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 FORMER UNITED STATES DISTRICT COURT JUDGES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Thomas M. Bondy
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Kory DeClark
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Andrew D. Silverman
Counsel of Record
Rachel G. Shalev
Katherine E. Munyan
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
asilverman@orrick.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici are two former United States District Court Judges who spent years overseeing criminal proceedings. They are now law professors who research and write about criminal justice policy. They remain dedicated to the proper administration of justice.

Judge Paul G. Cassell was a judge of the United States District Court for the District of Utah from 2002 until 2007. He is now on the faculty of the S.J. Quinney College of Law at the University of Utah.

Judge Nancy Gertner was a judge of the United States District Court for the District of Massachusetts from 1994 until 2011, leaving to be on the faculty of Harvard Law School.

INTRODUCTION AND SUMMARY OF ARGUMENT

Criminal defendants should not be penalized with plain-error review when they fail to raise in the district court objections that circuit courts have uniformly foreclosed. When an intervening change in law renders those once-futile claims viable, appellate courts should treat them as preserved and subject to the corresponding standard of appellate review, not the four-factor test elaborated in *United States v. Olano*, 507 U.S. 725 (1993). Amici therefore agree

---

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

with Respondent on the threshold question that the preserved-error standard applies, not plain-error review. Amici do not take a position on the other questions arising in the case, including whether an error under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), is structural and whether Respondent otherwise satisfies the third and fourth plain-error prongs under *Olano*.

As former federal district court judges, amici well understand the importance of claim preservation. When defendants raise their objections first in the district court, district judges—who are closest to the case—can avoid or fix errors, thereby sparing (or at least facilitating) appellate review and potentially averting remand or retrial. The contemporaneous-objection requirement and its appellate counterpart, the plain-error rule, also deter sandbagging by defense counsel.

But the interests in judicial economy and fairness those rules ordinarily advance are not served when the would-be objection is entirely foreclosed by a circuit consensus this Court later sweeps away. In such a scenario, there is nothing to fix and no tactical advantage to be gained from failing to object. Rigid insistence on claim preservation in those circumstances instead actively undermines efficient judicial administration, as it forces defendants to object at every turn, clogging up cases with kitchen-sink briefs and wasting the resources of already overburdened counsel and courts. It also unfairly rewards defendants whose counsel was either preternaturally prescient or ignorant, undiscerning, or even downright obstruc-

tionist, while punishing those whose counsel appropriately focused on arguments that were more likely to succeed.

The rule Respondent and amici advance here not only makes sense but also finds strong support in this Court's precedents—the Government's argument to the contrary notwithstanding. And its circumscribed scope should assuage the Court's concern that recognizing it would promote, rather than frustrate, the values that animate claim-preservation rules. Critically, an unraised claim should not be treated as preserved merely because the defendant's circuit has rejected it. Rather, an objection is futile and thus exempt from plain-error review only when *all* the circuits to have addressed the claim of error have rejected it.

Because the courts of appeals "uniform[ly]" held at the time of Respondent's plea that knowledge of prohibited status was not an element of an offense under 18 U.S.C. § 922(g) and § 924(a)(2), Government's Opening Brief (OB) 4, Respondent's claim of error should not be subject to plain-error review, even though Respondent raised it for the first time on appeal. The judgment below should therefore be affirmed if the Court determines that *Rehaif* error is structural or if the Government cannot carry its burden to show on these facts that the error was harmless.

ARGUMENT

I. Respondent's Futility Exception To Plain-Error Review For Uniformly Foreclosed Arguments Promotes Judicial Economy And Fairness.

At the trial level, the contemporaneous-objection rule directs litigants to raise objections "when the court ruling … is made or sought." Fed. R. Crim. P. 51(b). Plain-error review "sets forth the consequences" on appeal when litigants fail to do so. *Puckett v. United States*, 556 U.S. 129, 135-36 (2009). Those two rules work in tandem to "induce the timely raising of claims and objections" in district court prior to appellate proceedings. *Id.* at 134. And in the typical case, they promote judicial efficiency and the fair treatment of parties. *See Henderson v. United States*, 568 U.S. 266, 278 (2013); *see generally* Fed. R. Crim. P. 2 (rules of criminal procedure "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").

