No. 20-444

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MICHAEL ANDREW GARY,

Respondent.

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

BRIEF OF AMICUS CURIAE STUART BANNER IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Stuart Banner, the Norman Abrams Distinguished Professor of Law at UCLA, has written several books about the history of the American legal system. He files this brief to explain that the Court's recent plain error jurisprudence has diverged substantially from the caselaw that Rule 52(b) was meant to codify, and that this divergence has created a dilemma for the courts of appeals in cases like this one, where the law has changed between the trial court proceedings and the appeal.

SUMMARY OF ARGUMENT

This case highlights a potential anomaly in the law governing criminal appeals.

On one hand, when a conviction is appealed, the defendant should not be penalized for his lawyer's failure to object in the trial court, where an objection would have been futile because the law at the time of trial was clearly on the government's side. As the Court has observed, requiring an objection to preserve an issue for appeal in such circumstances would incentivize prudent lawyers to make a laundry list of frivolous objections, in case the law should happen to change in the defendant's favor before his appeal is heard.

On the other hand, under a rote application of the plain error standard set forth in *United States v.*

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and his counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this amicus brief.

Olano, 507 U.S. 725 (1993), defendants *would* be penalized for their lawyers' failure to make futile objections. In *Olano*, the Court construed the plain error standard of Fed. R. Crim. P. 52(b) to require a rigorous four-part showing before an appellate court can address an error to which defense counsel failed to object in the trial court. *Olano*'s four-part test imposes a far heavier burden on the appellant than the standard of review for preserved errors. If the *Olano* standard governed this situation, therefore, a prudent defense attorney should make precisely the laundry list of frivolous objections that the Court has said is unnecessary.

This anomaly can be traced to *Olano*, in which the Court departed from the text and original meaning of Rule 52(b). The rule, adopted in 1944, was intended to codify then-existing caselaw, under which federal courts had broad discretion, unconstrained by any multi-part test, to address errors to which counsel did not object below. *Olano*'s four-part test was invented in *Olano* itself. It cannot be found in the text of Rule 52(b) or in any of the pre-1944 cases. It is stricter and more rigid than the standard that Rule 52(b) was meant to codify.

To resolve this dilemma, *Olano* should not be extended to situations like the one in this case, where the law has changed in the appellant's favor between the time of trial and the appeal. Rather, appellate courts should have the discretion to reverse where there has been an intervening change in the law, just as they did under the pre-1944 caselaw codified in Rule 52(b).

ARGUMENT

Under Rule 52(b), as intended and originally understood, an appellate court has discretion to address a plain error where an objection would have been futile at the time of trial.

Rule 52(b), adopted in 1944, merely restated existing law, which placed no limits on the discretion of federal courts to address plain errors affecting the appellant's substantial rights. But the Court dramatically curtailed this discretion in *United States v. Olano*, 507 U.S. 725 (1993), by inventing a four-part test that is far more stringent than the pre-1944 law that Rule 52(b) was meant to codify. As a result, there is considerable tension between the Court's current plain error jurisprudence and the principle that a defendant should not be penalized for his counsel's failure to make an objection that would have been frivolous at the time. This tension can be alleviated by declining to extend *Olano* to cases where the law has changed in the appellant's favor during the pendency of an appeal.

A. Rule 52(b) was meant to codify pre-existing law, under which federal courts had broad discretion to consider plain errors.

Rule 52(b), adopted in 1944, provides in full: "A plain error that affects substantial rights may be considered even though it was not brought to the

court's attention."[2] The plain error standard had long been a familiar part of appellate practice, in both civil and criminal cases, so the rule's drafters did not need to provide any further explanation of plain error. As the Advisory Committee observed, Rule 52(b) was merely "a restatement of existing law." Advisory Committee Notes, Fed. R. Crim. P. 52(b). *See United States v. Young*, 470 U.S. 1, 15 n.12 (1985) ("the Rule restated existing law").

Under then-existing law, federal courts had broad discretion to consider plain error where justice so required. Courts were not constrained by any tests or doctrines in deciding whether to address an error to which counsel did not object in the trial court.

1. The Advisory Committee provided two examples of the law that Rule 52(b) was meant to codify. In both examples, the Court simply exercised case-specific discretion. It did not apply any tests or standards.

