No. 20-444

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL ANDREW GARY,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that the *Rehaif* error in Mr. Gary's case requires vacatur of his guilty plea, irrespective of any case-specific demonstration of prejudice.

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BRIEF FOR RESPONDENT

Respondent Michael Andrew Gary respectfully requests that this Court affirm the judgment of the court of appeals.

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. 2a. The State of South Carolina subsequently charged him with the misdemeanor offense of violating S.C. Code § 16-23-20. J.A. 12-13. 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.[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, state authorities charged him with violating S.C. Code § 16-23-30(C). J.A. 14-15.[2] That provision

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[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* J.A. 130. The Government repeated this error in its petition for certiorari. Pet. 2, 11. Having now had the error identified, *see* BIO at 1 n.1, the Government asserts that Mr. Gary was "arrested" for felon-in-possession. U.S. Br. 2. It is hard to see why, even if true, that would matter.

[2] Page 15 of the Joint Appendix contains a typo. It says "Section 16-23-020" where it should read "Section 16-23-030(C)."

forbids possessing "any stolen handgun or one from which the original serial number has been removed or obliterated."

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. In both counts, the indictment alleged simply that "the Defendant, MICHAEL ANDREW GARY, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce, a firearm and ammunition, . . . all of which had been shipped and transported in interstate and foreign commerce." J.A. 20-21. The indictment made no mention of any requirement that Mr. Gary *knew* of his status that prohibited him from possessing a firearm.

Instead, the Government proceeded as if it had charged a strict-liability offense. And to prove the existence of a qualifying prior conviction, the Government relied on a single conviction: Mr. Gary's conviction in 2014 for second-degree burglary. Pet. App. 6a-7a & n.5; *see also infra* at 47-48. Mr. Gary had spent 691 days in pretrial detention in connection with that burglary charge. Pet. App. 7a n.5. After pleading guilty, he was immediately released under the terms of an eight-year suspended sentence. *Id.*; J.A. 123-25.

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, U.S.

Br. 4—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* U.S. Br. 4. As with the indictment, the district court made no mention of any requirement on the Government's part to prove that Mr. Gary knew at the relevant times that he had previously been convicted of a felony.

Mr. Gary acknowledged that he understood the elements the district court laid out, and that his conduct satisfied them. J.A. 40-42, 56.

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). He asserted that his guilty plea should be vacated in light of *Rehaif* because he was never informed in the district court of "all the elements of the offenses." C.A. Doc. 36, at 1-2 (Oct. 9, 2019).

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 assumed that "[b]ecause Gary did not attempt to withdraw his guilty plea in the district court," his claim was reviewable only for "plain error." *Id.* 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," an 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. 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. Pet. App. 15a-16a.

The Fourth Circuit 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 Fourth Circuit ruled that "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea." *Id.* 18a.

Finally, the court of appeals held that a guilty plea taken in violation of *Rehaif* satisfies the fourth prong of the *Olano* framework. It reasoned 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. Pet. App. 21a. Where "life and liberty are at stake," defendants must be "fully informed" of the charge before pleading guilty, even where evidence at the prosecution's disposal "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 that he preferred to speed the case's path to this Court. *Id.* 25a. Without citing any statistics or any other empirical evidence, he also asserted that the panel's decision would affect "[m]any, many cases" and "strain the resources" of prosecutors and district courts. *Id.* 25a, 31a.

SUMMARY OF THE ARGUMENT

Mr. Gary is entitled to relief, without having to demonstrate case-specific prejudice, from his unconstitutionally procured guilty plea.

I. It would have been utterly futile for Mr. Gary to have objected in the trial court to the omission of Section 922(g)'s knowledge-of-status element, and he raised the claim on appeal as soon as the law supported it. Accordingly, his claim is subject to Criminal Rule 52(a), not Rule 52(b)'s plain-error doctrine. Rule 52 codified a system of appellate review that had developed over several decades. That system did not penalize parties for failing to have objected where, as here, every federal court of appeals had rejected the claim. Holding otherwise now would frustrate—not facilitate—efficient and fair process, requiring defense counsel in every case to make endless, seemingly hopeless objections, motions, and demands for evidentiary hearings.

A defendant is entitled to relief under Rule 52(a) without any case-specific showing of prejudice if the error was structural. The constitutional error here was indeed structural. Procuring a guilty plea from Mr. Gary without telling him everything the Government would have had to prove at trial deprived him of the personal autonomy to make the fundamental choices regarding his defense. The consequences of the error are also impossible to measure. And allowing Mr. Gary's guilty plea to stand would be fundamentally unfair. A defendant should not be deemed to have surrendered his liberty, subjecting himself to years in a concrete cell, without understanding the true nature of the charge against him.

II. Even if Rule 52(b)'s plain-error doctrine applied here, Mr. Gary would still not need to show case-specific prejudice to obtain relief. The plain text of Rule 52 dictates that constitutional errors that are structural, by definition, "affect[] substantial rights." Fed. R. Crim. P. 52(b). The constitutional error here also necessarily has a seriously effect on the fairness, integrity, or public reputation of judicial proceedings. "The first and most universally recognized requirement of due process"—well known to lawyers and laypersons alike—is that every defendant must receive "real notice of the true nature of the charge against him." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). This time-honored principle is at war with allowing a panel of federal judges to decide for themselves whether it would have been wise for Mr. Gary to defend against the "crucial element" of the Section 922(g) charge—the element "separating innocent from wrongful conduct." *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019).

The Government lastly claims that automatically granting relief under the circumstances here would impose unjustified burdens on the judiciary. But the reverse is true. Under the automatic vacatur rule the court of appeals established, each federal district judge would need to revisit, on average, only one case. And if the Government is right that defendants "will rarely view the knowledge-of-status element as a reason to go to trial," U.S. Br. 39, most of those defendants will readily plead guilty again. On the other hand, applying the plain-error doctrine here and requiring a case-specific showing of prejudice to obtain relief would trigger a cascade in every criminal case of protective motions, frivolous objections, and foreclosed legal arguments. Such a

transformation of federal criminal practice would be far more consequential and deleterious than anything this Court might have to say about the distinctive and fleeting class of *Rehaif* violations at issue here.

ARGUMENT

I. Mr. Gary need not make a record-specific showing of prejudice because Rule 52(a) governs, and the due process error here automatically satisfies that rule.

The Government implicitly acknowledges that a threshold issue—"fairly included" in the question presented, *LeBron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-88 (1995)—is whether Criminal Rule 52(b)'s plain-error doctrine applies here in the first place. *See* U.S. Br. 25-27; Cert. Reply 6-8; *see also* BIO 11-14 (flagging this issue). It does not. Rule 52(a) governs and requires relief unless the Government can show that the due process error here—taking Mr. Gary's guilty plea without advising him of the mens rea element recognized in *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—did not affect substantial rights. The Government cannot make any such showing because the error is structural.

A. Rule 52(a), not Rule 52(b)'s plain-error doctrine, governs here.

When Mr. Gary's plea colloquy occurred, every court of appeals with criminal jurisdiction had held—some for as many as 30 years—that the prosecution did not have to prove under 18 U.S.C. § 922(g) that a defendant knew of his status as a person barred from possessing a firearm. U.S. Br. 4; *Rehaif,* 139 S. Ct. at 2201 (Alito, J., dissenting). Under these extreme circumstances, objecting would have been futile.

Failing to have done so, therefore, should not subject Mr. Gary's claim to plain-error review.

1. Rule 52 contains two subsections. Subsection (a) provides that any error that "does not affect substantial rights must be disregarded." Subsection (b) provides that an appellate court "may" grant relief based on "a plain error that affects substantial rights . . . even though it was not brought to the court's attention." Taken together, these provisions make clear that appellate courts may grant relief based on claims that were not pressed in district court. But they do not expressly say whether unpreserved claims may be addressed *only* under Rule 52(b), or whether certain unpreserved claims may be properly considered under Rule 52(a).

To answer that question, it is necessary to look to the legal roots of the phrase "plain error." Rule 52 "is a restatement" of a preexisting system of plain-error review. Fed. R. Crim. P. 52(b), Advisory Committee Note (1944). Because Rule 52 codifies a legal term of art, the term "brings the old soil with it," "carr[ying] forward the same meaning" this Court previously "ascribed to it." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018); *see also, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 331-33 (2010) (construing AEDPA's phrase "second or successive" according to preexisting law).

