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 OF AMICUS CURIAE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

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I.

INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership is composed of attorneys who work for federal public defender and community defender organizations authorized under the Criminal Justice Act. NAFD attorneys represent tens of thousands of individuals in federal court each year at all stages of federal proceedings, including in motions to suppress evidence and motions to dismiss charges, at trial and change of plea hearings, at sentencing, and on appeal. NAFD attorneys regularly must make decisions about what claims to raise and frequently confront plain error review on appeal. NAFD's membership also includes supervising attorneys who must train and decide how to train line attorneys about what claims to raise and how to avoid and/or address plain error review on appeal. Amicus NAFD therefore has particular expertise and interest in the subject matter of this litigation.

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[1] Under S. Ct. R. 37.8, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, their members, or their counsel made a monetary contribution to preparation or submission of this brief. Amicus has obtained a letter of consent to the filing of this brief from counsel for Petitioner, the United States, and counsel for Respondent filed a blanket consent on February 22, 2021.

II.

SUMMARY OF ARGUMENT

This brief addresses the specific issue of whether the plain error standard should apply where there was a solid wall of contrary circuit authority at the time of the decision challenged – typically, when the case was in the district court. For a number of reasons, it should not.

Requiring counsel to make objections in the face of such authority will waste judicial resources in multiple ways. It will require counsel to file – and district courts to consider – numerous motions and objections for which the ruling is preordained by the contrary authority. It will discourage counsel from agreeing to jury instructions and/or the admissibility of evidence that counsel would otherwise agree are compelled by the existing authority. It will force counsel to make evidentiary objections in the form of pretrial motions in limine and objections during trial that are fruitless, distracting, and waste the time of the district court and jury. And no benefit offsets this waste of judicial resources. The purpose of requiring a contemporaneous objection – giving the district court a chance to correct an error – is not advanced when the district court must follow contrary authority.

Both ethical limitations and conventions of contemporary federal criminal practice also militate against forcing counsel to make objections in the face of a solid wall of circuit authority. Attorneys will be forced to walk an ethical line, because ethical rules preclude

making frivolous legal arguments. While there is an exception for good faith arguments to reverse existing law, disciplinary authorities' view of good faith may differ from that of the attorney.

Beyond ethical considerations, opinions of both this Court and courts of appeals actively discourage attorneys from raising every possible issue – with good reason. Attorneys who make every possible argument "just in case," even when there is a wall of contrary circuit authority, lose credibility with the court and thereby become less effective advocates on other issues. The attorneys may be viewed as obstructing the trial process because they cannot agree to instructions and evidence on which the law seems settled. Finally, the attorneys must make evidentiary objections they know will be overruled and thereby damage their credibility with the jury, and even their clients.

There is harm to defendants as well. Litigating hopeless issues and challenging facts that are irrelevant under controlling law may lead prosecutors to withhold plea offers, develop and present evidence in support of sentence enhancements they might otherwise not seek, or make harsher sentencing recommendations. Challenging irrelevant facts may also affect the district court's sentencing decisions. This includes not only the court's ruling on the "acceptance of responsibility" reduction under the sentencing guidelines, which directly affects the guideline range, but also the court's exercise of discretion to select a sentence within the range and/or vary from the range. The previously irrelevant fact made relevant by *Rehaif v. United*

States, 139 S. Ct. 2191 (2019) – whether the defendant knew the prior conviction was for a felony – is a good illustration of the risk. A prosecutor or judge might well look askance at a suggestion the defendant did not understand he or she was convicted of a felony and view a defendant who makes such a suggestion as less deserving of leniency.

These multiple reasons not to require objections in the face of a wall of contrary circuit authority far offset the minimal – indeed, essentially nonexistent – benefit to requiring such objections. It is neither reasonable nor fair to require an objection when the issue is settled against the defendant in every single circuit.

III.

ARGUMENT

A. A FUTILITY EXCEPTION FINDS SUPPORT IN THE CONSIDERED AND PERSUASIVE OPINIONS OF MEMBERS OF THIS COURT AND THE COURTS OF APPEALS.

Former and present members of this Court have recognized an objection should not be required when it would be futile. Justice Scalia, dissenting on other grounds in *Henderson v. United States*, 568 U.S. 266 (2013), opined: "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." *Id.* at 284 (Scalia, J., dissenting). Then Judge, now Justice, Gorsuch, wrote that "plain error review should not be like a hidden mantrap, encountered without

warning yet often deadly[,]" and "counsel will not be stuck with plain error review for having failed to voice an objection when doing so would have been futile." *United States v. Uscanga-Mora*, 562 F.3d 1289, 1294 (10th Cir. 2009).