As former district court judges, amici well understand, and are committed to advancing, efficiency and fairness in judicial proceedings. Amici are the first to agree that, in ordinary circumstances, defendants should timely raise issues in the trial court and face heightened appellate review when they do not. After all, trial judges' proximity to the case and familiarity with the parties put them "in the best position" to address issues brought to their attention in the first instance. *Puckett*, 556 U.S. at 134; *see*

generally Neely v. Martin K. Eby Const. Co., 386 U.S. 317, 325 (1967) (stating that some issues "should be passed upon by the district court … because of the trial judge's firsthand knowledge of witnesses, testimony, and issues"). Avoiding or fixing errors at the district court level—e.g., giving a curative instruction or granting the defendant "an immediate remedy"—can preempt a costly appeal and remand, *Puckett*, 556 U.S. at 140, thereby sparing the "needless[] ping-pong back and forth between the district court and court of appeals, with the parties expending substantial resources fighting over a problem that could have been readily identified and cured up front." *United States v. Uscanga-Mora*, 562 F.3d 1289, 1294 (10th Cir. 2009) (Gorsuch, J.). At the very least, bringing possible errors to the district court's attention ensures that the factual record is adequately developed for appeal. *See Puckett*, 556 U.S. at 134, 140.

The pairing of the contemporaneous-objection rule and plain-error review also promotes fairness in the typical case. The contemporaneous-objection rule recognizes that it is fair to require a party who perceives an error to inform the court and opposing counsel of the error right away, rather than capitalizing on it by "remaining silent" and "belatedly raising the error only if the case does not conclude in his favor." *Id.* at 134. And plain-error review reduces any incentive to "sandbag[]" the prosecution (and the district court) in this way. *Id.*

Critically, however, requiring defendants to raise in the district court arguments that are squarely

foreclosed across the circuits does nothing to advance judicial economy and fundamental fairness. In fact, in those "rare circumstances," "unyielding application of the general rule[s]" of contemporaneous objection and plain error "would disserve any perceivable interest." *Lee v. Kemna*, 534 U.S. 362, 379-80 (2002).

A. Efficiency.

It is a fundamental maxim that "[g]ood judicial administration is not furthered by insistence on futile procedure." *Wade v. Mayo*, 334 U.S. 672, 681 (1948). That is particularly true here. Where uniform precedent bars an argument for error, the district court cannot "correct or avoid the mistake," *Puckett*, 556 U.S. at 134, because at that point there is no mistake at all. The court can only deny the objection. The court, in theory, could allow the parties to supplement the record based on the defendant's farfetched objection, but the parties, and the district court, would be shooting in the dark, not knowing what the record would require in the hypothetical world in which there were an error.

Without a futility exception, counsel may feel duty bound "to file one 'kitchen sink' brief after another, raising even the most fanciful defenses that could be imagined based on long-term logical implications from existing precedents." *United States v. Smith*, 250 F.3d 1073, 1077 (7th Cir. 2001) (Wood, J., dissenting from denial of reh'g en banc). It is not just pointless to require a defense attorney to "mak[e] a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent," *Johnson v. United States*, 520 U.S. 461, 468 (1997), it

is harmful. As Justice Scalia put it, requiring a defendant to object "when the law is settled against" the claim of error "disserve[s] efficiency" and "the orderly administration of justice." *Henderson*, 568 U.S. at 284 (Scalia, J., dissenting); *see also Reed v. Ross*, 468 U.S. 1, 16 (1984) (explaining in the habeas context that it would "actually disrupt" proceedings to "encourag[e] defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition"); *see infra* 15-16 (discussing *Reed*'s applicability to this case).

For one thing, it may leave all but the luckiest defendants—the cert-lottery-winning Rehaifs of the world—worse off. It is well-documented that defense counsel—particularly for the many indigent defendants in the criminal justice system—are often "overworked and underpaid." *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016). "[M]any federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources." *Id.* (citation omitted). When defense counsel devote their limited time to pointless or even frivolous objections, they have less time to spend developing and presenting more fruitful arguments. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 34 (1997) ("Resource constraints impose a ceiling on how many things counsel can object to, how many claims can plausibly be raised.").

What's more, bloated arguments are bad arguments: As Justice Jackson put it, "receptiveness

declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one." Robert Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951), quoted in *Jones v. Barnes*, 463 U.S. 745, 752 (1983); *see also* Joseph Story, *Life and Letters of Joseph Story* 90 (William W. Story ed. 1851) ("Who's a great lawyer? He, who aims to say [t]he least his cause requires, not all he may."). That is, "[g]ood lawyers, knowing that judges and juries have limited time and limited patience, serve their clients best when they are judicious in making objections." *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1295 (11th Cir. 2014). Amici can confirm that in the harried district court setting, it is vital that defense counsel focus the court's attention on their clients' most meritorious arguments.