The law that Rule 52(b) codified makes clear that plain-error review does not apply under the circumstances here. For example, in *Patterson v. Alabama*, 294 U.S. 600 (1935), this Court held, without any mention of plain error, that "the Court is *bound* to consider any change, either in fact or in law, which has supervened since the judgment was entered," so long as it "may affect the result." *Id.* at

607. In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), the Court likewise explained that the general rule that a party must raise a claim in district court to avoid forfeiture on appeal does not apply where an intervening decision "suppl[ies] a new and unexpected basis for a claim by the defeated party of the denial of a federal right." *Id.* at 367 (citing cases).[3]

Secondary sources at the time Rule 52 was promulgated were in accord. One 1939 text stated that appellate courts could review claims not raised below, without applying the strictures of plain error, where the claims rested on law that "only ar[o]se after the case ha[d] come to the appellate court." 1 Lester Bernardt Orfield, Criminal Appeals in America 96 (1939). A law review article published after Rule 52 was adopted confirmed the point. The article explained that "appealing parties are ordinarily deemed to have waived any contentions as to fact or law not presented before the first tribunal having jurisdiction to hear them." *Federal Procedure: Intervening Change in Law and the Waiver of Constitutional Claims*, 66 Colum. L. Rev. 386, 386 (1966). But where "an intervening decision of the Supreme Court has enunciated a fundamental change in constitutional law, thereby creating a

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[3] Although *Great Northern Railway* is a civil case, the Advisory Committee Notes make clear that the rules governing objections and appellate review were intended to "be the same in civil and criminal cases." Fed. R. Crim. P. 51, Advisory Comm. Notes (1944); *see also* Fed. R. Crim. P. 52, Advisory Comm. Notes (1944) (Rule 52 "similar" to preexisting Federal Rule of Civil Procedure 61).

defense not previously thought available and thus not argued below, an appealing party may usually assert the newly-proclaimed right for the first time on appeal" without having it treated as "waived." *Id.*[4]

2. The broader structure of the Federal Rules of Criminal Procedure confirms that plain-error review should not apply where uniform precedent foreclosed the claim in the district court.

a. Rule 2 instructs that the Rules "are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." Fed. R. Crim. P. 2. Each of these directives renders the plain-error standard inappropriate in the setting of this case.

i. Subjecting claims like this one to the ordinary harmless-error framework is necessary "to secure simplicity in procedure" and "eliminate unwarranted

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[4] In a few other decisions before and after Rule 52(b)'s codification, this Court and others treated futility in cases like this as an application of, rather than an exception to, the plain-error doctrine. *See Silber v. United States*, 370 U.S. 717, 717-18 (1962) (per curiam); *Hormel v. Helvering*, 312 U.S. 552, 557-60 (1941); *Gros v. United States*, 136 F.2d 878, 880-81 (9th Cir. 1943). It would make no material difference here to conceptualize futility that way instead. In the parlance of this Court's modern case law, declining to grant relief because a defendant failed to offer a pointless objection would "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal quotation marks omitted); *see Hormel*, 312 U.S. at 560 (denying relief in this situation "would defeat rather than promote the ends of justice").

expense and delay." Otherwise, defense counsel would always be obligated to imagine every possible change in constitutional and statutory law that has the remotest chance of occurring over the next several years. The resulting motions, objections, and demands for evidentiary hearings would make every stage of criminal prosecutions—from pretrial motion practice to trial to sentencing—costlier and lengthier, as defense counsel would need to insist on raising one foreclosed claim after another. And all to no useful end: District court judges would be unable to disobey "settled law to the contrary." *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996). What's more, such objections would not just "imped[e] the proceeding and wast[e] judicial resources." *Id.* They would also dilute the ability of judges to pay attention to defense objections that might actually be meritorious.

ii. Applying Rule 52(a) here, rather than plain-error review, would also ensure fairer procedures and produce more just outcomes. Courts "cannot expect a defendant to foresee a new rule of law when we have consistently rejected that rule." *Osborne v. State*, 715 N.W.2d 436, 442 (Minn. 2006) (suspending state-law plain-error review in this circumstance). Consequently, "it would be unfair" to penalize a defendant for failing "to object at trial where existing law appears so clear as to foreclose any possibility of success." *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994). Instead, the ordinary rules governing appellate review should apply in this setting. That approach would ensure that defendants

whose cases are on direct review receive the benefit of dramatic changes in the law, while still precluding relief for those who cannot satisfy Rule 52(a).[5]

b. Declining to apply the plain-error rule in these circumstances also accords with Rule 51—Rule 52's next-door neighbor. Rule 51 makes clear that "exceptions" are not required. An "exception" is an objection after a court has already rejected an argument. In keeping with Rule 2, exceptions are not required because they are "a mere formality, with no reasonable likelihood of convincing the court to change its mind on the issue." *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997); *see* Charles A. Wright et al., Fed. Practice & Procedure §§ 841, 2472 (3d ed. 2002) (characterizing an exception as an empty "ritual").

Requiring an objection under the extreme circumstances here would be no different from requiring an exception. The objection would be a pure formality, as the district court would be powerless to grant any relief and would simply reject the claim out of hand. Furthermore, unlike a scenario where there is a circuit split or only a few courts have considered the issue, the district court in the situation here would almost certainly perceive the objection to be so meritless that it would have no reason to consider

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[5] Recognizing an exception to plain-error review in these circumstances would benefit the Government as well as criminal defendants. *See, e.g.*, *United States v. Zeigler,* 19 F.3d 486, 494 (10th Cir. 1994) (applying similar approach where Government objected to defendant's sentence for the first time on appeal based on intervening Supreme Court decision that abrogated circuit precedent).

alternative holdings or other adjustments to trial. In short, if exceptions are unnecessary, the same should be true for rote objections in the face of uniform circuit precedent.

3. Background legal principles confirm that plain-error review is inapplicable here.

a. This Court has long recognized that the law does not require useless acts—a concept often called *lex non cogit ad inutilia*. *See, e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 74 (1980); *Cary v. Curtis*, 44 U.S. 236, 246 (1845); *Camberling v. McCall*, 2 U.S. 280, 283 (1797). This rule "has been a fundamental tenet in Anglo-American jurisprudence for centuries." Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. App. Prac. & Process 521, 522-23 & n.8 (2002); *see also, e.g.*, Herbert Broom, A Selection of Legal Maxims 252 (7th ed. 1874) ("[T]he law will not, in the language of the old reports, enforce any one to do a thing which will be vain and fruitless." (citing cases)).

This Court has applied this principle in numerous ways. For example, under the habeas "cause" standard, a petitioner is not excused on "futility" grounds for failing to object merely because his claim "was unacceptable to [a] particular court at [a] particular time." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks and citation omitted). But a petitioner's failure to have raised an objection in earlier proceedings *is* excused when he faced a "longstanding and widespread" body of adverse lower court decisions. *Reed v. Ross*, 468 U.S. 1, 10, 16-17 (1984) (citation omitted). A contrary rule, the Court has explained, would "disrupt state-

court proceedings by encouraging defense counsel to [raise] any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 16.[6]

More generally, this Court routinely entertains arguments to overrule its own cases when petitioners did not press such arguments below. *See, e.g.*, *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); *Hudson v. United States*, 522 U.S. 93 (1997); *Solorio v. United States*, 483 U.S. 435 (1987). The Court does not appear to have explained why it considers such arguments outside of the strictures of plain-error review. But its practice seems to be a tacit recognition that raising such claims below would have been futile.

This same principle exists in the context of administrative exhaustion. Plaintiffs in federal court need not have made pressed claims before agencies where "any attempt[s] to persuade" the agencies "would [have been] futile." *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 404-05 (1988).

b. Applying Rule 52(a) rule here also comports with Sixth Amendment jurisprudence. Under current law, defense counsel is not constitutionally deficient for failing "to pursue every claim or defense,

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[6] The Government responds that *Reed* is not comparable because a habeas petitioner may not assert an unpreserved claim unless he also demonstrates "prejudice." U.S. Br. 26-27. But a prejudice requirement exists here as well. As noted above and below, if Rule 52(b)'s plain-error standard does not apply, then Rule 52(a)'s "affect[ed] substantial rights" test still governs. Fed. R. Crim. P. 52(a).

regardless of its merit, viability, or realistic chance for success." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984). The federal courts of appeals thus hold that counsel is not ineffective for failing "to anticipate a change in the law" or otherwise make futile objections. *Anderson v. United States*, 762 F.3d 787, 794 (8th Cir. 2014).[7]

If, however, this Court were to hold that the plain-error rule applies under the circumstances here, it is hard to see how failing to file seemingly hopeless motions that might someday prove meritorious would be "reasonable" performance. In order to discharge their constitutional duties (and presumably ethical duties as well), trial counsel would need to scour things like concurring and dissenting opinions in appellate courts and law reviews to discern any and all legal arguments that might possibly draw favor in coming years.