Multiple courts of appeals have also recognized a futility exception, though at least some have since retreated. In considering a constitutional challenge to a presumption instruction, the court in *United States v. Scott*, 425 F.2d 55 (9th Cir. 1970), held:

> At the time of Scott's trial, there was a solid wall of circuit court authority, including our own, sustaining the presumption against constitutional attack. An exception would not have produced any results in the trial court. . . . We conclude that Scott's failure to except did not waive the point on appeal.

Id. at 57-58 (citations and footnote omitted). Other circuits then adopted *Scott*'s view. *Territory of Guam v. Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (citing *Smith v. Estelle*, 602 F.2d 694, 708 n.19 (5th Cir. 1979), *aff'd*, 451 U.S. 454, 468 n.12 (1981); *United States v. Grant*, 489 F.2d 27, 29-30 (8th Cir. 1973); *United States v. Liquori*, 438 F.2d 663, 665 (2d Cir. 1971); and *Martone v. United States*, 435 F.2d 609, 610-11 (1st Cir. 1970)).

More recently, the Second Circuit, while not completely rejecting application of the plain error standard, recognized a "modified plain error" standard, for

reasons comparable to those articulated in the foregoing opinions.

> A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have "forfeited a right" by not making an objection, since at the time of trial no legal right existed. If we were to penalize defendants for failing to challenge entrenched precedent, we would be insisting upon an omniscience on the part of defendants about the course of the law that we do not have as judges.

United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994). The court then held:

> When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant. In this special context, as in harmless error review under Rule 52(a) [of the Federal Rules of Criminal Procedure], the government must show that the error did not affect the defendant's substantial rights.

Id.[2]

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[2] This modified plain error standard has been rejected by other circuits and may or may not survive in the Second Circuit, *see United States v. Bryant*, 976 F.3d 165, 173 n.5 (2d Cir. 2020), *petition for cert. pending*, No. 20-7300 (filed Mar. 2, 2021), but the reasoning remains cogent.

Later circuit opinions have suggested an objection does have to be made even when there is a solid wall of contrary authority. *See, e.g.*, *United States v. Keys*, 133 F.3d 1282, 1284, 1286 (9th Cir.) (en banc) (overruling *Scott*), *opinion amended on denial of rehearing*, 143 F.3d 479 (9th Cir.), and *amended*, 153 F.3d 925 (9th Cir. 1998); *United States v. Knoll*, 116 F.3d 994, 1000 (2d Cir. 1997). But those cases rely on *Johnson v. United States*, 520 U.S. 461 (1997), and read *Johnson* too broadly. *See Keys*, 133 F.3d at 1286; *Knoll*, 116 F.3d at 1000.[3] *Johnson* is distinguishable, because the pertinent authority there – holding that the materiality element of perjury was to be decided by the court rather than the jury – was only "*near*-uniform." *Id.* at 467 (emphasis added). Conspicuously absent from the near-uniform circuit law *Johnson* cited was any case from the Ninth Circuit. *See id.* at 468 n.1 (citing cases from every circuit except Ninth Circuit). And, in fact, the Ninth Circuit had raised grave doubt on the question in an en banc opinion decided several months before the trial from which the appeal had been taken in *Johnson*. In holding that materiality in an 18 U.S.C. § 1001 false statement prosecution is a jury question, it had "cut[ ] the ground out from under" cases holding materiality in other statutes was a question for the court and "t[ook] particular aim at our cases involving perjury and false statements to the grand jury." *United States v. Gaudin*, 28 F.3d 943, 957 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting), *aff'd*, 515 U.S. 506

[3] The government in the present case also relies on *Johnson* and reads it too broadly. *See* U.S. Br. 25-26.

(1995).[4] *See also Gaudin*, 515 U.S. at 527 (Rehnquist, J., concurring) (noting conflict in 18 U.S.C. § 1001 cases and citing Ninth Circuit dissenting opinion).

Where another circuit has definitively held differently than counsel's circuit, it may be reasonable to require defense counsel to raise an objection. *See* Model Rules of Pro. Conduct r. 3.1 (Am. Bar Ass'n 1983) (recognizing not unethical to make good faith argument for reversal of existing law). But in the absence of a contrary holding in another circuit, it is not reasonable to require defense counsel to raise an objection.

B. REQUIRING COUNSEL TO MAKE OBJECTIONS IN THE FACE OF A SOLID WALL OF CONTRARY CIRCUIT AUTHORITY WILL WASTE JUDICIAL RESOURCES.

The opinions suggesting or recognizing a futility exception to plain error review do so for a persuasive reason – that requiring futile objections will waste judicial resources. Justice Scalia, in his 2013 dissent in *Henderson*, explained:

> An objection would therefore disserve efficiency, and a time-of-trial rule "would result in counsel's inevitably making a long and virtually useless laundry list of objections

[4] The en banc *Gaudin* opinion was filed in June, 1994, *see id.*, 28 F.3d at 943, and the *Johnson* trial took place in December, 1994, *see* Brief for Petitioner, *Johnson v. United States*, 520 U.S. 461 (1997) (No. 96-203), 1996 WL 741434, at *5-6.