And yet the Government's position encourages defendants "to raise all possible objections at trial despite settled law to the contrary…, impeding the proceeding[s] and wasting judicial resources." *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996).

The already-heavily-burdened district courts should not have to contend with a flurry of such objections. In 2019 alone, each district court judge was responsible for an average of 440 civil cases and 137 criminal cases against new defendants. Admin. Office of the U.S. Courts, U.S. District Courts—Judicial Business 2019, https://tinyurl.com/2vds67x9 (last visited Mar. 25, 2021). And in just the last year,

filings in U.S. district courts increased by 13%, while terminations "held steady." Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2020, https://tinyurl.com/avxx3duz (last visited Mar. 25, 2021). The increased workload has led the Judicial Conference of the United States to ask Congress to create 77 new U.S. district court judgeships and convert eight temporary ones to permanent status. Andrew Kragie, *Federal Judiciary Seeks 79 New Judgeships Nationwide*, Law360 (Mar. 16, 2021), https://tinyurl.com/49zpjfmt (noting that "district court filings have increased 47% since 1990 while the number of district judges has risen barely 5%").

A sharp uptick in criminal cases—80% over the past 45 years—has contributed to the increase in workload. Christopher Slobogin, *The Case for a Federal Criminal Court System (and Sentencing Reform)*, 108 Cal. L. Rev. 941, 944 (2020). Criminal-defendant filings rose 11% in 2019 alone, and by another 3% in 2020. Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2019, https://tinyurl.com/asf6svap (last visited Mar. 20, 2021); Federal Judicial Caseload Statistics 2020, *supra*. It is also taking longer to resolve those cases: Despite speedy trial rules, the median length of a federal criminal case from initiation to termination has increased by over 200% in the last 45 years. Slobogin, *supra*, at 946-47.

The contemporaneous-objection rule and plain-error review are meant to streamline the judicial process, but in the circumstances of this case, they would have the perverse effect of clogging

overburdened district courts with frivolous filings, diminishing the quality of advocacy, and wasting precious resources. In short, it is "contrary to the efficient administration of justice, to expect a defendant 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).

B. Fairness.

The Government's rule also does nothing to advance the fairness interests behind claim-preservation rules. And indeed, it is itself deeply unfair.

Critically, when an objection is thoroughly foreclosed, there is no risk of sandbagging—the principal fairness concern that underlies claim-preservation rules. *Supra* 5. The point of sandbagging is to withhold an objection to an error the trial court could have fixed so that the defendant can keep in her back pocket a basis for reversal on appeal should she lose at trial. But the defendant gets no strategic benefit from sitting on an objection to an error that is at that time, and so far as anyone can reasonably anticipate, non-existent. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018) (noting the low risk of sandbagging where any benefit is "highly speculative"). If, as this Court said in *Henderson*, the "lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for 'plain error' *later*" is like a "unicorn," 568 U.S. at 276, then the lawyer who deliberately stays silent in the hope that this Court will overturn the

circuit consensus while the case is still on appeal and give her a second bite at the apple is a creature beyond fairy tale.

The real unfairness lies in saddling defendants with plain-error review for failing to raise thoroughly foreclosed claims that are only later proven viable. *See McCoy v. United States*, 266 F.3d 1245, 1274 (11th Cir. 2001) (Barkett, J., concurring in result only) ("To penalize a petitioner for failing to make a claim on appeal that had been explicitly rejected by every circuit in the country would be patently unfair."). As the Second Circuit has put it, "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), *abrogated on other grounds by Salinas v. United States*, 522 U.S. 52 (1997); *see infra* 21, 24 n.8 (discussing *Viola*).

The Government argues it is nevertheless worthwhile to require timely objections, even where, as in this case, "circuit precedent accords with uniform precedent in other circuits" in foreclosing the objection. OB26. After all, the Government says, the *Rehaif* petitioner ultimately succeeded in persuading this Court to knock down the wall of adverse precedent. *Id.* But this Court has already recognized that the "remote possibility" that a claim will succeed is no reason to reject a futility exception. *Reed*, 468 U.S. at 15. Anyway, and as Respondent notes, Rehaif's objection was not at that time futile—his

circuit had not yet directly addressed the specific objection he raised. Resp. Br. 17-18.