4. Declining to apply plain-error review here also accords with this Court's post-Rule 52 precedent.

Plain-error review is designed to deal with error so obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982). That objective is completely inapposite here. Certainly neither the judge nor prosecutor was derelict for

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[7] *See also, e.g.*, *Downs v. United States*, 879 F.3d 688, 691 (6th Cir. 2018); *United States v. Weston*, 708 F.2d 302, 307 (7th Cir. 1983); *United States v. Brown,* 663 F.2d 229, 231 (D.C. Cir. 1981).

conducting the plea colloquy as they did. In fact, if Mr. Gary *had* objected that Section 922(g) contained a knowledge-of-status element, the objection would have occasioned nothing but a boilerplate denial (probably from an irritated judge).

The Government nevertheless suggests that *Johnson v. United States*, 520 U.S. 461 (1997), requires the Court to treat Mr. Gary's *Rehaif* claim as forfeited. U.S. Br. 25. *Johnson*, however, did not consider whether the plain-error doctrine applies where *uniform* circuit precedent foreclosed the claim in district court. Rather, the defendant in *Johnson* failed to object on an issue on which the circuits had *split*. *See United States v. Gaudin*, 515 U.S. 506, 527 (1995) (Rehnquist, C.J., concurring) (noting conflict).

Requiring an objection in district court where a circuit split exists makes sense: Where there is a circuit split, defendants have notice that the issue is debatable and can infer that unfavorable law may change in the near future. Even where the particular court in which the defendant is being prosecuted would be bound by circuit precedent to reject a claim, objecting on a ground on which the circuits are split puts the district court on notice that it may wish to avoid the issue—or resolve it in a way that would not create reversible error on appeal if this Court ends up disagreeing with then-extant circuit precedent. But where, as here, every single circuit has weighed in and rejected the argument, it makes little sense to saddle defendants with plain-error review if they do not raise the issue in district court.

The Government also notes that the defendant in *Rehaif* objected despite the fact that substantial precedent cut against his claim. U.S. Br. 26. But

Rehaif was different from this case, too. There, the Eleventh Circuit had not yet decided whether Section 922's particular subsection dealing with immigration status contained a mens rea element. So there was no precedent "directly on point" even in the court in which the defendant was litigating. *See* Appellant Br. 11-16, *United States v. Rehaif*, 2016 WL 7474621 (11th Cir. Dec. 27, 2016).

Finally, the Government provides one example of a defendant in Texas objecting, a few months before this Court decided *Rehaif*, that the prosecution needed to prove knowledge of felon status. U.S. Br. 26. But one stray objection hardly demonstrates that plain-error review is appropriate for everyone else. To the contrary, that the Government scares up only a single objection over the past several years confirms that defendants like Mr. Gary did not believe the argument was available to them.

5. The Government also references lower-court case law. U.S. Br. 25-26. But to the extent there is such relevant precedent, it supports Mr. Gary.

The Government says that "the courts of appeals have consistently rejected arguments that plain-error review is inapplicable where circuit precedent would have foreclosed the unpreserved claim." U.S. Br. 25-26. But that does not fully describe the situation here. This case concerns the scenario in which *every single court of appeals* had rejected the issue. That is a far more uncommon and dramatic scenario.

The Government also recognizes that lower courts withhold plain-error review where an objection would have been "futile." Cert. Reply 8; *see also* U.S. Br. 26. But it says that precedent is limited to situations in which the defendant unsuccessfully

objected once and then failed to "*re*assert" the argument. *Id.* That is incorrect.

Courts of appeals have applied the futility concept—allowing defendants to raise a new argument on appeal, without being subject to the plain-error rule—"where the Supreme Court's ruling comes out of the blue and could not have been anticipated" because there was "settled law to the contrary" at the time of the district court proceedings. *United States v. Weiner*, 3 F.3d 17, 24 n.5 (1st Cir. 1993); *see also, e.g.*, *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996); *United States v. Bell*, 70 F.3d 495, 497 (7th Cir. 1995); *United States v. Indiviglio*, 352 F.2d 276, 280 & n.7 (2d Cir. 1965) (noting that courts withhold plain-error review where, "under the law existing at the time of the trial, objection would have been futile and when error was asserted on review on the basis of a subsequent appellate decision"); *United States v. Byers*, 740 F.2d 1104, 1132 n.53 (D.C. Cir. 1984) (Robinson, C.J., concurring in the judgment) (similar).

The D.C. Circuit calls this the "supervening-decision doctrine." *Washington*, 12 F.3d at 1138-39. Under the doctrine, a court of appeals may consider issues not raised below, unencumbered by the plain-error rule, "where a supervening decision has changed the law in appellant's favor and the law was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless." *Washington*, 12 F.3d at 1139; *see also Byers*, 740 F.2d at 1115-16 nn.6 & 11 (en banc) (Scalia, J., writing for a plurality). And the Second Circuit has twice in recent years granted relief to criminal defendants based on its "modified plain-error rule,"

which requires "the government, not the defendant" to show "that the error . . . was harmless" where the claim is based on a supervening decision. *United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012) (internal citation omitted) (alteration in original); *see United States v. Monteleone*, 257 F.3d 210, 223 (2d Cir. 2001).

To be sure, some courts of appeals have questioned such approaches after *Johnson*. *See, e.g.*, *United States v. Martoma*, 894 F.3d 64, 72 n.4 (2d Cir. 2017); *United States v. Perkins*, 161 F.3d 66, 72-73 (D.C. Cir. 1998); U.S. Br. 26 (citing cases). But as just explained, *Johnson* is distinguishable. *See supra* at 17. In any event, that the courts of appeals long took the approach Mr. Gary advocates shows that it is both consistent with the concerns motivating plain-error review and workable in the federal system.

The practice of several states confirms as much. California, for instance, has a plain-error rule much like Rule 52(b), which allows an appellate court to review unpreserved claims if the alleged error affected "the substantial rights of the defendant." Cal. Penal Code § 1259. Yet California recognizes that, where an intervening decision changed the law "so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change," an appellate court may review the claim under the ordinary standard of review, even if the claim was not raised in trial court. *People v. Black*, 161 P.3d 1130, 1136-37 (Cal. 2007). Similarly, Minnesota's plain-error rule allows an appellate court to consider "[p]lain error affecting a substantial right," "even if it was not brought to the trial court's attention." Minn. R. Crim. P. 31.02. Yet Minnesota courts do not apply

this rule to new claims on appeal where the relevant "case law had consistently rejected" the claim at the time of trial court proceedings. *Osborne*, 715 N.W.2d at 441-42; *see also State v. Goodrich*, 2006 WL 9534, at *2 (Minn. Ct. App. Jan. 3, 2006) (citing cases).[8]

Moreover, the concerns that motivate the futility exception that the Government *does* recognize—*i.e.*, the rule that a defendant need not re-raise a claim that his judge has already rejected, *see* U.S. Br. 26—apply equally in this setting. Whether a claim is futile because the judge has already rejected it or because precedent across the circuits forecloses it, a defendant "is not remiss for failing to bring his claim of error to the court's attention" because "[i]t would be futile." *Henderson v. United States*, 568 U.S. 266, 284 (2013) (Scalia, J., dissenting on other grounds); *see United States v. Uscanga-Mora*, 562 F.3d 1289, 1294 (10th Cir. 2009) (Gorsuch, J.). A defendant should be praised—not saddled with plain-error review—for not wasting the court's time with numerous objections based on a distant hope that this Court will reject an overwhelming body of precedent before the case becomes final.