> to rulings that were plainly supported by existing precedent."

Id., 568 U.S. at 284 (Scalia, J., dissenting) (quoting *Johnson*, 520 U.S. at 468).

The court of appeals cases recognizing a futility exception reasoned similarly. *Scott* explained:

> Under these circumstances were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

Id., 425 F.2d at 57-58. *Accord United States v. Grant*, 489 F.2d at 30 (quoting *Scott*). *Viola* reasoned that "[i]mposing such a duty would only encourage frivolous objections and appeals." *Id.*, 35 F.3d at 42. A subsequent Eighth Circuit opinion citing *Viola* – *United States v. Baumgardner*, 85 F.3d 1305 (8th Cir. 1996) – reasoned that "to 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." *Id.* at 1309.

Potential examples of this in felon in possession of a firearm cases – and other cases – abound, and are limited only by attorney imagination. An attorney trying to read the tea leaves of this Court's limitation of

the Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1995), might feel bound to raise a Commerce Clause challenge to the felon in possession of a firearm statute, despite a solid wall of circuit authority to the contrary, *see United States v. Singletary*, 268 F.3d 196, 205 (3d Cir. 2001) (collecting cases).[5] An attorney trying to read the tea leaves of this Court's relatively recent recognition that the Second Amendment protects a personal right to bear arms, *see District of Columbia v. Heller*, 554 U.S. 570 (2008), might feel bound to raise a facial Second Amendment challenge to the statute, despite a similar wall of authority, *see Medina v. Whitaker*, 913 F.3d 152, 155 (D.C. Cir. 2018) (collecting cases), *cert. denied*, 140 S. Ct. 645 (2019); *United States v. Moore*, 666 F.3d 313, 317 (4th Cir. 2012) (collecting cases). Until very recently, an attorney with a client already convicted in state court might have read the concurring opinion in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016), to require a challenge to the "dual sovereignty" doctrine, which holds duplicative state and federal prosecutions for the same offense do not violate the Double Jeopardy Clause.[6]

Other illuminating examples can be found in the decades of litigation about the Armed Career Criminal Act, which enhances a defendant's sentence based on

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[5] For the circuits not cited in *Singletary*, see *Fraternal Order of Police v. United States*, 173 F.3d 898, 907 (D.C. Cir. 1999); *United States v. Cardoza*, 129 F.3d 6, 10-11 (1st Cir. 1997); *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996).

[6] "Until very recently" because the Court took up this question in 2019 and reaffirmed the dual sovereignty doctrine. *See Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019).

certain prior convictions, *see* 18 U.S.C. § 924(e). One of those is the litigation about the Act's "residual clause." In 2007, when the Court first interpreted the clause in *James v. United States*, 550 U.S. 192 (2007), Justice Scalia hinted it *might* be unconstitutionally vague. *See id.* at 216, 231 (Scalia, J., dissenting). Then, in 2011, Justice Scalia's position grew stronger, as he asserted it *was* unconstitutionally vague, *see Sykes v. United States*, 564 U.S. 1, 28, 34-35 (2011) (Scalia, J., dissenting), but a majority of the Court disagreed, *see id.* at 15. Finally, in 2015, a majority of the Court accepted Justice Scalia's view and held the clause was unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591 (2015). Throughout this period, defense attorneys had to decide whether to raise this vagueness challenge in the complete absence of any court support.

As another Armed Career Criminal Act example, attorneys might feel obligated – even today – to challenge the *Almendarez-Torres* exception to the *Apprendi* rule discussed *infra* pp. 19-21 – exempting prior convictions from the general rule that facts which increase a sentence must be found by a jury beyond a reasonable doubt – despite a solid wall of circuit authority rejecting that challenge.[7] This and all of the

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[7] *See United States v. Jimenez-Banegas*, 790 F.3d 253, 258 (1st Cir. 2015); *United States v. Gonzalez*, 682 F.3d 201, 204 (2d Cir. 2012); *United States v. Weaver*, 267 F.3d 231, 250-51 (3d Cir. 2001); *United States v. McDowell*, 745 F.3d 115, 124 (4th Cir. 2014); *United States v. Rodriguez-Montelongo*, 263 F.3d 429, 434 (5th Cir. 2001); *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006); *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001);

other challenges just discussed would need to be raised despite the contrary authority if there is no futility exception to the plain error rule.