It is not reasonable or fair to expect defendants whose objections are truly futile to nevertheless raise them, especially given the conventional wisdom about how judges are likely to react to futile arguments. While amici believe that most judges would not retaliate against litigants, this fear might reasonably dissuade defense counsel from objecting. *See, e.g.*, *United States v. Baker*, 489 F.3d 366, 372 (D.C. Cir. 2007) (noting that defendant who objects to a particular Rule 11 error "risks angering the judge" and "possibly encourages the court to impose a more severe sentence"); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 989 n.363 (2006) (noting that "lawyers may refrain from making (and thus preserving) certain kinds of arguments out of a desire to avoid alienating judges before whom they regularly appear"). Counsel raising futile arguments may also fear sanctions. *See, e.g.*, *United States v. Robinson*, 251 F.3d 594, 596 (7th Cir. 2001) ("There is no legal objection to the imposition of sanctions for frivolous filings in a criminal case ...."); *In re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989) (imposing $2,500 sanction on defense counsel for "reassert[ing] an argument in a petition for rehearing which was summarily rejected on direct appeal, and which fl[ew] in the face of unambiguous, firmly established law"); *see also* Richard P. Mauro, *The Chilling Effect that the Threat of Sanctions Can Have on Effective Representation in Capital Cases*, 36 Hofstra L. Rev. 417, 417-19 (2007).

Counsel may also reasonably stay silent out of respect for their "responsibility not to annoy or antagonize judge or jury by objections perceived by the judge to be meritless"—as "impatience or undisguised incredulity on the part of the judge all too easily may be translated in the minds of the jury into a suggestion of insubstantiality of defense and of grasping at straws." *Honeycutt v. Mahoney*, 698 F.2d 213, 219 (4th Cir. 1983) (Murnaghan, J., dissenting). Defense counsel, in other words, find themselves in the precarious position of having to raise objections they know the judge will overrule at the expense of their standing with the court in order to avert plain-error review. At the very least, and as explained above, raising foreclosed arguments will draw attention away from arguments that remain viable and so may lower the defendant's chances of prevailing on those points. *Supra* 7-8.

In the end, the Government's rule rewards defendants with undiscerning counsel (those not judicious enough to focus on colorable claims), uninformed counsel (those too ignorant of the state of the law to know that the argument is foreclosed by precedent), and the highly risk-tolerant (those willing to chance upsetting the judge or jury, or risk burying other better arguments, to press Hail-Mary objections), while punishing defendants with prudent counsel. It does so even though all those defendants are similarly situated in the way that matters: The law was squarely against them at trial but in their favor by the time the case was on appeal. *See Henderson*, 568 U.S. at 274 (cautioning against applying plain-error review in such a way that would

result in "unjustifiably different treatment of similarly situated individuals").

II. Authority From This Court And Others Supports Respondent's Futility Exception.

Contrary to what the Government says, a futility exception when uniform circuit precedent forecloses an objection finds "meaningful support" in both this Court's precedents and lower-court decisions. OB25. Several lines of authority bolster it, and none bars it.

A. This Court's cases support the futility exception.

In closely related contexts—including direct appeals—this Court has recognized that futility should excuse procedural defaults.

1. For starters, the Court in *O'Connor v. Ohio*, 385 U.S. 92 (1966) (per curiam), held that a defendant's failure to raise in state court a then-futile objection later made viable by an intervening decision of this Court did not constitute an adequate state ground to preclude the Court's direct review (and reversal) of the conviction. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (characterizing *O'Connor*). Defendant O'Connor did not object when the prosecutor commented negatively on his invocation of his right to remain silent; he raised the issue only upon petitioning this Court, which had recently held in *Griffin v. California*, 380 U.S. 609 (1965), that such practice violates the Fifth Amendment. Because O'Connor could not "be charged with anticipating the *Griffin* decision," the Court explained that his "failure to object in the

state courts cannot bar [him] from asserting [his] federal right" or "strip him of his right to attack the practice following its invalidation by this Court." 385 U.S. at 93; *see also Anders v. California*, 386 U.S. 738, 746 n.* (1967) (citing *O'Connor* and noting that the claim, prior to *Griffin*, "did not raise an 'arguable' issue").