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[8] Many other states follow this basic approach. *See, e.g.*, *State v. Ledbetter*, 881 A.2d 290, 307 (Conn. 2005), *rev'd on other grounds by State v. Harris*, 191 A.3d 119 (Conn. 2018); *Smylie v. State*, 823 N.E.2d 679, 690 n.16 (Ind. 2005); *State v. Nguyen*, 133 P.3d 1259, 1270 (Kan. 2006); *Unger v. State*, 48 A.3d 242, 246-47 (Md. 2012); *Commonwealth v. Mendes*, 974 N.E.2d 606, 611 (Mass. 2012); *State v. Carter*, 114 P.3d 1001, 1004 (Mont. 2005); *State v. Nelson*, 196 A.2d 52, 57 (N.H. 1963); *State v. Burke*, 522 A.2d 725, 731 (R.I. 1987); *State v. Harris*, 224 P.3d 830, 832 (Wash. Ct. App. 2010).

B. A *Rehaif* violation in conjunction with taking a guilty plea is structural error.

An error necessarily "affect[s] substantial rights" under Rule 52(a) if it is "structural." *See Neder v. United States*, 527 U.S. 1, 7 (1999). The Court has identified three general categories of structural error: (1) when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) when the "effects of the error are simply too hard to measure"; and (3) when the "error always results in fundamental unfairness." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). The court of appeals here correctly concluded that the omission of the knowledge-of-status element of Section 922(g) from a plea colloquy independently satisfies all three tests. This Court's precedent relating to the omission of elements confirms this analysis.

1. The constitutional error here meets all three tests for structural error.

a. *Personal autonomy.* First and foremost, a guilty plea taken in violation of *Rehaif* violates a constitutional right that "protects some other interest" aside from the risk of erroneous conviction, *Weaver*, 137 S. Ct. at 1908—the defendant's autonomy interest in making the fundamental choice whether to defend himself at trial.

i. As this Court has recognized, a defendant must be the "master of his own defense." *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979). For good reason: It is *the defendant's* "individual liberty" that is "at stake." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018). Where, therefore, a constitutional right safeguards a defendant's ability "to make

fundamental choices about his own defense, *id.* at 1511, "harm is irrelevant" to the defendant's entitlement to relief, *Weaver*, 137 S. Ct. at 1908.

In *McCoy*, for instance, this Court held that "a defendant has the right to insist that counsel refrain from admitting guilt." 138 S. Ct. at 1505. A violation of this right requires reversal "without any need to show prejudice," *id.* at 1511—"even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty," *id.* at 1505. Given "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty," a court's acceptance of an admission of guilt over the defendant's objection inescapably violates a defendant's "autonomy" and thus constitutes structural error. *Id.* at 1508, 1510-11 (quoting *Weaver*, 137 S. Ct. at 1908).

The self-representation doctrine recognized in *Faretta v. California*, 422 U.S. 806 (1975), is cut from the same cloth. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. But a defendant "must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* Thus, depriving a defendant of an opportunity to make a knowing and voluntary decision about whether to represent himself constitutes structural error. *See Weaver*, 137 S. Ct. at 1908; *see also McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (case-specific prejudice irrelevant with respect to *Faretta* violations). No other rule would honor the vision of the Framers,

who "understood the inestimable worth of free choice." *Faretta*, 422 U.S. at 834-35.

ii. Mr. Gary's right to autonomy was similarly violated by the failure to inform him, before he entered a guilty plea, of the mens rea element of Section 922(g) that separates wrongful from potentially innocent conduct.

Pleading guilty—relinquishing the panoply of Fifth and Sixth Amendment protections and accepting a term of imprisonment—is "a grave and solemn act." *Brady v. United States*, 397 U.S. 742, 748 (1970). It is also a highly personal one that belongs only to the defendant. *McCoy*, 138 S. Ct. at 1508. A person who submits himself to a term of imprisonment effectively gives up all freedom of movement and self-determination. The standard medium-security cell in a federal prison is 75 square feet, or 8.5-by-8.5 feet.[9] When a six-foot-tall prisoner lies down in such a cell to sleep, he has eighteen inches of space from his feet to the door and even less between his head and the wall. The prisoner also is likely to share a cell with at least one other person, since overcrowding and triple-bunking are common.[10]

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[9] *See* Federal Bureau of Prisons, *BOP Policies*, Policy No. 1060.11 (Rated Capacities for Bureau Facilities), at 5, https://www.bop.gov/PublicInfo/execute/policysearch?todo=query # (last updated Oct. 30, 2017). Furthermore, single-occupancy rooms in medium-security prisons may be "less than 70 square feet." *Id.*

[10] *See id.* (cells of 70 square feet or more may be "rated for double occupancy"); Federal Bureau of Prisons, *Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, at 10-12. https://www.gao.gov/assets/650/ 648123.pdf.

What is more, "it is commonplace in prisons to have toilets within double cells that have no partitions between the toilet and rest of the cell," rendering even a prisoner's most intimate bodily functions no longer private.[11]

A person who pleads guilty to a federal crime also largely relinquishes his personal liberty to interact with loved ones and others in society. Prisoners are separated from their families and friends, sometimes by hundreds or thousands of miles, and are often moved to different facilities with little notice.[12] Even when loved ones have the means to visit, visiting times are constrained and physical contact is strictly limited, or sometimes even barred. Finally, a prisoner is under constant surveillance, subject to "unannounced and random" searches of his person or belongings "at any time by any staff member."[13]

Given all that is at stake, the decision to plead guilty must be made "voluntarily, knowingly, and intelligently." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). And "[w]here a defendant pleads guilty to a

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[11] *See Johnson v. Conley*, 2018 WL 4224076, at *7 (D. Conn. Sept. 5, 2018); *Nwani v. Molly*, 2018 WL 2461987, at *9 (E.D. Pa. May 31, 2018).

[12] *See, e.g.*, Derek Gilna, *Damage to South Carolina Prisons Shifts Prisoners to Lewisburg, Pennsylvania*, PRISON LEGAL NEWS, Oct. 1, 2020, https://www.prisonlegalnews.org/news/2020/oct/1/damage-south-carolina-prisons-shifts-prisoners-lewisburg-pennsylvania/.

[13] Federal Bureau of Prisons, *Inmate Information Handbook* ("BOP Handbook"), at 15, https://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf.

crime without having been informed of the crime's elements," the knowing and voluntary "standard is not met and the plea is invalid." *Id.* at 183; *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) (same). A guilty plea "is an admission of all the elements of a formal criminal charge," *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (citation omitted). If the defendant is unaware of one or more elements of a charge, he cannot truly plead guilty to the charge. *See Gaudin*, 515 U.S. at 511.

Here, the failure to inform Mr. Gary of the mens rea element of Section 922(g) prevented him from pleading guilty "voluntarily, knowingly, and intelligently." *Bradshaw*, 545 U.S. at 183. Furthermore, this constitutional violation deprived Mr. Gary of his autonomy interest in deciding whether to submit to a term of imprisonment or defend himself against the Government's charge at trial. When Mr. Gary made the decision to plead guilty, he thought that he was declining to defend himself against only the set of elements presented to him. He was never made aware of all the Government would have had to prove to convict him of violating Section 922(g).

Put another way, the Government is now seeking to convict Mr. Gary of a different crime than the one to which he thought he pleaded guilty. Mr. Gary thought he was pleading guilty to a strict-liability offense—one that rendered it irrelevant whether he knew he had a status forbidding him from possessing a firearm. Yet the Government is now seeking to convict him for possessing a gun while *knowing* he was not allowed to do so. This is akin to procuring a defendant's plea after reciting the elements of

negligent homicide and then later asking an appellate court to convict him of murder. If anything, what the Government is seeking here is worse: It is not even clear that the facts Mr. Gary admitted at his plea colloquy constituted any federal crime at all. *See Rehaif*, 139 S. Ct. at 2197.

iii. In a single paragraph, the Government tries to brush aside the autonomy violation here. The Government contends that the error here does not implicate a defendant's autonomy because the choice to plead guilty "*does not become someone else's choice* simply because the colloquy was deficient." U.S. Br. 33 (emphasis added). This contention is doubly misguided.