While the foregoing challenges at least limit the wasteful consumption of judicial resources to review of pleadings, hearing oral argument, and issuing rulings, other motions might require unnecessarily expanding evidentiary hearings. One example of this is a case where evidence is found during a possibly pretextual traffic stop, which is a common scenario in firearms possession cases.[8] Counsel in such a case may feel compelled to file a motion seeking to revisit the Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), that pretextual traffic stops do not violate the Fourth Amendment. *Whren* has been questioned by state courts, commentators, and even a member of this Court, *see District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring),[9] but there

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United States v. Martinez-Rodriguez, 472 F.3d 1087, 1093 (9th Cir. 2007); *United States v. Beckstrom*, 647 F.3d 1012, 1020 (10th Cir. 2011); *United States v. Gibson*, 434 F.3d 1234, 1246-47 (11th Cir. 2006); *United States v. Webb*, 255 F.3d 890, 897-98 (D.C. Cir. 2001).

[8] For instance, one of the guns in the present case was found during a traffic stop, Pet. App. 2a, which may or may not have been pretextual.

[9] *See also State v. Ochoa*, 206 P.3d 143 (N.M. Ct. App. 2008) (declining to follow *Whren* on state constitutional grounds); *State v. Ladson*, 979 P.2d 833 (Wash. 1999) (same); 1 Wayne R. LaFave, *Search and Seizure* § 1.4(f) (5th ed. 2012), *cited in Wesby*, 138 S. Ct. at 594 (Ginsburg, J., concurring); Jeff D. May, Rob Duke & Sean Geuco, *Pretext Searches and Seizures: In Search of Solid Ground*, 30 Alaska L. Rev. 151 (2013); Peter Shakow, *Let He Who*

remains a wall of circuit authority summarily dismissing pretext challenges, *see, e.g.*, *United States v. Wilson*, 979 F.3d 889, 909-10 (11th Cir. 2020); *United States v. Wilson*, 960 F.3d 136, 145 (3d Cir. 2020), *cert. denied*, No. 20-6427, 2021 WL 78300 (U.S. Jan. 11, 2021), and *cert. denied*, No. 20-6099, 2021 WL 78297 (U.S. Jan. 11, 2021); *United States v. Lott*, 954 F.3d 919, 922-23 (6th Cir. 2020); *United States v. Correa*, 908 F.3d 208, 214 (7th Cir. 2018), *cert. denied*, 140 S. Ct. 648 (2019). Counsel wishing to avoid plain error review will have to raise pretext challenges nonetheless – both in pleadings and in expanded examination of witnesses in evidentiary hearings.

Failing to recognize a futility exception will also make counsel hesitant to agree to jury instructions or the admissibility of evidence, creating additional disputes that waste judicial resources. A sampling of general procedural orders found on district court websites illustrate that many judges prefer not to be burdened with challenges to settled law. As one example, some judges direct parties to submit joint proposed jury instructions. This includes judges in the very district in which Respondent is charged. *See* United States Courts, D.S.C., *Instructions for Cases Before Judge R. Bryan Harwell*, http://www.scd.uscourts.gov/Forms/Jury/Harwell_Instructions_Proposed_Jury_Charges.pdf (last visited Mar. 16, 2021); United States Courts, D.S.C., *Instructions for Proposed Jury Charges for Criminal Cases Before Judge Lydon*, https://www.

Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States, 24 Am. J. Crim. L. 627 (1997).

scd.uscourts.gov/Forms/Special_Instructions/Lydon_Standing_Order_for_Criminal_Jury_Charges.pdf (last visited Mar. 16, 2021). It also includes judges in other, larger districts.[10] While these orders do allow for objections, the goal of the orders is presumably to streamline litigation and that goal will be undercut if counsel must make objections even in the face of well-settled authority to the contrary.

Counsel also will have to make far more evidentiary objections that will require judicial resolution. Attorneys who wish to preserve evidentiary issues will have to make objections even in the face of a wall of contrary circuit authority. This will burden courts with both fruitless pretrial motions in limine and fruitless objections during trial and burden jurors while they wait for counsel to make the record.

On the other side of the coin, fruitless objections provide no benefit. The purpose of an objection, as set

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[10] *See, e.g.*, United States Courts, C.D. Cal., *Judges' Procedures and Schedules*, http://www.cacd.uscourts.gov/judges-schedules-procedures (last visited Mar. 17, 2021) (providing links to judges' procedures, approximately half of which require joint jury instructions in some form); United States Courts, E.D.N.Y., *Judges' Info*, https://www.nyed.uscourts.gov/judges-info (last visited Mar. 17, 2021) (providing links to judges' procedures, three of whom – Judges Gujarati, Komitee, and Ross – require parties to "endeavor to agree upon the requests to charge, to the extent possible," or "confer in good faith and attempt to resolve any disagreements"); United States Courts, E.D. Pa., *Judges' Info*, https://www.paed.uscourts.gov/judges-info/district-court-judges (last visited Mar. 17, 2021) (providing links to judges' procedures, three of whom – Judges Gallagher, Wolson, and Younge – require joint jury instructions).

