessarily satisfied in this context. The court of appeals' determinations, however, are correct.

A. The constitutional error at Mr. Gary's plea colloquy affected his substantial rights.

1. The third prong of the plain-error test "requires the same kind of inquiry" as the Court has established for determining whether an error is structural. *Olano*, 507 U.S. at 734. Put another way, an error necessarily affects a defendant's "substantial rights" if it is not susceptible to harmless-error review. And this Court's precedent, as well as first principles, establish that a guilty plea taken in violation of *Rehaif* is structural error.

a. *Precedent*. 'The first and most universally recognized requirement of due process" is that every defendant receive "real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)); *see also Bousley v. United States*, 523 U.S. 614, 618 (1998); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). That being so, the Court held in *Henderson* that where a trial court failed at a plea colloquy to inform the defendant of an intent element regarding the charge, accepting the defendant's guilty plea violated the Due Process Clause's requirement that guilty pleas be knowing and voluntary. 426 U.S. at 646. Furthermore, the *Henderson* Court held that the violation of this constitutional principle required the defendant's guilty plea to be set aside, even "assum[ing] . . . that the prosecutor had overwhelming evidence of guilt available." *Id.* at 644.

The *Henderson* Court also noted that the defendant's "unusually low mental capacity . . . foreclose[d] the conclusion that the error was harmless beyond a reasonable doubt." 426 U.S. at 647. But contrary to the Government's contention (Pet. 16), that passage does not mean that a harmless-error analysis is required when a trial court omitted a *mens rea* element from a plea colloquy. The Court simply observed, given the defendant's low mental capacity in that case, that any potential argument that the error was harmless was "foreclose[d]." 426 U.S. at 647. At any rate, the only argument the Government actually makes for why the error here is subject to harmless-error review is that "the government's evidence" on the *mens rea* element was overwhelming. Pet. 11, 14 (internal quotation marks and citation omitted). But that is exactly what the Court ruled in *Henderson* was irrelevant to

whether relief should be granted, for reasons having nothing to do with the particular defendant's mental capacity. *See* 426 U.S. at 644-46; *see also Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (citing *Henderson* for the rule that "[w]here a defendant pleads guilty to a crime without having been informed of the crime's elements," the knowing and voluntary standard "is not met, *and the plea is invalid*") (emphasis added).

The Government also contends that *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), suggests that the error here is subject to harmless-error analysis because the Court in that case conducted such an analysis in the context of an imperfect Rule 11 colloquy. Pet. 18-19. The Government is wrong. *Dominguez* dealt with a nonconstitutional violation of Rule 11 (namely, a violation of the requirement that the defendant be advised that he could not withdraw his plea if the court rejected the prosecution's recommended sentence), not a violation of the constitutional requirement that guilty pleas be knowing and voluntary. In fact, *Dominguez* expressly "contrast[ed]" cases involving "the constitutional question whether a defendant's guilty plea was knowing and voluntary." 542 U.S. at 84 n.10. The Court emphasized it was not suggesting that such pleas could "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.*

The Government tries to minimize this express distinction in *Dominguez*, maintaining that the Court was distinguishing only the situation in *Boykin v. Alabama*, 395 U.S. 238 (1969). In *Boykin*, the Court held that the defendant's plea was not knowing and voluntary because the record showed no evidence that he was advised of "*any* of the constitutional rights that he gave up through his plea." Pet. 18.

But the Government ignores that the Court in *Dominguez* characterized *Boykin* merely as an "example" of the kind of constitutional error that "must be reversed" regardless of the strength of the prosecution's evidence. *Dominguez*, 542 U.S. at 84 n.10. And the Court in *Boykin* itself explained that because "a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 395 U.S. at 243 n.5 (citation omitted). That passage captures this case. Mr. Gary was never advised of the *mens rea* aspect of the "crucial" element of the charged offense. *Rehaif*, 139 S. Ct. at 2197. The error here is thus very different from a trial court simply misdescribing one of the elements of the offense, while advising the defendant of all the elements. *Compare, e.g.*, *Bousley*, 523 U.S. at 616-17.

b. *First principles.* Omission of the knowledge-of-status element of Section 922(g) from a plea colloquy also constitutes structural error as a matter of first principles. The Court has identified three categories of structural errors: (a) those where the right at issue is "not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (b) those where the "effects of the error are simply too hard to measure"; and (c) those where the error "always results in fundamental unfairness." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). The Fourth Circuit correctly held that the *Rehaif* error here is structural under each of those independent tests.

First and foremost, a guilty plea taken in violation of *Rehaif* contravenes a defendant's interest in "mak[ing] the fundamental choices about his own defense." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). In *McCoy*, the Court held that a

violation of a defendant's constitutional right to decide whether to admit guilt at trial constitutes structural error. It explained that even when counsel believes "that confessing guilt offers the defendant the best chance to avoid the death penalty," a defendant must have the autonomy to "insist that counsel refrain from admitting guilt." *Id.* at 1505. Similarly, in *Faretta v. California*, 422 U.S. 806 (1975), the Court held that a defendant "must be free personally to decide whether in his particular case counsel is to his advantage," even if refusing counsel is "ultimately to his own detriment." *Id.* at 834. These holdings reflect the Framers' belief in "the inestimable worth of free choice." *Id.*

If, as *McCoy* and *Faretta* hold, a deprivation of a defendant's right to decide *how* he will put forward his defense impinges a defendant's autonomy, it necessarily follows that an impingement of a defendant's right to determine *whether* he puts forward a defense likewise violates a vital autonomy interest. Before giving up his liberty and agreeing to spend years in prison—separated from his family and friends and housed in a concrete cell—Mr. Gary had the right to be informed of every fact the Government would have to prove at a jury trial. Only with that complete information could Mr. Gary make a "choice on whether to plead guilty" that truly respected his autonomy. Pet. App. 16a.