First, a person's autonomy can be violated without giving his ability to decide something to someone else. Take, for example, the "informed consent" doctrine in medicine—a doctrine that protects the autonomy interest in "bodily integrity." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 268-69 (1990). If a person consents to a medical procedure without being advised of a major side effect, it violates his autonomy just as surely as if someone else agreed to the procedure for him. So too here: It violates a defendant's autonomy to negate *his own* ability to choose knowingly and intelligently whether to submit to a deprivation of liberty. And here, Mr. Gary was deprived of the ability to decide—based on a full understanding of the Section 922(g) charge—whether to defend against the charge and the deprivation of liberty a conviction would entail.

Second, even if transferring autonomy to another party were required for structural error, that is exactly what the Government is asking the Court to

do here. The Government is asking for a federal judge, not Mr. Gary, to decide whether it would have been sensible for him to defend against Section 922(g)'s knowledge-of-status element—the element that separates "wrongful" from potentially innocent conduct. *Rehaif*, 139 S. Ct. at 2197.

The Government resists this straightforward logic, protesting that this Court has "drawn a clear distinction between elements-based errors like the one at issue here and errors that in fact infringe on the defendant's right to choose his own path." U.S. Br. 33. According to the Government, the only autonomy interest a defendant has during a plea colloquy is in choosing whether to plead guilty "overall"—not whether to defend against any particular element (or elements). *Id.* This argument misses the mark. In *McCoy*, the only case the Government cites for this supposedly "clear line," the majority reserved the question whether a violation of the right to defend against "an element of a charged offense" would be structural error. 138 S. Ct. at 1510. The dissenters did not answer it either; they merely observed that *McCoy*'s holding would be more consequential if it extended to single elements. *Id.* at 1516-17 (Alito, J., dissenting).

Whatever the answer to the precise question reserved in *McCoy*, there is no basis in the context of guilty pleas for distinguishing "overall" offenses from elements. A defendant cannot "plead guilty" to a single element of a crime. A defendant either pleads guilty to the Government's charge—that is, "*all* the elements of a formal criminal charge," *Boykin*, 395 U.S. at 243 n.5 (emphasis added)—or he does not. Accordingly, the only sensible way to understand the

current state of the record is that Mr. Gary never pleaded guilty to violating Section 922(g).

Even if the knowledge-of-status issue could somehow be separated from Mr. Gary's plea, it would not matter. The Government's request for a federal judge to decide whether it would have been in Mr. Gary's interest to defend against that element would still infringe upon Mr. Gary's "right to make the fundamental choices about his own defense." *McCoy*, 138 S. Ct. at 1511. A defendant surely has an autonomy interest in deciding whether to challenge an allegation that separates wrongful conduct—punishable by years in prison—from potentially innocent behavior. No constitutional system that considers "respect for the individual" to be "the lifeblood of the law," *id.* at 1507, could posit otherwise.

b. *Inability to measure.* The constitutional violation here also 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)).

i. Mr. Gary had no notice that, to convict him of violating Section 922(g), the Government had to prove that he was aware of his felon status. As a result, the question whether "the same" guilty plea would have been rendered absent the constitutional error cannot meaningfully be answered. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The Government insists that harmlessness can be measured in cases like this by looking to the "government's evidence" and "the defendant's admissions." U.S. Br. 31 (internal quotation marks

and citation omitted). But relying on this information would assume that the record would have been the same had Mr. Gary been aware of the knowledge-of-status element. No such assumption is warranted. If Mr. Gary had realized that he had to know of his status that rendered him unable to from possess a firearm, he may well have disputed the arguments the Government makes now.

On a more general level, the Government incorrectly assumes that a defendant's decision whether to plead guilty turns on nothing more than an assessment of the strength of the prosecution's case. As this Court recently noted, however, "common sense . . . recognizes that there is more to consider" when deciding whether to plead guilty "than simply the likelihood of success at trial." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). Even if it is "almost certain[]" that a jury would find him guilty, an individual may still reasonably decide to insist upon a trial. *Id.* An individual, for example, may "wish to avoid, above all else, the opprobrium that comes with admitting" that he committed the particular crime with which he is charged. *McCoy*, 138 S. Ct. at 1508.

The desire that defendants sometimes have to refuse to admit, in open court, that they *knowingly* violated the law is particularly salient here. A requirement that a defendant "understand the wrongful nature of [his] act," *Rehaif*, 139 S. Ct. at 2196, reflects the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952); *see also* 4 William Blackstone, Commentaries on the

Laws of England 21 (1769) (knowledge element ensures that a defendant in fact possessed "a vicious will"). Consequently, admitting that he possessed the necessary mens rea here would have been a concession that, when confronted with a choice "between good and evil," *Morissette*, 342 U.S. at 250, Mr. Gary intentionally acted with a "culpable mental state," *Rehaif*, 139 S. Ct. at 2195. There are strong reasons, deeply embedded in the human psyche and cultural norms, why defendants may not want to concede such behavior.[14]

Worse yet, the Government's blithe treatment of the mens rea element here would not in any way be limited to Section 922(g). For example, federal law criminalizes certain financial activities, such as "structuring" cash payments, that are "not inevitably nefarious." *Ratslaf v. United States*, 510 U.S. 135, 144 (1994). Largely for that reason, such statutes often require proof "that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 137; *see also Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (noting that "certain federal criminal tax offenses" require that the defendant possess the "specific intent to violate the law"). Imagine a financial analyst who is charged with such an

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[14] What's more, possession of a firearm is, as this Court has held, a right that is generally protected by the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). A defendant may prefer not to admit that he knew he was a member of a class of persons so "potentially irresponsible and dangerous" that he could be denied a valued constitutional right. *Barrett v. United States*, 423 U.S. 212, 218 (1976).

offense. He might approach the decision whether to plead guilty very differently, without regard for the evidence against him, depending on whether he believed the crime had a robust mens rea element or was a strict-liability offense. Among other considerations, he might believe that pleading guilty to knowingly violating the law in a regulated industry would harm his future job prospects in a way that pleading guilty to a strict liability offense would not. Yet the Government's theory would ignore all of this, asking only whether strong evidence of guilt existed. That cannot be right.

ii. The Government is also wrong that this Court's precedent sanctions its proposed approach. *Neder v. United States*, 527 U.S. 1 (1999), stands at most 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 it finds that the prosecution presented overwhelming evidence regarding the element.

This principle has no purchase when applied to a guilty plea. Evidence admitted at trial is subject to a panoply of rules designed to guard against unreliability. When the Government introduces damning evidence at trial, the defendant also has "a full opportunity to put on [responsive] evidence." *Rose v. Clark*, 478 U.S. 570, 579 (1986). And he often has a strong incentive to do so, even when he does not think that the evidence pertains directly to an element. Juries are sometimes swayed by context, atmospherics, and the perceived character of the defendant. *See, e.g.*, 2 F. Lee Bailey & Kenneth J. Fishman, Criminal Trial Techniques § 44:2 (2020)

("The more respectable and dignified your client appears, the more credible he or she will be.").

By contrast, during the guilty plea process, the defendant has little opportunity to challenge any assertions the Government makes. *See supra* at 30. Indeed, once a defendant decides to plead guilty, challenging the Government's allegations can jeopardize a sentence reduction for the "acceptance of responsibility." U.S.S.G. § 3E1.1; *see also United States v. Debowale*, 498 F. Appx. 447, 447 (5th Cir. 2012) (denial of credit for acceptance of responsibility after a defendant "told the court he had accepted responsibility but disavowed knowledge of wrong doing"). A "record" from a guilty plea proceeding thus does not provide an acceptable platform from which to conduct a harmless-error inquiry.

Bousley v. United States, 523 U.S. 614 (1998), does not help the Government either. In *Bousley*, the defendant pleaded guilty to using a firearm. Years later, this Court defined "use" more narrowly than the district court did during Bousley's plea colloquy. The Court then held that defendants like Bousley—whose convictions had become final and were seeking collateral relief—were eligible for such relief only if they could establish that the errors in their plea hearings "probably resulted in the conviction of one who is actually innocent." 523 U.S. at 623 (internal quotation marks and citation omitted).