forth in Rule 51 of the Federal Rules of Criminal Procedure, is to inform the district court "of the action the party wishes the court to take." Fed. R. Crim. P. 51(b). This gives the district court an opportunity to take the desired action and thereby avoid the error the party believes the court is making. *Puckett v. United States*, 556 U.S. 129, 134 (2009) (noting district court "can often correct or avoid the mistake"); *United States v. Abney*, 957 F.3d 241, 247 (D.C. Cir. 2020) (explaining point of rule "is to afford the district court the opportunity to consider [the objections], not to clutter the proceedings with needless objections" (quoting *United States v. Tate*, 630 F.3d 194, 197 (D.C. Cir. 2011)). An objection cannot fulfill this purpose where authority prevents the district court from taking the desired action. *Accord United States v. Scott*, 425 F.2d at 57 ("An exception would not have produced any results in the trial court.").

Related to this, there can be no concern about sandbagging the court where the district court's ruling is preordained. *Cf. Puckett*, 556 U.S. at 134 (noting one purpose of contemporaneous objection rule is to prevent sandbagging). The comments in the opinions quoted *supra* pp. 8-9 actually suggest the opposite concern – that counsel not burden the courts with objections on which there is no chance of prevailing.

C. ETHICAL LIMITATIONS AND CONVENTIONS OF CONTEMPORARY FEDERAL PRACTICE MILITATE AGAINST FORCING COUNSEL TO MAKE OBJECTIONS WHEN THERE IS A SOLID WALL OF CONTRARY CIRCUIT AUTHORITY.

1. Ethical Rules Arguably Preclude Making an Objection When There Is a Solid Wall of Contrary Circuit Authority.

Requiring attorneys to raise a claim in the face of a solid wall of contrary authority requires attorneys to walk an ethical line. Under Model Rule of Professional Conduct 3.1 – which has been adopted or has a parallel in almost all jurisdictions – it is an ethical violation to make an argument if there is not a non-frivolous legal basis for the argument. *See* Model Rules of Pro. Conduct r. 3.1 (Am. Bar Ass'n 1983). While the rule does allow "a good faith argument for an extension, modification or reversal of existing law," *id.*, good faith, like beauty, may be in the eye of beholder. Attorneys have been disciplined for making arguments that conflict with controlling precedent and/or failing to sufficiently distinguish controlling precedent. *See., e.g.*, *In re Butler*, 868 N.W.2d 243, 248-49 (Minn. 2015) (disciplining attorney for making arguments that had been "rejected by multiple federal district judges and the Eighth Circuit"); *In re Richards*, 986 P.2d 1117, 1119-20 (N.M. 1999) (disciplining attorney even though attorney relied on Supreme Court cases because cases distinguishable and attorney's argument that cases

did apply was not sufficiently persuasive to rise to level of good faith argument).

2. This Court, the Circuit Courts, and Noted Commentators Discourage Making Objections When There Is a Solid Wall of Contrary Circuit Authority.

Beyond ethical considerations, courts actively discourage counsel from raising issues – even when they are not frivolous, but simply weaker than others. As this Court explained in *Jones v. Barnes*, 463 U.S. 745 (1983), quoting from multiple commentators:

- "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-52.
- "Multiplicity hints at lack of confidence in any one [issue]. . . . [Experience] on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." *Id.* at 752 (quoting Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951)).
- "The effect of adding weak arguments will be to dilute the force of the stronger ones." *Jones*, 463 U.S. at 752 (quoting Robert L. Stern, *Appellate Practice in the United States* 266 (1981)).

- "A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." *Jones*, 463 U.S. at 753.

See also Davila v. Davis, 137 S. Ct. 2058, 2067 (2017) ("Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed." (Citations omitted.)); *cf. Reed v. Ross*, 468 U.S. 1, 16 n.11 (1984) ("For instance, in *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 2d 232 (1884), this Court held that indictment by a grand jury is not essential to due process under the Fourteenth Amendment. Surely, we should not encourage criminal counsel in state court to argue the contrary in every possible case, even if there were a possibility that some day *Hurtado* might be overruled.").

The courts of appeals have similarly discouraged raising weaker issues. The Ninth Circuit has advised:

> Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point – "just in case" – is likely to serve her client less effectively than one who concentrates solely on the strong arguments.

Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989). The Tenth Circuit has advised:

> The weeding out of weak claims to be raised on appeal is the hallmark of effective advocacy, because every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues and reduces appellate counsel's credibility before the court.

United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995) (citations and internal quotations omitted). The Third Circuit has advised that "the more claims an appellate brief contains, the more difficult for an appellate judge to avoid suspecting that there is no merit to any of them." *United States v. Turner*, 677 F.3d 570, 577 (3d Cir. 2012) (quoting *Johnson v. Tennis*, 549 F.3d 296, 302 (3d Cir. 2008)).