The Government responds that Mr. Gary's autonomy interest was not violated—and thus the error here is not structural—because his power to decide whether to defend himself with respect to Section 922(g)'s status element was not transferred to "someone else[]," such as his counsel. Pet. 14. But this misses the point. It violates a defendant's autonomy to thwart his ability to choose knowingly and

voluntarily whether to plead guilty, regardless of whether that power is transferred to someone else. At any rate, affirming Mr. Gary's conviction *would* involve transferring his decision-making power to another entity. The federal judiciary would have to decide that it would not have been in Mr. Gary's interest to challenge the knowledge-of-status element and go to trial. It should be Mr. Gary's decision, not a federal court's, whether to put up a defense on the *mens rea* component of a felon-in-possession prosecution that "separat[es] innocent from wrongful conduct." *Rehaif*, 139 S. Ct. at 2197 (citation and internal quotation marks omitted).

Second, the *Rehaif* error here makes it "impossible" to determine whether the error was 'harmless beyond a reasonable doubt.'" *Weaver*, 137 S. Ct. at 1908 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Because the Government has never put Mr. Gary on proper notice or presented evidence of his knowledge of his status, there is real no way to know "what choice Gary would have made," if properly advised, "regarding whether to plead guilty or go to trial." Pet. App. 18a; *see also Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) (noting "there is more to consider" when deciding whether to plead guilty "than simply the likelihood of success at trial"). Certainly a court lacks the capacity with such a limited record to pronounce that a defendant in Mr. Gary's position would not have gone to trial.

The Government says that *Neder v. United States*, 527 U.S. 1 (1999), dictates that harmless-error analysis is nevertheless possible here. But *Neder* stands only for the proposition that when an element was omitted from instructions given to a jury at the close of trial, a court may permit a guilty verdict to stand where the trial court found the element was satisfied and the prosecution presented overwhelming

evidence in that regard. *See id.* at 6-15. A full trial is worlds apart from a guilty plea. Evidence admitted at trial is introduced in an adversarial setting and is subject to a panoply of rules designed to ensure its accuracy. Pleading guilty, by contrast, is an inherently conciliatory process in which the defendant has no incentive, and little opportunity, to challenge the prosecution's allegations. Indeed, doing so can be harmful to defendants and jeopardize sentence reductions for the "acceptance of responsibility." U.S.S.G. § 3E1.1.

Third, a guilty plea taken in violation of *Rehaif* is structural error because it "always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. The Constitution contemplates "a norm in which the accused" alone is the "master of his own defense." *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979). Implicit in this norm is the presumption that the criminal defendant must be "fully informed" in order to evaluate "his own best interests." *Martinez v. Ct. of Appeal*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment). If the defendant is not advised of the critical *mens rea* element of the charged offense, no resulting "punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

2. As a fallback argument, the Government briefly asserts that even if the error here is structural, it still does not satisfy *Olano*'s third prong. Pet. 15. According to the Government, a cost-benefit analysis suggests that guilty pleas taken in violation of *Rehaif* need not always be vacated on direct review. *Id.* This suggestion overlooks the text of Rule 52. The "plain language" of that Rule dictates that a structural error necessarily "affects substantial rights." *United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996) (Luttig, J.) (quoting Fed. R. Crim. P. 52(a)). That is the exact same test

that, under Rule 52(b), governs prong three of the *Olano* framework.[7] The Government's argument also ignores the fact that autonomy interests are not subject to cost-benefit analyses.

B. The error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

The Fourth Circuit also correctly determined that the *Rehaif* error here seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted). As noted above, the rule that, before pleading guilty, a criminal defendant must receive "real notice of the true nature of the charge against him" is "the first and most universally recognized requirement of due process." *Bousley*, 523 U.S. at 618 (quoting *Smith*, 312 U.S at 334). That longstanding principle was violated here. Consequently, "the structural integrity of the judicial process" would be undermined if Mr. Gary's "conviction[] based on [a] constitutionally invalid guilty plea[were allowed] to stand." Pet. App. 21a.

The Government's sole challenge to this analysis is a "case-specific and fact-intensive" argument. Pet. 20 (citation omitted). Comparing this case to *Johnson* and *United States v. Cotton*, 535 U.S. 625 (2002), the Government contends that the omission of the crucial element from Mr. Gary's plea colloquy is tolerable because the evidence on the element "would have been uncontestable." Pet. 19-20. But *Johnson*

[7] Rule 52 provides in full: (a) Harmless Error. Any error, defect, irregularity, or variance that does not *affect substantial rights* must be disregarded. (b) Plain Error. A plain error that *affects substantial rights* may be considered even though it was not brought to the court's attention." (emphases added).

and *Cotton*, like *Neder*, involved trials, not guilty pleas. And the Court has explained that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Olano*, 507 U.S. at 736-37 (emphasis added). "By focusing instead on principles of fairness, integrity, and public reputation, the Court recognized a broader category of errors that warrant correction on plain-error review." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). The autonomy violation here during Mr. Gary's plea colloquy falls into that broader category.

In any event, the evidence against Mr. Gary was not, in fact, overwhelming. *See supra* at 14-17.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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