According to the Government, the fact that the Court in *Bousley* directed a prejudice-type inquiry is instructive here because this case, like *Bousley*, involves a "misdescription" of an element during a plea colloquy. U.S. Br. 21. But the Government's characterization of this case is inaccurate. The

scenario here—as all of the courts of appeals have recognized—involves the total omission of an element.[15] And *omitting* an element is different from the mere misdescription that occurred in *Bousley*. Bousley was well-aware when he pleaded guilty that "use" was an element of the charged offense, *see* 523 U.S. at 622, giving him notice that—however the element might precisely be understood by a judge or jury—the way he allegedly handled the gun mattered. Here, by contrast, Mr. Gary was led to understand that Section 922(g) contained no scienter element at all respecting his status. He understood the issue to be one of strict liability, with no potential basis for dispute regarding his mental state. In this situation, there is truly "no *object*, so to speak, upon which harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280.

c. *Fundamental unfairness.* Finally, a guilty plea taken in violation of *Rehaif* "always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Where, as here, the defendant has no notice of the

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[15] *See, e.g.*, *United States v. Balde*, 943 F.3d 73, 97 (2d Cir. 2019) (discussing "the element announced in *Rehaif*"); *United States v. Staggers*, 961 F.3d 745, 754 (5th Cir.) ("We now know . . . that knowledge of felon status is an element of a § 922(g)(1) offense."), *cert. denied*, 141 S. Ct. 388 (2020); *United States v. Watson*, 820 F. Appx. 397, 399 (6th Cir. 2020) (discussing a "defective felon-in-possession indictment that omitted *Rehaif* 's knowledge-of-status element"); *United States v. Triggs*, 963 F.3d 710, 712 (7th Cir. 2020) (*Rehaif*'s "second knowledge element is new; no one was aware of it when Triggs pleaded guilty"); *United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020) ("*Rehaif* held that the government must also prove a fourth element.").

critical mens rea element of the charged offense, no resulting admission of guilt "may be regarded as fundamentally fair." *Rose*, 478 U.S. at 578; *cf. Lafler v. Cooper*, 566 U.S. 156, 168-70 (2012) (concerns regarding the "fairness and regularity" of the plea-bargaining process extend beyond whether evidence indicates that the defendant is "guilty").

The Government responds that the "kind and degree of harm" that *Rehaif* errors in the guilty plea context create can "vary" depending on the facts and record of each case. U.S. Br. 32. But that contention takes an unduly limited view of the consequences that inevitably flow from the constitutional violation here. A guilty plea taken in violation of *Rehaif* does not just create the potential for a factually unfounded guilty plea. It also occasions a defendant's surrender of his liberty and conviction of a crime without his ever understanding the true nature of the charge against him. That is something our Constitution cannot tolerate.

2. This Court's precedent concerning omitted elements during guilty pleas confirms the error is structural.

Beyond arguing first principles, the Government maintains that this Court's precedent forecloses categorizing the error here as structural. To the contrary, *Henderson v. Morgan*, 426 U.S. 637 (1976), holds that when a defendant pleads guilty without being informed of a critical element of the offense, vacatur is required without a showing of prejudice. The Government's other authorities do not establish otherwise.

a. In *Henderson*, the defendant, Morgan, pleaded guilty to second-degree murder and did not appeal.

But there was a fatal defect in his plea colloquy: Morgan, like Mr. Gary, was never made "aware that intent was an essential element of the crime." 426 U.S. at 639. Confronted with this missing mens rea element, this Court held that "the judgment of conviction was entered without due process of law." *Id.* at 647.

With respect to the remedy for this fair-notice violation, this Court assumed that "the prosecutor had overwhelming evidence of guilt available." *Id.* at 644. Indeed, New York then had a rule in second-degree murder prosecutions that a defendant "must be presumed to have intended the natural consequence of his act," *id.* at 646 n.17 (citation omitted), seemingly confirming that Morgan's guilt as to the missing intent element "would almost inevitably have been inferred" by a jury had he gone to trial, *id.* at 645. No matter. This Court affirmed the vacatur of Morgan's conviction without requiring any showing that informing him of the missing mens rea element might have changed the outcome of his case.

Henderson predates this Court's use of the term "structural error." But concluding that an error renders a conviction invalid without regard to the strength of the prosecution's case is the very definition of structural error. Indeed, the Court has described *Henderson* as holding that "[w]here a defendant pleads guilty to a crime without having been informed of the crime's elements, . . . the plea is *invalid*." *Bradshaw*, 545 U.S. at 183 (emphasis added); *see also Class v. United States*, 138 S. Ct. 798, 814 (2018) (Alito, J., dissenting) (explaining that in *Henderson*, the Court "held that if a defendant

does not understand that he is admitting his conduct satisfies each element of the crime, his guilty plea is involuntary and unintelligent and therefore *invalid*." (emphasis altered)).

The Government disputes this reading of *Henderson*. It points (U.S. Br. 20) to the Court's statement at the end of the opinion that Morgan's "unusually low mental capacity . . . foreclose[d] the conclusion that the error was harmless," 426 U.S. at 647. But against the backdrop of the Court's earlier assumption that the evidence against Morgan was "overwhelming," that sentence is best understood as suggesting that reversal might not have been required if Morgan had known of the omitted element's existence, despite the judge's failure to advise him regarding it. *See Bradshaw*, 545 U.S. at 183 (the "constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel"). Justice White's concurrence, joined by three other Justices, supports this limited understanding of the sentence. He explained that he "join[ed] the opinion of the Court" in part because "[i]t *cannot* be 'harmless error'" to "permit a guilty plea to be entered against a defendant" without his being advised of an element of the offense. *Henderson*, 426 U.S. at 650 (emphasis added).

At any rate, *Henderson* makes clear that the only harmless-error argument the Government advances here is off-limits. The Government argues that Mr. Gary suffered no prejudice because evidence in the presentence report shows that Mr. Gary "could not have realistically hoped to persuade a jury" that he

lacked knowledge of felon status. U.S. Br. 24. Yet *Henderson* squarely holds that "overwhelming evidence of guilt" is not a permissible basis to uphold a plea where the defendant was never advised of a critical mens rea element. 426 U.S. at 644.

b. The Government also invokes *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). In that case, the Court applied harmless-error analysis to the district court's failure to advise a defendant, consistent with Rule 11(c)(3)(B), that he could not "withdraw his guilty plea if the court did not accept the Government's [sentencing] recommendations." *Id.* at 79. The Government argues that the due process violation here requires the same treatment because it also occurred during a plea colloquy. U.S. Br. 18, 22.

But *Dominguez Benitez* itself says exactly the opposite. The Court expressly "contrast[ed]" its holding with cases involving "the constitutional question whether a defendant's guilty plea was knowing and voluntary." 542 U.S. at 84 n.10. Convictions flowing from such errors, the Court explained, cannot be "saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.* Mr. Gary's guilty plea belongs to precisely this class of constitutional errors.

The Government responds that the *Dominguez Benitez* Court intended to suggest only that a "completely uninformed plea," as in *Boykin v. Alabama*, 395 U.S. 238 (1969), is exempt from harmless-error scrutiny. U.S. Br. 22. But the Court was clear that *Boykin* merely provided one "example" of a constitutional violation requiring automatic vacatur of a plea. *Dominguez Benitez*, 542 U.S. at 84 n.10. A single-item list does not require "example[s]."

In short, the dividing line in the realm of fair-notice violations during plea colloquies between errors requiring automatic reversal and those that can be subjected to harmless-error-type inquiries is not—as the Government would have it—between failing to advise regarding any elements and omitting just one element. Instead, the line is between omissions and misdescriptions of elements—at least where, as here, the omitted element "separate[s] wrongful from innocent acts." *Rehaif*, 139 S. Ct. at 2197. At least in that circumstance, the defendant has a vital autonomy interest in deciding whether to concede having knowingly engaged in wrongful conduct. And in that situation, the decision whether to submit to a multi-year prison sentence is so deeply personal and fraught that it is impossible to know whether any given defendant would have done so if properly advised.

Any other conclusion would create vexing administrability problems. If, as the Government says, one omitted element can be subjected to harmless-error scrutiny—even when it separates wrongful from innocent conduct—what about two elements? Or three? Surely at some point the omission of some, but not all, of the elements renders it impossible to say that "the defendant possesse[d] an understanding of the law in relation to the facts," thus rendering the guilty plea automatically "void." *McCarthy*, 394 U.S. at 466. What if the offense itself—such as assault or theft—has only two or three elements and one is omitted? Would the omission of a "crucial" element in that context, *Rehaif*, 139 S. Ct. at 2197, really be subject to harmless-error analysis? The Government offers no answers to these questions, and none are apparent.