While such advice is generally wise, it can also have a chilling effect. A disturbing example can be found in *United States v. Pineda-Arellano*, 492 F.3d 624 (5th Cir. 2007). The defense there challenged the continuing vitality of this Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that prior convictions which enhance a sentence do not need to be proven to a jury beyond a reasonable doubt. *Pineda-Arellano*, 492 F.3d at 625. The defense argued this conflicted with the later holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact increasing a sentence has to be proven to a jury beyond a reasonable doubt. *Pineda-Arellano*, 492 F.3d at 625. The defendant acknowledged the argument was

foreclosed in the court of appeals, but "nevertheless raised it as his sole appellate issue to preserve it for Supreme Court review." *Id.*

The Fifth Circuit not only rejected the merits of the argument but suggested it should not even have been raised – and warned against raising it in the future. First, it publicly questioned defense counsel's competence and motive, asking "why so many defendants in this circuit have pursued reconsideration of *Almendarez-Torres*" and answering, "Probably because, like the mountain, it's there," and, "Defense counsel may also perceive some marginal tactical benefit in placing any roadblock in the way of expeditious conviction or punishment." *Pineda-Arellano*, 492 F.3d at 626. Second, it rejected the justification that it was necessary "to preserve the issue for further review." *Id.* Third, it warned against making such challenges in the future, stating, "It would be prudent for appellants and their counsel not to damage their credibility with this Court by asserting non-debatable arguments." *Id.*

What is particularly disturbing is that a court made this threat when there was at least some suggestion from this Court that *Almendarez-Torres* warranted reconsideration. In *Apprendi* itself, the Court acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi*, 530 U.S. at 489. In a later case, the Court described the question of whether *Almendarez-Torres* should be overruled as a "difficult constitutional question," which it then avoided deciding. *Dretke v. Haley*, 541 U.S. 386, 392-96 (2004). The following year, Justice Thomas opined

that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided" and "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in judgment). *See also Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006) (Thomas, J., dissenting from denial of certiorari) (urging that "the Court should address the ongoing validity of the *Almendarez-Torres* exception").[11]

This is a dramatic example of the no-win situation defense counsel will be in if the plain error rule is applied even when there is a solid wall of contrary circuit authority. On the one hand, counsel must raise the claim to avoid the demanding standard of plain error review. On the other hand, counsel risks criticism of the kind voiced in *Pineda-Arellano* and will suffer "damage[d] . . . credibility" that detracts from stronger arguments.[12]

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[11] The Court's conferences suggest concern about this issue continues, moreover. *See, e.g.*, Docket of No. 13-10640, *Ernest James McDowell, Jr. v. United States*, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-10640.htm (last visited Mar. 16, 2021) (petition challenging *Almendarez-Torres* denied only after response requested from Solicitor General); Docket of No. 10-5296, *Esteban Ayala-Segoviano v. United States*, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/10-5296.htm (last visited Mar. 16, 2021) (petition challenging *Almendarez-Torres* distributed for conference four times).

[12] The government suggests in its brief that *Rehaif* itself demonstrates these concerns do not require a futility exception, apparently because the defendant in *Rehaif* raised his claim. *See* U.S. Br. 26. But the 18 U.S.C. § 922(g) provision at issue in *Rehaif*

3. Requiring Counsel to Make Objections When There Is a Solid Wall of Contrary Circuit Authority Will Undercut Counsel's Credibility and Lessen Counsel's Ability to Resolve Matters Without Objection.

Requiring objections even in the face of a wall of contrary circuit authority is problematic for counsel in the district court in multiple ways. Initially, counsel will lose credibility with the court when counsel are forced to make motions based on arguments the courts of appeals have consistently rejected, such as the motions discussed *supra* pp. 9-13. Counsel will also lose credibility when they must resist agreeing to joint jury instructions, as discussed *supra* pp. 13-14, and/or other matters on which they might agree based on existing controlling authority. This will not only undercut counsel's credibility with the court, but make counsel appear uncooperative in resolving issues.

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was § 922(g)(5)(A), which is much less commonly charged than § 922(g)(1) and on which there was far less authority. *See United States v. Rehaif*, 888 F.3d 1138, 1142 (11th Cir. 2018) (acknowledging defendant's argument that "although several courts have ruled that knowledge of one's status as a convicted felon is not necessary for a conviction under § 922(g)(1), the question of whether knowledge is necessary for a conviction under § 922(g)(5)(A) is not settled"), *rev'd and remanded*, 139 S. Ct. 2191 (2019); TRACREPORTS, *Federal Weapons Prosecutions Rise for Third Consecutive Year*, Table 2 (Nov. 29, 2017), https://trac.syr.edu/tracreports/crim/492 (table reflecting cases from 2008 through 2017, showing approximately 54,000 cases with § 922(g)(1) as lead charge and fewer than 3,000 cases with § 922(g)(5)(A) as lead charge).