O'Connor was no one-off. In *Grosso v. United States*, 390 U.S. 62, 70-72 (1968), the Court reversed on direct review a defendant's state-court convictions for failing to pay an occupational tax on illegal gambling proceeds—notwithstanding the defendant's failure to object in state court that his convictions were obtained in violation of the Fifth Amendment's privilege against self-incrimination. At the time of trial, that objection was foreclosed by this Court's precedents, which the Court then overruled in the interim. *Id.* at 67, 70-71.[2]

[2] In a footnote in *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977), the Court suggested that the state could enforce its normal forfeiture rules even for objections that were foreclosed by state precedent. But that was dicta: The defendant had raised the objection on direct review in the state court, which did not find that it was procedurally defaulted. *Id.* at 237-40. Moreover, the Court did not say whether a procedural default of a futile objection would affect *federal* court review, either directly by the Supreme Court (as at issue in *O'Connor* and *Grosso*) or on federal collateral review. *See Morrison v. United States*, No. 16-cv-1517, 2019 WL 2472520, at *8-9 (S.D. Cal. June 12, 2019) (granting motion to vacate sentence under 28 U.S.C. § 2255 where petitioner showed cause per *Reed*). To maintain consistency with *O'Connor*, the footnote is best read as addressing only state-court proceedings.

2. The Court has endorsed the futility exception outside of the direct review context, as well. For instance, in *Reed*, the Court explained that, generally, a state-court defendant's failure to raise a timely objection under the state's procedure results in a procedural default that prevents the federal court from vindicating his or her claim on habeas review. 468 U.S. at 13-14. But the Court recognized an exception and held that the defendant had "cause" to excuse the default because the objection was "not reasonably available" at the time, a condition that occurs when (among other things) "a near-unanimous body of lower court authority" is aligned against the defendant. *Id.* at 16-17 (quotation marks and citation omitted); *see also Smith v. Estelle*, 602 F.2d 694, 709 n.19 (5th Cir. 1979) (excusing default where "the apparent futility of objecting to an alleged constitutional violation excuses a failure to object"); *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981) (adopting reasoning of Fifth Circuit in *Smith v. Estelle*).

The Government correctly observes (at OB27) that "prejudice" is also required to overcome a procedural default in the habeas context. *Reed*, 468 U.S. at 11-12. It makes sense that the petitioner would need to show something more—like prejudice—to excuse forfeiture in federal habeas cases. After all, "[f]ederal habeas challenges to state convictions … entail greater finality problems and special comity concerns." *Engle v. Isaac*, 456 U.S. 107, 134 (1982).[3] In

[3] In *Engle*, the Court declined to find cause to excuse a procedural default because (unlike in *Reed*) "numerous courts" had agreed with the defendant's basic position. 456 U.S. at 132-33; *see Reed*, 468 U.S. at 19-20 (distinguishing *Engle*).

federal cases on direct review, by contrast, "society's legitimate interest in the finality of the judgment has [not yet] been perfected" and "considerations of comity" are absent. *United States v. Frady*, 456 U.S. 152, 152-53, 164, 166 (1982). Indeed, where at least one of those interests (finality) was absent in cases like *O'Connor* and *Grosso*, the Court did *not* require the defendant to demonstrate prejudice before overlooking the procedural default. Here, both finality and comity concerns are absent, making the case for the futility exception even stronger than it was in those cases. Ultimately, though, the Government's argument is a non sequitur: To recognize the futility exception for federal cases on direct review is not necessarily to dispense with the prejudice inquiry. *See* Resp. Br. 15 n.6. A finding of futility means that the ordinary standard of review for preserved errors applies, which in most cases will involve a harmless-error analysis. *See* Fed. R. Crim. P. 52(a); *infra* 26.

3. The futility exception also accords with the well-settled principle that appellate courts directly reviewing convictions should apply the law as it currently stands, not as it stood at the time of trial. *See Griffith v. Kentucky*, 479 U.S. 314 (1987); *Washington*, 12 F.3d at 1138-39 (describing rule that the court "may consider issues not raised at trial 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" as "a corollary to the general principle that an appellate court should apply the law in effect at the time of appeal"). In *Griffith*, the Court recognized the fundamental unfairness that comes

from denying defendants whose cases are still on direct review the opportunity to avail themselves of favorable intervening Supreme Court authority. 479 U.S. at 323, 327-28. The restrictive view of claim-preservation the Government advances will deny many defendants the full benefit of *Griffith*'s holding—which the Court made clear applies "to *all* cases … pending on direct review … *with no exception*." *Id.* at 328 (emphasis added). It would instead leave them only with plain-error review.[4] And, as explained, it would do so for no good reason. *Supra* § I.