One of the Advisory Committee's examples was *Wiborg v. United States*, 163 U.S. 632 (1896), in which the Court reversed a conviction on the ground that insufficient evidence of guilt had been introduced at trial. Although defense counsel had failed to move for an acquittal on this ground, the Court explained that "we may properly take notice of what we believe to be a plain error, although it was not duly excepted." *Id.* at 659. This was the Court's entire discussion of the propriety of addressing the error.

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[2] This is the current text. The only change since 1944 was a stylistic amendment in 2002 that has no bearing on the argument made in this brief.

The Advisory Committee's other example was *Hemphill v. United States*, 312 U.S. 657 (1941) (per curiam), an opinion consisting of a single sentence: "The judgment is reversed and the cause remanded to the Circuit Court of Appeals with directions to consider the sufficiency of the evidence to support the verdict." *Id.* That was all.

In these two cases, the Court merely exercised its discretion to address an error to which counsel had not objected below. The Court did not require the appellant to make any particular showing or to establish the existence of any particular elements.

Wiborg and *Hemphill* were typical. Before 1944, when federal appellate courts decided whether to reverse for an error to which counsel had not objected in the trial court, they exercised a case-by-case discretion ungoverned by any rules or tests.

For example, in *Clyatt v. United States*, 197 U.S. 207 (1905), the Court reversed a conviction for insufficient evidence despite defense counsel's failure to move for acquittal. "While no motion or request was made that the jury be instructed to find for defendant," the Court explained that it was nevertheless justified "in examining the question in case a plain error has been committed in a matter so vital to the defendant." *Id.* at 221-22. That was all the Court had to say on the issue. There were no elements or factors to consider in determining whether to reverse for plain error.

Another example was *Brasfield v. United States*, 272 U.S. 448 (1926), in which the Court reversed a conviction because the trial judge recalled the jury in the middle of its lengthy deliberations to inquire how it was divided numerically. "The failure of petition-

ers' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error," the Court observed. *Id.* at 450. "This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done." *Id.* Again, that was all the Court had to say. Plain error was a matter of discretion, not rules.

This discretion was the norm, in both civil and criminal cases, when federal appellate courts decided whether to reverse for plain error. *See, e.g.*, *New York Cent. R. Co. v. Johnson*, 279 U.S. 310, 318 (1929) (reversing for improper examination of a witness, despite opposing counsel's failure to object, with no further explanation than that "[t]he public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice"); *Mahler v. Eby*, 264 U.S. 32, 45 (1924) (reversing despite counsel's failure to object, with no more explanation than that "[t]he warrant lacks the finding required by the statute, and such a fundamental defect we should notice"); *Pierce v. United States*, 86 F.2d 949, 953 (6th Cir. 1936) (reversing for improper prosecutorial argument, despite defense counsel's failure to object, because "[a]bove and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums"); *Aetna Life Ins. Co. v. Kelley*, 70 F.2d 589, 594 (8th Cir. 1934) (where lawyer attempted "improperly to influence the verdict by appeals to passion and prejudice, … the failure of coun-

sel to particularize an exception will not preclude the court from correcting such error"); *Van Gorder v. United States*, 21 F.2d 939, 942 (8th Cir. 1927) ("[I]n criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections."); *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920) (addressing error, despite counsel's failure to object, because "it is clearly established that the defendant in a criminal case may take advantage of a material defect appearing on the record, though such point be raised for the first time in this court").

2. On a few occasions before the adoption of Rule 52(b), the Court reflected on the discretionary nature of a court's authority to address plain error.

In *Weems v. United States*, 217 U.S. 349 (1914), for example, the government argued that reversing for plain error would be inappropriate because the Court had not reversed for plain error in a similar case. The Court rejected the government's argument, on the ground that plain error review is inherently discretionary. *Id.* at 362. "[T]he rule [allowing for plain error review] is not altogether controlled by precedent," the Court noted. *Id.* "It confers a discretion that may be exercised at any time, no matter what may have been done at some other time." *Id.* The Court conceded that the prior case was similar, *id.*, but it nevertheless reversed the defendant's conviction as contrary to the Eighth Amendment despite

the absence of any objection at trial on that ground. *Id.* at 382.