In addition, counsel will have to risk appearing obstructionist in front of the jury. It is well accepted trial practice that attorneys should avoid making objections that make them appear obstructionist, especially if the objection is certain to be overruled.[13] Attorneys who wish to preserve evidentiary issues even in the face of a wall of circuit authority will be forced into this position.[14]

Finally, counsel risks losing credibility with the client. As the client sees counsel's arguments being continually rejected, the client may come to question counsel's competence. This has an impact beyond just the client's feelings about counsel. Clients who view their counsel as ineffective can raise multiple claims that courts then have to devote judicial resources to resolving. These include motions for substitute counsel,

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[13] *See, e.g.*, Thomas A. Mauet, *Trial Techniques and Trials* 511 (9th ed. 2013) (recognizing "each side has a limited number of objections that it can use before the judge's and jury's patience are exhausted" and "stock" "falls" when objection lost); Cedric Ashley, *Juries Are Always Listening, Even When You Are Not Speaking*, 35 No. 5 GP Solo 12, 14 (Sept./Oct. 2018) ("Be selective with your objections. Make sure that when you object, you are virtually certain that the court will say: 'sustained.' "); Hon. Amy J. St. Eve & Gretchen Scavo, *What Juries Really Think: Practical Guidance for Trial Lawyers*, 103 Cornell L. Rev. Online 149, 163 n.20 (2018) (noting "jury research suggesting that '[i]f a lawyer continually makes frivolous objections that are routinely overruled by the trial judge, jurors take note, even to the point of keeping score' " (quoting Randy Wilson, *From My Side of the Bench: Jury Notes*, Advocate 90 (Fall 2013))).

[14] While some evidentiary objections can be dealt with outside the presence of the jury, others must be made contemporaneously in the presence of the jury.

motions for self-representation if motions for substitute counsel are denied, and claims of ineffective assistance of counsel made in new trial motions, on direct appeal, and/or in post-conviction proceedings under 28 U.S.C. § 2255. It thus is not just clients and counsel, but also courts, that have an interest in clients' satisfaction with counsel.

4. Requiring Counsel to Make Objections When There Is a Solid Wall of Contrary Circuit Authority Can Harm the Defendant by Irking the Prosecutor and Court and Placing the Credibility of the Defendant at Risk.

It is not just the credibility of counsel that is placed at risk by a futile objection in the face of a wall of circuit authority. When the objection includes or suggests a factual predicate, the objection places the credibility of the defendant himself at risk. As this Court has recognized in cases applying the "categorical approach" to prior convictions used to enhance a sentence, which requires a focus on the elements of the prior offense rather than the underlying conduct:

> A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense – and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish

> to irk the prosecutor or court by squabbling about superfluous factual allegations.

Descamps v. United States, 570 U.S. 254, 270 (2013). *See also Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016) ("At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, the defendant 'may have good reason not to' – or even be precluded from doing so by the court." (Quoting *Descamps*.)).

In a federal case, irking the prosecutor or the court can create risk in at least three ways. First, it can affect what, if any, plea offer the prosecutor makes. It is not uncommon for prosecutors to condition plea offers on a defendant's agreement not to litigate motions or other legal issues.[15] Assistant federal public defenders in the district in which Respondent is charged – the District of South Carolina – report they are frequently told there will be no plea offer if the defendant pursues certain pretrial motions.

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[15] *See, e.g.*, *Mostowicz v. United States*, 625 Fed. Appx. 489, 490 (5th Cir. 2015) (unpublished) (describing email from prosecutor stating that government would not enter into plea agreement if defendant pursued motion to suppress); *United States v. Dohm*, 1995 WL 460365, at *1, 62 F.3d 1426 (9th Cir. 1995) (table) (describing statement by prosecutor that plea offer would be withdrawn "[i]f I have to do any work on this case" or if case became too "complicated"); Memorandum and Order, at 6-7, *United States v. Cynthia Jones*, No. 3:08-cr-00887-MHP (N.D. Cal. Sept. 9, 2009), ECF No. 106 (describing plea offer that, inter alia, required defendant to "decline to litigate the case in any way").

Second, irking the prosecutor or court can affect the calculation of offense level under the sentencing guidelines. One of the main reasons for pleading guilty is to receive a 2- or 3-level reduction in offense level for "acceptance of responsibility." U.S.S.G. § 3E1.1.[16] And this reduction can be placed at risk by either a prosecutor or a court.