II. Even if Rule 52(b)'s plain-error doctrine applies, Mr. Gary need not make a case-specific showing of prejudice.

Even if the plain-error doctrine applied here, the result would be the same. In *United States v. Olano*, 507 U.S. 725 (1993), the Court established a four-part framework for assessing claims of plain error. First, there must "indeed be an error." *Id.* at 732 (internal quotation marks omitted). Second, the error must be "plain," or "obvious." *Id.* at 734. Third, the error must "affect [the] substantial rights" of the defendant. *Id.* Finally, if these three criteria are met, then a court may 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 concedes that the first two prongs are satisfied. But it argues that the third and fourth prongs are not automatically met under the circumstances here. The Government is incorrect.

A. Because the error here is structural, it necessarily affects substantial rights.

Every court of appeals to consider the issue—including in opinions written by then-Judge Breyer and Judge Luttig—has held that structural errors automatically satisfy prong three of the plain-error test. *See United States v. Colon-Pagan*, 1 F.3d 80, 81-82 (1st Cir. 1993) (Breyer, C.J.); *United States v. Ramirez-Castillo*, 748 F.3d 205, 214 (4th Cir. 2014); *United States v. Barnett,* 398 F.3d 516, 526-27 (6th Cir. 2005); *United States v. Becerra*, 939 F.3d 995, 1005-06 (9th Cir. 2019); *United States v. Wyles*, 102 F.3d 1043, 1057 (10th Cir. 1996). The "plain

language" of Rule 52—which the Government ignores—demonstrates that the lower court consensus is correct. *United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996) (Luttig, J.) (citation omitted).

1. Under Rule 52(a), "[a]ny error, defect, irregularity, or variance that does not *affect substantial rights* must be disregarded." Fed. R. Crim. P. 52(a) (emphasis added). Rule 52(b)—the provision allowing appellate courts to notice plain errors—uses "the same language." *Olano*, 507 U.S. at 734. It provides that "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) (emphasis added). As a result, the third prong of the plain-error test "requires the same kind of inquiry" as the Court has established under Rule 52(a) for determining whether an error is susceptible to harmless-error scrutiny. *Olano*, 507 U.S. at 734. And, as noted above, an error is not susceptible to harmless-error scrutiny if it is "structural." *See supra* at 22.

2. Instead of attending to Rule 52's text, the Government discusses *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). According to the Government, that case enables courts, in the context of plain-error review, to require showings of prejudice to obtain relief for structural errors. U.S. Br. 35. But *Weaver* is inapposite.

Weaver was an ineffective-assistance-of-counsel case on collateral review. 137 S. Ct. at 1905. Weaver argued that his counsel's failure to object at trial when the courtroom was "closed to the public for two days of the jury selection process" entitled him to relief on ineffective-assistance grounds. *Id.* He

maintained that because violations of the right to a public trial constitute structural error, he was automatically entitled to relief based on his lawyer's deficient performance. The Court rejected that argument, holding that Weaver still had to show he suffered case-specific prejudice. *Id.*

This holding does not apply here. As the Court stressed in *Weaver*, the "ultimate" test for ineffective-assistance relief is whether the trial was "fundamentally unfair"—a test that under *Strickland v. Washington*, 466 U.S. 668 (1984), requires a case-specific showing of "prejudice." *Weaver*, 137 S. Ct. at 1911. The *Strickland* test, however, does not govern plain-error review. Rather, the test for plain error is whether the error "affects substantial rights." Fed. R. Crim. P. 52(b). As explained above, structural errors satisfy that test regardless of whether defendants are able to make case-specific showings of prejudice. *See supra* at 40-41.

The Government is likewise mistaken in suggesting (U.S. Br. 21) that *Bousley v. United States*, 523 U.S. 614 (1998), demands a case-specific showing of prejudice under Rule 52(b). In *Bousley*, the defendant was bringing a successive motion for collateral relief. He thus had to show that he was "actually innocent," 523 U.S. at 622—a test that necessitates a showing of prejudice. By contrast, the question under plain-error review is whether the error "affects substantial rights." Once again: structural errors necessarily satisfy that test.[16]

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[16] Because the question presented is limited to whether the type of error here "automatically" entitles defendants to relief,

B. The due process violation here necessarily had a serious effect on the fairness, integrity or public reputation of judicial proceedings.

Even without any case-specific showing of prejudice, the constitutional violation here "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted).

1. An error warrants relief under prong four when its correction is important to "maintaining public perception of fairness and integrity in the justice system." *Rosales-Mirales v. United States*, 138 S. Ct. 1897, 1907 (2018). That is necessarily the case here. "The first and most universally recognized requirement of due process"—well known to lawyers and laypersons alike—is that every defendant must receive "real notice of the true nature of the charge against him." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *see also United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (fair notice is "the first essential" of due process) (citation omitted). Indeed, "the adversary process could not function effectively" without "provid[ing] each party with a fair chance to assemble and submit evidence to contradict or

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U.S. Br. I, Mr. Gary does not address whether he could satisfy prong three because prejudice should be "presumed" in his case and that presumption is not rebutted, or because he can somehow demonstrate prejudice. *See Olano*, 507 U.S. at 735. If this Court were to reverse, those would be questions for the court of appeals to address in the first instance on remand.

explain the opponent's case." *Taylor v. Illinois*, 484 U.S. 400, 410-11 (1988).

These core principles were transgressed here. Mr. Gary lacked any notice of the "crucial" element of the charged offense—the one separating "wrongful" from possibly innocent conduct. *Rehaif*, 139 S. Ct. at 2197. Nor was he afforded any meaningful chance to present or dispute evidence regarding the element. Surely the public perception of the judicial system would suffer if a plea under these circumstances were allowed to stand.

The Government resists this conclusion, citing *Johnson v. United States*, 520 U.S. 461 (1997), and *United States v. Cotton*, 535 U.S. 625 (2002). But neither of those cases involved guilty pleas, and the defendants in both cases had opportunities to challenge the prosecution's evidence. In *Johnson*, the trial court neglected to instruct the jury on an element of the offense and instead found for itself that the element was satisfied. 520 U.S. at 469. This Court held that prong four of the *Olano* test was not met, stressing that the element "was essentially uncontroverted at trial." *Id.* at 470. Similarly, in *Cotton*, the trial court failed to instruct on an element and instead found during sentencing proceedings that the element was satisfied. 535 U.S. at 628. This Court then relied on the "overwhelming" evidence the prosecution submitted to conclude that prong four was not met. *Id.* at 633.

The situation here is fundamentally different. The whole point of classifying a constitutional error as an autonomy violation is that it is inappropriate to conduct a case-specific prejudice inquiry. *See supra* at 22-24. The impossibility of dependably conducting

harmless-error scrutiny in this setting also, by definition, forecloses a meaningful assessment of the Government's evidence. *See id.* at 29-32. Those problems were not present following the jury trials in *Johnson* or *Cotton*. *See Neder v. United States*, 527 U.S. 1, 8-15 (1999); *Washington v. Recuenco*, 548 U.S. 212, 218-22 (2006). But here, these problems preclude conducting a harm-based inquiry under prong four. Any other conclusion would allow the Government to argue through the back door what it cannot argue through the front.

Additionally, in *Johnson*, the defendant had the incentive and an opportunity to present all the evidence she could to defeat the materiality element. 520 U.S. at 470 n.2. In *Cotton*, too, the prosecution introduced a significant amount of evidence at trial concerning the omitted element, and the defendants knew such evidence could affect their punishments. Yet they "never argued" that the prosecution's evidence was inaccurate. 535 U.S. at 633 n.3. Mr. Gary, by contrast, had no incentive or meaningful opportunity to present any evidence in conjunction with pleading guilty. *See supra* at 30, 33 It would therefore impugn the integrity of the criminal justice system to require him to show prejudice by pointing to a record he had no reason to develop.

2. If the Court nevertheless concludes that a showing of prejudice is required here under prong four, it should stop there and remand.

The Government invites this Court to undertake a fact-specific adjudication of Mr. Gary's case. U.S. Br. 39-40. But the question presented is simply whether the Fourth Circuit correctly concluded that *Rehaif* error "automatically" entitles a defendant to

relief. *Id.* at I; *see also id.* at 11 (asking this Court to reverse the Fourth Circuit's holding that the *Rehaif* error here "'requires automatic vacatur,'" "even when the error had no practical effect") (quoting Pet. App. 5a). The court of appeals has never considered whether Mr. Gary could show case-specific prejudice.