The Court provided a similar account of the discretionary nature of plain error review in *United States v. Atkinson*, 297 U.S. 157 (1936). The Court observed: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 160. As in the other plain error cases decided before the adoption of Rule 52(b), *Atkinson* did not list any elements the appellant had to establish. Rather, the Court simply noted that where defense counsel failed to object to an error, an appellate court nevertheless had the discretion to consider the error in "exceptional circumstances." *Id.* One such circumstance was where the error was "obvious." *Id.* Another was where the error, even if not obvious, might "otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.*

And in *Hormel v. Helvering*, 312 U.S. 552 (1941), only three years before the adoption of Rule 52(b), the Court once again explained that where justice requires, appellate courts should address arguments that were not made at trial. "Ordinarily an appellate court does not give consideration to issues not raised below," the Court noted, "[f]or our procedural scheme contemplates that parties shall come to issue in the trial forum." *Id.* at 556. But the Court nevertheless cautioned:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557. The Court concluded that an appellate court should consider an issue not raised below "where application of the general practice would defeat rather than promote the ends of justice." *Id.* at 560.

The courts of appeals took the same broad view of their discretion to address plain error where justice required. *See, e.g.*, *United States v. Harrell*, 133 F.2d 504, 507 (8th Cir. 1943) ("[A] federal appellate court, in order to prevent a manifest miscarriage of justice, may notice an apparent error not properly raised on the record."); *Kinard v. United States*, 101 F.2d 246, 247 (App. D.C. 1938) ("[T]he court may, on its own motion and in the exercise of a sound discretion, notice errors to which no exception has been taken …. [T]he purpose of such an exercise of discretion is to insure justice.") (internal quotation marks omitted); *London Guarantee & Acc. Co. v. Woelfle*, 83 F.2d 325, 342 (8th Cir. 1936) ("[A] new trial may be granted by the appellate court even where there was no objection or exception if the error can be said to be so great that justice requires that it should be corrected."); *Ayers v. United States*, 58 F.2d 607, 609 (8th Cir. 1932) ("[T]his court, in order to prevent an in-

justice, may notice a plain error."); *Hart v. Adair*, 244 F. 897, 900 (9th Cir. 1917) (observing that an appellate court should "notice palpable error not assigned, where the failure to consider it would result in injustice"); *Lepper v. United States*, 233 F. 227, 229 (4th Cir. 1916) ("[A]ppellate courts should not affirm an unjust conviction because formal objection was not made."); *Central Improvement Co. v Cambria Steel Co.*, 201 F. 811, 818 (8th Cir. 1912) ("[A] plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice."); *Morse v. United States*, 174 F. 539, 543 (2d Cir. 1909) (per curiam) ("If we were satisfied that any substantial injustice had been done the defendant, … we would not hesitate to ignore the failure to note an exception."); *New York Life Ins. Co. v. Rankin*, 162 F. 103, 108 (8th Cir. 1908) ("[W]hen justice requires it, we may notice a plain error, though not assigned.").

The plain error standard codified in Rule 52(b) was thus a well-known principle of appellate practice under which federal courts had a broad case-by-case discretion to address errors to which counsel had not objected. This discretion was not constrained by any rules governing its exercise. There was no test the appellate court had to follow. There were no elements the appellant had to establish. There were no precedents the court had to consider. Rather, plain error review allowed a court to decide, on a case-by-case basis, whether justice required reversal despite the absence of an objection in the trial court.

B. The four-part *Olano* test is stricter and more rigid than the original meaning of Rule 52(b).

For nearly half a century after the adoption of Rule 52(b), the Court interpreted the rule according to its original meaning. In deciding whether to address an unobjected-to error, the Court did not apply any rule or test. Rather, as courts had done before 1944, the Court merely exercised its discretion in the interest of justice. *See, e.g.*, *United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395, 412 (1947); *Giordenello v. United States*, 357 U.S. 480, 484 & n.2 (1958); *Silber v. United States*, 370 U.S. 717, 718 (1962) (per curiam); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 442 & n.52 (1972). As the Court made clear, "Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice." *United States v. Frady*, 456 U.S. 152, 163 (1982); *see also id.* at 184 (Brennan, J., dissenting) ("The plain-error doctrine merely allows federal courts the discretion common to most courts to waive procedural defaults where justice requires."); *United States v. Robinson*, 485 U.S. 25, 35 (1988) (Blackmun, J., concurring in part and dissenting in part) (noting that the Court "has avoided articulating a strict formula for other courts to follow in applying the doctrine").