What federal trial attorneys and district judges commonly refer to as the "third point" – an additional point, in some cases,[17] for "permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently" – requires an affirmative motion by the government. U.S.S.G. § 3E1.1(b) & comment. (n.5). In some circuits, prosecutors may refuse to make the motion if a defendant files and litigates motions or other claims. *See United States v. Johnson*, 980 F.3d 1364, 1379-85 (11th Cir. 2020) (discussing cases). Sentencing recommendations may also be adversely affected when a prosecutor perceives a defendant as being overly litigious. *See, e.g.*, *United States v. Williams*, 976 F.3d 781, 783 (8th Cir. 2020) (higher sentence recommendation made by prosecutor after defendant sought to proceed

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[16] The reduction is extremely unlikely, if not impossible, when the defendant goes to trial. *See* U.S.S.G. § 3E1.1, comment. (n.2) (stating that adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt" and that adjustment applies to defendant who goes to trial only "[i]n rare situations").

[17] The offense level prior to the reduction must be 16 or greater. *See* U.S.S.G. § 3E1.1(b).

pro se so he could make pretrial motion and sentencing arguments because defendant's comments "reflect[ed] on the genuineness of his acceptance of responsibility").

In addition, the court, with or without the prosecutor's encouragement, may deny even the basic 2-level reduction. While a guilty plea is "significant evidence of acceptance of responsibility," U.S.S.G. § 3E1.1, comment. (n.3), the reduction is not guaranteed by a guilty plea. Rather, "[a] defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." U.S.S.G. § 3E1.1, comment. (n.1(A)). And courts have broad discretion in determining whether a defendant has accepted responsibility; "[i]ndeed, the sentencing judge's factual determinations on acceptance of responsibility are entitled to even greater deference than that accorded under a clearly erroneous standard." *United States v. Guerrero*, 768 F.3d 351, 365 (5th Cir. 2014) (internal quotation marks and citation omitted). This is because "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility," U.S.S.G. § 3E1.1, comment. (n.5), and it is the sentencing judge that "ha[s] the opportunity to observe [the defendant's] demeanor," *United States v. Morris*, 139 F.3d 582, 584 (8th Cir. 1998).

Finally, annoying the court can affect the sentence in more subtle ways. Courts have broad discretion in the selection of a sentence within the guideline range and/or whether and how much to vary or depart from

the guideline range. *See Gall v. United States*, 552 U.S. 38, 51 (2007) (extent of departure or variance from guideline range); *United States v. Sampson*, 898 F.3d 287, 313 (2d Cir. 2018) (whether to depart or vary from range); *United States v. Young*, 847 F.3d 328, 373 (6th Cir. 2017) (selection of sentence within range). A defendant's equivocation about facts could affect the exercise of this discretion even if it does not lead to outright denial of the acceptance of responsibility reduction. And these decisions approach being unreviewable so long as the court makes no legal error; review is "particularly deferential" and requires that the sentence "amounts to a 'manifest injustice or shock[s] the conscience.'" *United States v. Spoor*, 904 F.3d 141, 156 (2d Cir. 2018) (quoting *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) and *United States v. Rigas*, 583 F.3d 108, 124 (2d Cir. 2009)), *cert. denied*, 139 S. Ct. 931 (2019). There will be relief "only in rare cases." *United States v. Ressam*, 679 F.3d 1069, 1088 (9th Cir. 2012) (en banc).

A *Rehaif* claim offers a good illustration of this risk. An admission the defendant had been convicted of a crime punishable by a term of imprisonment exceeding one year accompanied by a suggestion the defendant did not know he or she had been convicted of such a crime might well be viewed, rightly or wrongly, with skepticism by a court. That could harm the defendant in two ways. First, in a case where the acceptance of responsibility reduction was not a sure thing, it might lead to a denial of the reduction. Second, in a case where the court grudgingly gave credit for

acceptance of responsibility, the court might grant a lesser departure or variance than it might otherwise have granted, decline to depart or vary downward at all, and/or choose a higher point within the guideline range. *See, e.g.*, *United States v. Mitchell*, 681 F.3d 867, 875, 884-85 (6th Cir. 2012) (basing degree of variance and selection of sentence within modified guideline range in part on defendant's minimization of his conduct, failure to take responsibility for crime, and lack of remorse). And a reviewing court might never know this, because sentencing courts are not required to provide detailed explanations for their rulings on acceptance of responsibility or selection of a sentence within the guideline range. *See Rita v. United States*, 551 U.S. 338, 358-59 (2007) (sufficient that district court listened to each argument, stated guideline range "appropriate," and stated sentence at bottom of range "not inappropriate"); *United States v. Marquardt*, 949 F.2d 283, 285-86 (9th Cir. 1991) (rejecting requirement that court state specific reasons for denial of acceptance of responsibility).

IV.

CONCLUSION

The plain error rule should not apply where, as here, there was a solid wall of contrary circuit authority. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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