Accordingly, if the error does not require automatic vacatur, then the case should be sent back to the court of appeals for an assessment of case-specific prejudice, along with other relevant considerations under prong four. This is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And the Government does not offer any reason for this Court to depart from its "normal practice" of allowing lower courts, "in the first instance," to apply the law to the facts. *Neder*, 527 U.S. at 25; *see also, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017). Such a departure would be particularly inappropriate here because, even as Mr. Gary is writing this brief, it is not clear which of the documents the Government relies on can be properly considered in any assessment of prejudice. That remains to be decided in *Greer v. United States*, No. 19-8709.

3. In any event, the Government's case-specific prejudice argument is flawed on multiple levels.

As an initial matter, the Government suggests that Mr. Gary's April 7, 2014 burglary conviction shows that he must have known he had been previously convicted of a felony because he was "incarcerated for . . . 691 consecutive days" in connection with that conviction. U.S. Br. 23. But all of the 691 days Mr. Gary spent in jail were in pretrial detention. J.A. 123-25. 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 (Nov. 2, 2018) (describing South Carolina practices).[17]

The Government notes that when accepting Gary's guilty plea for the burglary offense, the court imposed an eight-year sentence. U.S. Br. 5. But the court suspended all of the time not already served. So Mr. Gary—who did not complete high school and has no legal training, J.A. 68—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" after pleading guilty was not the same as "imprisonment." 18 U.S.C. § 922(g)(1).

The Government also points to other prior convictions listed in Mr. Gary's Presentence Report (PSR). U.S. Br. 5, 23-24. But the Government's reliance on those convictions is misguided in three ways.

First, the Government has waived its ability to rely on any prior conviction other than the 2014 burglary conviction. In the Fourth Circuit, the Government briefly referenced "several [previous] convictions for which Gary faced a maximum penalty

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

in excess of one year." Gov't C.A. Supp. Br. 4. But when asked directly at oral argument for its evidence regarding Section 922(g)'s knowledge-of-status element, the Government pinned its argument exclusively on Mr. Gary's 2014 burglary conviction. The Government's "no prejudice" argument consequently must turn solely on that conviction.[18]

Second, the Government relies on parts of the record compiled after Mr. Gary pleaded guilty—namely, aspects of the PSR and Mr. Gary's sentencing memorandum. But for the reasons elaborated in petitioner's brief in *Greer*, the plain-error standard does not allow the Court to rely on those materials. *See Greer* Petr. Br. at 8-19.

Third, the other convictions the Government references do not show sufficient knowledge of felon status anyway. The Government cites convictions for third-degree burglary, committed when Mr. Gary was only 17 years old, and for two second-degree burglaries. U.S. Br. 5-6, 23-24. But Mr. Gary was convicted for all three on the same day under South Carolina's Youthful Offender Act ("YOA"), and purportedly received a sentence not to exceed five

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[18] When asked in the Fourth Circuit 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." CA4 Oral Arg. Recording 29:22-30:05.

years in custody, suspended on two years of probation.[19] When his probationary sentence was converted, the PSR reflects that he was sentenced to only four months. J.A. 116-18, 119-21.

Nor do Mr. Gary's convictions in 2015 for second-degree assault and battery prove he knew of his prohibited status. His convictions were for violations of S.C. Code § 16-3-600(D)(1). As classified in South Carolina, these crimes are misdemeanors. S.C. Code § 16-3-600(D)(2); *see also* S.C. Code § 16-1-100(A) and (B). To be sure, Section 922(g) is technically keyed to "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). But the Section 922(g) offense is often called "felon-in-possession"—the phrase the Government itself uses throughout its brief. *See*, e.g., U.S. Br. I, 2-4, 6, 14-15, 26, 35, 37, 39, 41. Accordingly, Mr. Gary might have thought his prior conviction needed to be classified as an actual felony.

At any rate, the 2015 charges led to two three-year sentences and a three-year probation revocation sentence, all of which ran concurrently. But Mr. Gary served only eight months in custody following his guilty plea to the offenses. J.A. 126-28. Even if one

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[19] Under South Carolina's YOA, a defendant receives an indeterminate sentence which cannot exceed six years or the statutory maximum that would govern if an adult were convicted. *Craft v. State*, 314 S.E.2d 330, 331 (S.C. 1984); S.C. Code § 24-19-50. The court cannot impose a definite sentence, as the Youthful Offender Division, part of the South Carolina Department of Corrections, is responsible for executing the YOA's purpose of treatment and decides when release is appropriate. *Id.*; S.C. Code §§ 24-19-20, 24-19-30, 24-19-60.

also accounts for time he may have spent in pretrial detention (the PSR does not indicate 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.

Finally, the Government quotes Mr. Gary's statement in his sentencing memorandum that he "was aware that he was not supposed to have a weapon." J.A. 68. But this statement says nothing about *why* Mr. Gary thought he was not supposed to possess a gun. He might simply have realized the gun was not properly permitted, *see* S.C. Code § 16-23-20(9), or that it was stolen property, *see* J.A. 15.

C. The Government's "practical" concerns fall flat.

The Government lastly argues that the burdens the Fourth Circuit's automatic vacatur rule would impose outweigh the benefits. U.S. Br. 38-44. The Government does not explain why it thinks that Rule 52(b) permits an assessment of "practical consequences," U.S. Br. 38, unmoored from the strictures of *Olano*'s prongs three and four. Regardless, the Government's arguments are unconvincing.

1. An automatic vacatur rule here would not impose "substantial burdens" on the judicial system, U.S. Br. 38.

According to the Government, "[t]he felon-in-possession offense is one of the most frequently prosecuted federal crimes" and "plea-colloquy *Rehaif* errors are at issue in more than 80 pending appeals" in the Fourth Circuit. U.S. Br. 42. This count actually

includes several cases that involve jury verdicts or requests for post-conviction relief.[20] Such cases do not implicate the question presented. Even so, 80 cases would average out to about one case per district judge within the Fourth Circuit, among hundreds of criminal cases on a typical judge's docket at any given time.

What's more, if the Government is right that defendants in Mr. Gary's position will "typically" know they had prior felony convictions—and thus "will rarely view the knowledge-of-status element as a reason to go to trial," U.S. Br. 39 (citation omitted)—then such defendants will presumably readily plead out again on remand.

The Government says that some defendants "may hope that dimmed memories and stale or misplaced evidence" may leave the Government at a disadvantage on remand. *Id.* at 43. But the Government offers no actual support for its speculation. Nor would there be much basis for a defendant to harbor such hope; almost all of the cases raising the question presented were filed in the past few years, between 2018 and 2020. The typical civil case with such a filing date would not even have gone

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[20] Upon Mr. Gary's request, the Government provided a list of citations purportedly supporting its assertion in its brief. Mr. Gary spot-checked the list and found that the following cases involve jury verdicts: *United States v. Barnes*, No. 19-4259, *United States v. Sloan*, No. 18-4782, *United States v. Holden*, No. 18-4804, and *United States v. Parks*, No. 18-4369. The following cases involve requests for collateral relief: *United States v. Harris*, No. 19-6915, *In re Jeffers*, No. 19-359, and *James v. Andrews*, No. 21-6159.

to trial by now. Finally, if there is the occasional case in which a remand requires the Government and a judge to exert some effort, that seems a small price to pay for honoring a bedrock due process guarantee.

2. The Government also asserts that an automatic vacatur rule would undermine the interests in the "prompt resolution of criminal charges" and the "conservation of judicial and prosecutorial resources." U.S. Br. 35. But if the guiding light of the Court's analysis here should be the prompt and efficient resolution of criminal charges, then the Government cannot possibly prevail. Whatever benefits the justice system may procure in the short run by subjecting errors like the one here to plain-error review and requiring a showing of prejudice would be dwarfed by the burden the Government's rule would impose: a constant stream in all future criminal prosecutions of motions, objections, and demands for evidentiary hearings at every stage of litigation, all grounded in the faintest hope that each precedent unfavorable to the defense could conceivably be changed in the future. *See supra* at 12.

In sum, ruling for the Government would steer the judicial system away from a minor speedbump and into grinding rush-hour traffic. There is no good reason to chart that course.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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