That changed abruptly in *United States v. Olano*, 507 U.S. 725 (1993). In *Olano*, the Court invented a new four-part test to govern plain error review. *Id.* at 732-38. *Olano*'s test is more rigid and far stricter than the discretionary standard that was codified in Rule 52(b).

Under the *Olano* test, an appellate court may reverse for plain error only where:

(1) there is an "error," *id.* at 732;

(2) the error is "clear" or "obvious," *id.* at 734;

(3) "the defendant shows that the error was prejudicial," *id.*; and

(4) "the error seriously affects the fairness, integrity or public reputation of judicial proceedings," *id.* at 736 (brackets and internal quotation marks omitted).

Olano changed the law in three ways.

First, element 3 imposed on the appellant a burden of persuasion that did not exist when Rule 52(b) was adopted. The pre-1944 cases did not discuss or even imply any allocation of a burden of persuasion. They neither required the appellant to show prejudice nor required the government to show the absence of prejudice. Courts simply addressed an error where justice so required.

Second, in elements 2 and 4, *Olano* transformed a disjunctive pair of circumstances into a conjunctive pair of requirements. When Rule 52(b) was adopted, courts would address plain errors "if the errors are obvious, *or* if they *otherwise* seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Atkinson*, 297 U.S. at 160 (emphases added). *Olano* quoted part of this passage from *Atkinson* but omitted all the words before "seriously," including the crucial words "or" and "otherwise." *Olano*, 507 U.S. at 736. After *Olano*, courts can address plain errors only if they are obvious *and* they seriously affect the fairness, integrity, or public reputa-

tion of judicial proceedings. This is a much stricter standard than the one described in *Atkinson*.

Third, *Olano*'s four-part test ossified what had once been a broad discretionary standard. When Rule 52(b) was enacted, the plain error standard was "not altogether controlled by precedent." *Weems*, 217 U.S. at 362. It was a standard that "confers a discretion that may be exercised at any time, no matter what may have been done at some other time." *Id.* But not any longer. Ever since *Olano*, plain error review has become a rulebound exercise in which courts mechanically proceed through the four elements, as if the elements could be found in the text of Rule 52(b). Today, plain error review is very nearly the opposite of the discretionary standard that Rule 52(b) was intended to preserve.

The *Olano* Court appears to have been unaware that it was changing the law. Neither party proposed the four-part test, so neither party had any occasion to discuss whether it accurately reflected pre-1944 practice. (Both parties were represented by eminent counsel, Solicitor General Starr for the government and Carter Phillips for the defendant, so the four-part test would surely have been discussed in the briefs and oral argument if it had any basis in then-existing law.) The only pre-1944 case the Court considered at any length was *Atkinson*, but, as we have seen, the Court misconstrued *Atkinson*. As a result, in *Olano* the Court made a significant change to the law, apparently by accident.

Because of *Olano*, the current interpretation of Rule 52(b) is quite different from the meaning intended at its adoption. The text of Rule 52(b) "reflects a careful balancing of our need to encourage all

trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Frady*, 456 U.S. at 163. The Court has cautioned that any judicial alteration of "this exacting definition of plain error would skew" the careful balance struck by the rule. *Young*, 470 U.S. at 15. In *Olano*, however, the Court inadvertently failed to heed its own admonition. It altered the balance codified in Rule 52(b) by making it much harder for appellants to establish plain error.

Olano has given rise to a second problem as well. By turning plain error review from a discretionary standard into a rigid set of rules, *Olano* has required the Court to resolve recurring circuit splits over how the four prongs of the *Olano* test should apply in specific situations. *See, e.g.*, *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *United States v. Marcus*, 560 U.S. 258 (2010); *Henderson v. United States*, 568 U.S. 266 (2013); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016); *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018). The present case is just the most recent in this line.

Such cases would have been unimaginable when Rule 52(b) was adopted, because circuit splits could not have arisen in the application of a case-specific discretionary standard. Before 1944, the Court appears *never* to have second-guessed a decision by a Court of Appeals to reverse for plain error. In its post-*Olano* cases, by contrast, the Court has had to elaborate ever-finer sub-rules to constrain the discretion of the courts of appeals, sub-rules that likewise would have been unimaginable when Rule 52(b) was adopted. Rule 52(b) was meant to give appellate

courts broad discretion, but now courts are hemmed in by all sorts of Court-devised doctrines that cannot be derived from the rule's sparse text or reconciled with the pre-1944 caselaw that the rule was supposed to restate.