B. Lower court cases support the futility exception.

Looking beyond this Court, lower courts, both state and federal, have also endorsed a futility exception like the one Respondent and amici advocate. *Contra* OB26.

1. Several state supreme courts treat as preserved futile objections, subjecting them to the ordinary standard of review (rather than the state-law version of plain-error review) or rejecting waiver and forfeiture arguments that would otherwise render the

[4] While *United States v. Booker*, 543 U.S. 220, 268 (2005), noted in dicta that it "expect[ed]" courts applying supervening Supreme Court precedent to continue to ask "whether the issue was raised below and whether it fails the 'plain-error' test," the Court had no cause to (and did not) address whether those "ordinary prudential doctrines" apply in the extraordinary situation where a circuit consensus foreclosed the argument.

claim unreviewable.[5] These courts have rightly recognized that "the rationale for denying the defendant a more favorable standard of review is not applicable" and "considerations of fundamental fairness weigh against applying the less favorable standard of review to the defendant." *Vasquez*, 923 N.E.2d at 532-33. And they acknowledge that stringent application of preservation rules in this context "would be counterproductive to the goal of judicial efficiency." *Robinson*, 253 P.3d at 89.

2. Federal appellate courts have also seen the folly in imposing plain-error review on futile objections. *See* Br. in Opp. 11-12. As the Government points out, several of those cases involved defendants who failed to renew an objection already made, OB26,

---

[5] *See, e.g.*, *State v. Robinson*, 253 P.3d 84, 89-90 (Wash. 2011) (recognizing exception to state-law equivalent of Rule 52(b) where the court issues a new controlling constitutional interpretation after the completion of the defendant's trial that overrules the existing one and applies retroactively); *Commonwealth v. Vasquez*, 923 N.E.2d 524, 530-33 (Mass. 2010) (declining to apply less favorable standard of review where intervening Supreme Court decision abrogated then-governing precedent); *see also People v. Sandoval*, 161 P.3d 1146, 1153 n.4 (Cal. 2007) (excusing forfeiture where objection "would have been futile" because trial court was bound by precedent to deny it); *State v. Ledbetter*, 881 A.2d 290, 307 (Conn. 2005), *overruled on other grounds by State v. Harris*, 191 A.3d 119 (Conn. 2018) (excusing waiver where argument was foreclosed); *State v. Goodyear*, 413 P.2d 566, 567-68 (Ariz. 1966) (rejecting wavier argument where objection "would have been futile" under established law at the time of trial), *abrogated on other grounds by State v. Bush*, 423 P.3d 370 (Ariz. 2018); *see also* Resp. Br. 20-21 & n.8 (citing additional state cases).

but those courts did not uniformly limit their endorsement of the futility exception to those circumstances. *E.g.*, *Uscanga-Mora*, 562 F.3d at 1294 (stating broadly that "counsel will not be stuck with plain error review for having failed to voice an objection when doing so would have been futile"). And again, the difference in contexts only strengthens the case for the futility exception's application here. If it is futile to take further exception after the district court overrules the objection because it is *unlikely* the court will change its mind and adopt the defendant's position, *see Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997), it is even more pointless to raise an objection when the district court *cannot* adopt the defendant's position in the first place because of controlling precedent uniform across the circuits.

In any event, cases involving a failure to renew an objection are not the only ones in which the courts have spoken approvingly of a futility exception. They have also done so where the defendant never raised an objection. *See* Resp. Br. 19-20 (discussing cases); *see, e.g.*, *United States v. Cano-Varela*, 497 F.3d 1122, 1132 (10th Cir. 2007) (McConnell, J.) (noting that "we are hesitant to apply a heightened standard of review [of unpreserved Rule 11(c)(1) violations] when defense counsel did not object to receiving the court's help [in persuading defendant to plead guilty]," though ultimately reversing under the plain-error standard); *United States v. Byers*, 740 F.2d 1104, 1109 n.6 (D.C. Cir. 1984) (Scalia, J.) (taking a "departure from the usual rule that we will not consider claims of error raised here for the first time" where "counsel could well have thought the objection futile"); *United States v. Rivera*, 513 F.2d 519, 526 (2d Cir. 1975) (Friendly,

J.) (rejecting government's waiver argument because "counsel could have considered objection to be futile"); *cf. Baker*, 489 F.3d at 373 (observing that a "blanket plain error standard" ignores that some cases are "fitting candidate[s]" for "a less exacting standard than plain error").

In the habeas context, too, several circuit courts have followed *Reed* in recognizing that it would be "pointless (and indeed wasteful) to require a defendant to raise … a [once-]futile objection in the district court." *English v. United States*, 42 F.3d 473, 479 (9th Cir. 1994); *see Cross v. United States*, 892 F.3d 288, 296 (7th Cir. 2018) (relying on *Reed* to excuse procedural default where Supreme Court "abrogated a substantial body of circuit court precedent" rejecting defendant's untimely claim).

Even federal courts that treat foreclosed objections as unpreserved and therefore redressable on appeal only if *Olano*'s four factors are met have nevertheless modified that analysis to ease the harshness of plain-error review. The Second Circuit, for instance, has said that "[w]hen a supervening decision alters settled law, the three *Olano* conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant." *Viola*, 35 F.3d at 42; *see Baumgardner*, 85 F.3d at 1309 n.2 ("[W]e find the *Viola* analysis persuasive," for it "recogniz[es] that a defendant should not

be penalized for failing to challenge entrenched precedent.").[6]

C. Nothing prevents this Court from adopting the futility exception.

As explained above, good reason and good authority support the futility exception. No rule or precedent prevents the Court from treating the error here as preserved and therefore exempt from plain-error review.

The Government relies principally on *Johnson v. United States*, 520 U.S. at 467-68. *See* OB25, 27. But as Respondent has explained (Br. in Opp. 14; Resp. Br. 17), and the Government does not contest, a circuit split over the underlying legal issue put the defendant in *Johnson* on notice that an objection would *not* have been futile. *See United States v. Gaudin*, 515 U.S. 506, 527 (1995) (Rehnquist, C.J., concurring) (noting circuit split).

The Government's reliance (at OB27) on *Bousley v. United States*, 523 U.S. 614, 623 (1998), fails for that same reason. There, the Court refused to excuse for futility a procedural default in a collateral attack on a conviction. As in *Johnson*, the circuits were split

---

[6] Although some Second Circuit panels have questioned *Viola*'s validity after *Johnson v. United States*, 520 U.S. 461 (1997), *see, e.g.*, *United States v. Grote*, 961 F.3d 105, 116 n.3 (2d Cir. 2020), it has not been overruled and has been applied since *Johnson*, *see, e.g.*, *United States v. Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997); *United States v. Monteleone*, 257 F.3d 210, 223 (2d Cir. 2001).

at the time the defendant failed to raise the underlying legal claim in the lower courts. *See United States v. Bousley*, 950 F.2d 727 (8th Cir. 1991) (affirming conviction on direct appeal); *Bailey v. United States*, 516 U.S. 137, 142 (1995), *superseded by statute as recognized in Welch v. United States*, 136 S. Ct. 1257 (2016) (noting "conflict" in the circuits going back to at least 1988). *Bousley*, then, rejected a far broader notion of futility than the one advanced here. *See infra* 24-25.[7]

The Government also attempts to draw support from this Court's statement in *Johnson* that it lacks the authority to create "an exception" to Rule 52(b). OB27 (quoting 520 U.S. at 466). But that assumes that Rule 52(b) applies in the first place. It does not. As Respondent has explained, Rule 52 does not say that "unpreserved [errors] may be addressed *only* under Rule 52(b)," and indeed, the preexisting law that Rule 52 codifies, along with the values of fairness and efficiency the rule must be "interpreted" to advance, show that such errors should not be addressed under Rule 52(b) at all. Resp. Br. 9; *see id.* at 9-13.

---

[7] One of the appellate decisions the Government cites (at OB25-26)—*United States v. Knoll*, 116 F.3d 994, 1000 (2d Cir. 1997)—is inapposite for this same reason. In the other two, where the courts reviewed for plain error, the defendant did not argue that a less stringent standard of review should apply because the unraised argument was futile. *See United States v. Johnson*, 979 F.3d 632, 637 (9th Cir. 2020); *United States v. Hughes*, 401 F.3d 540, 547-48 (4th Cir. 2005). Those decisions, therefore, should be given little weight and anyway are wrong for the reasons offered elsewhere in this brief.

Rule 51, too, takes futile objections out of Rule 52(b)'s ambit. That rule provides that "[i]f a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Fed. R. Crim. P. 51. When an objection is thoroughly foreclosed across the circuits, a defendant lacks a meaningful "opportunity" to object to it, and so should not be "prejudice[d]" by the imposition of the plain-error standard.