In one of the last opinions of his long career, Justice Stevens wisely suggested that this rigidification of Rule 52(b) has been a mistake. "In our attempt to clarify Rule 52(b)," he noted, "we have, I fear, both muddied the waters and lost sight of the wisdom embodied in the Rule's spare text." *Marcus*, 560 U.S. at 270 (Stevens, J., dissenting). Justice Stevens concluded: "This Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decisionmaking." *Id.* at 270-71.

C. Applying the *Olano* test in this situation would have the anomalous effect of penalizing a defendant on appeal for counsel's failure to make an objection that would have been futile at the time of trial.

This case is an exceptionally clear example of the "analytic maze" that concerned Justice Stevens. Everyone agrees that an error took place in the District Court. Everyone agrees that defense counsel did not object to the error. And everyone agrees that defense counsel did the right thing by not objecting to the error, because under the law of every circuit at the time, including the circuit the case was in, an objection would have been frivolous.

In this situation it makes little sense to penalize the defendant for counsel's failure to object. "When 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*, 568 U.S. at 284 (Scalia, J., joined by Thomas and Alito, JJ., dissenting). Requiring counsel to make an objection that is meritless under settled law "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent," just in case the law should change while the case is being appealed. *Johnson*, 520 U.S. at 468.

The contemporaneous-objection requirement is intended to make adjudication more efficient and to promote the interest of finality. *Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977). But a rule encouraging lawyers to make meritless objections would only prolong proceedings and make them less efficient. Trials and other hearings would become cluttered with pro forma objections at every point, objections that everyone recognizes have no chance of being granted. *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996) ("[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."). Defense counsel thus cannot be faulted for eschewing objections that would be frivolous under governing law.

But a rote application of the *Olano* test would do precisely that, when the law changes while a case is on appeal. It would penalize the defendant for counsel's failure to make a frivolous objection, by compel-

ling the Court of Appeals to use a far more stringent standard of review than it would use if counsel had objected. The *Olano* test thus encourages a prudent attorney to make the same "useless laundry list of objections" that the Court has deemed undesirable.

D. This anomaly can be resolved by declining to extend *Olano* to cases where an objection would have been futile.

This dilemma has a simple solution: The Court should not extend *Olano* to cases like this one, in which an objection would have been futile at the time of trial. Where the law changes between trial and appeal, an appellate court should have broad discretion to address the error or not, as justice requires.

Before *Olano*, when cases like this arose—that is, cases in which the law changed in the appellant's favor between trial and appeal—appellate courts reversed when it seemed fair to give the appellant a chance to make an argument in the trial court based on the new law. *See, e.g.*, *Silber*, 370 U.S. at 717-18; *Hormel*, 312 U.S. at 560; *Gros v. United States*, 136 F.2d 878, 880-81 (9th Cir. 1943). It was as simple as that. It would still be that simple if Rule 52(b) were interpreted as its drafters intended.

If the original meaning of Rule 52(b) were applied in this case, the outcome would lie midway between the position taken by the government and the view expressed by the Court of Appeals. On one side, the government errs: (a) in saddling respondent with the burden of persuasion; (b) in requiring the error to be obvious *and* to affect the integrity of judicial proceedings; and (c) most fundamentally, in arguing

that the Court of Appeals' discretion was constrained by doctrines that cannot be found in the rule's text or in the caselaw the rule was meant to codify. On the other side, the Court of Appeals likewise erred in holding that *all* errors of this type require reversal.

Instead, under Rule 52(b) as intended and originally understood, the Court of Appeals should simply have exercised its discretion to decide whether it would be just, in light of the change in the law that took place after respondent's conviction, to give respondent a chance to make an argument in the trial court based on the new law.

It seems clear from the Court of Appeals' opinion that the court would have so concluded. The court found that that respondent's guilty plea "was not knowingly and intelligently made because he did not understand the essential elements of the offense to which he pled guilty." Pet. App. 2a. The court concluded that "it is in the interest of justice that Gary" have a chance to reconsider whether to plead guilty now that the law has changed. *Id.* at 19a. Under the original meaning of Rule 52(b), that would have been enough to decide the case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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