Put another way, Rule 52(b) applies only to forfeited errors, but a defendant cannot forfeit an error that is not available in the first place: "[A]n appellant can only abandon an argument that was actually available to him, and thus may raise a new argument based on an intervening change in the law during the pendency of an appeal." *United States v. Lockhart*, 947 F.3d 187, 196 n.4 (4th Cir. 2020) (quotation marks omitted).[8]

III. Respondent's Futility Exception Is Appropriately Narrow.

The futility exception here is narrow, applying only in circumstances where it would indeed serve efficiency and justice.

First, it applies only to unraised claims that were foreclosed across the board. A claim is futile, and therefore tested for harmlessness rather than plain

[8] If the Court nonetheless believes it must apply Rule 52(b) to all unraised objections, even those that were foreclosed by uniform circuit authority, it should adopt the Second Circuit's approach, as articulated in *Viola*, which operates within Rule 52(b)'s strictures. *See* 35 F.3d at 42; *supra* 21-22.

error, only where every circuit to address the question (including the defendant's) has rejected it. In other words, it is not good enough that the argument "was unacceptable *to [a] particular court* at [a] particular time." *Bousley*, 523 U.S. at 623 (quoting *Engle*, 456 U.S. at 130 n. 35) (emphasis added). It must be "more generally unacceptable," *Smith*, 250 F.3d at 1075 (Wood, J., dissenting from denial of rehearing en banc), with a "nationwide rejection, by every court [to address it]," *McCoy*, 266 F.3d at 1273 (Barkett, J., concurring in result only). *Compare Engle*, 456 U.S. at 133 (claim not futile if "numerous courts agreed" with it at the time). In those circumstances, the objection truly is futile and efficiency and fairness counsel in favor of treating unraised claims as preserved.

This is not a difficult standard to administer. Indeed, courts already determine whether unraised objections would have been futile when they decide whether a preservation rule constitutes an adequate state ground to bar direct Supreme Court review or whether there is cause to excuse a procedural default on federal habeas review. *See supra* 14-16, 21. They do the same when applying doctrines of administrative exhaustion. Resp. Br. 15. More broadly, courts regularly ascertain the state of the law when determining, for instance, whether the law is clearly established for purposes of habeas relief or qualified immunity.

This case is proof of the rule's administrability, for even the Government acknowledges that Respondent was prosecuted "[c]onsistent with the courts of appeals' *uniform* interpretation of the felon-in-possession offense at that time." OB4 (emphasis added); *see*

Rehaif, 139 S. Ct. at 2195 (observing that, at the time of Rehaif's plea, "no court of appeals had required the Government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions").

Second, the futility exception just means that the plain-error framework is not applicable. It does not mean that the conviction or sentence must be vacated. Defendants who can avail themselves of the futility exception must still demonstrate that there was error under the new law.

All agree there was error in Respondent's case—indeed, the Government concedes the *Rehaif* error was plain. OB8. But in other cases, it may be that, even under the new law, there was no problem with the proceedings. That is especially likely when the intervening decision of this Court merely "fine tune[s]" the law in the circuits, rather than reversing or overruling it. *United States v. McGuire*, 79 F.3d 1396, 1410 (5th Cir.) (Wiener, J., concurring), *opinion vacated on reh'g en banc*, 90 F.3d 107 (5th Cir. 1996). And unless the error is structural or otherwise falls within a category of errors "that can be corrected regardless of their effect on the outcome," the Government will still have an opportunity (and the burden) to avert vacatur by showing that any error was harmless. *Olano*, 507 U.S. at 734-35. Under that standard, defendants who are "manifestly guilty" (OB 43) will not be entitled to relief.

Third, the futility exception is not a one-way ratchet that favors only defendants. As Respondent

indicates, the Government would also be able to avail itself of it. *See* Resp. Br. 14 n.5.

CONCLUSION

For the foregoing reasons, the plain-error standard does not apply, and this Court should affirm the judgment below if it determines either that *Rehaif* error is structural or that the Government cannot carry its burden to show that the error was harmless.

Respectfully submitted,

Thomas M. Bondy
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Kory DeClark
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA
94105

Andrew D. Silverman
Counsel of Record
Rachel G. Shalev
Katherine E. Munyan
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
asilverman@orrick.com

March 25, 2021