No. 11-9307

In the Supreme Court of the United States

ARMARCION D. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an error is "plain" for purposes of review under Federal Rule of Criminal Procedure 52(b) when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 646 F.3d 223. The order of the court of appeals denying the petition for rehearing en banc (Pet. App. 8a-18a) is reported at 665 F.3d 160. The order of the court of appeals denying panel rehearing (Pet. App. 19a) is not reported. The order of the district court denying petitioner's motion to correct his sentence (Pet. App. 5a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2011. A petition for rehearing en banc was denied on December 15, 2011 (Pet. App. 8a), and a petition for panel rehearing was denied on January 30, 2012 (Pet. App. 19a). The petition for a writ of certiorari was filed

on March 14, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rules of Criminal Procedure 35, 51, and 52 are reproduced in the appendix to this brief. App., *infra*, 1a-3a. The provision directly at issue here is Rule 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Louisiana, petitioner was convicted of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 60 months of imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. In January 2009, a police officer in Haynesville, Louisiana, initiated a traffic stop after observing a truck weaving across the center line of the road. As the officer approached the truck to obtain the driver's information, the officer saw a rifle magazine protruding from underneath the passenger seat, where petitioner was sitting. The officer instructed petitioner and the driver to step out of the vehicle for safety reasons. The driver then fled on foot, and the officer detained petitioner. When the officer returned to the truck, he found a loaded semiautomatic rifle under the passenger seat. Petitioner later admitted to the officer that he had received the rifle from the father of an acquaintance. He also admitted that he was a convicted felon and said that he would "take the gun charge." Presentence Investigation Report (PSR) para. 6; see PSR paras. 4-7;

5:09-cr-00111, Docket entry No. 53, at 7-11 (W.D. La. July 14, 2010) (Doc. No.) (change of plea hearing).

2. Petitioner was charged in a single-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). After the district court denied his motion to suppress the firearm found during the traffic stop, petitioner entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to suppress. See Doc. No. 41, at 1-2 (Feb. 1, 2010).

a. The PSR prepared by the Probation Office calculated petitioner's range under the advisory Sentencing Guidelines as 33 to 41 months, based on a total offense level of 19 and a criminal history category of II. See PSR para. 45. The PSR noted that petitioner, who was then 26 years old, had admitted to using marijuana since he was 14 and to doing so "daily prior to his arrest for the instant offense." PSR para. 39. The PSR also noted that petitioner had not received any substance abuse treatment. See *ibid.*

Petitioner did not object to the advisory Guidelines range, but did seek to clarify in a letter to the Probation Office that drug tests administered near the time of his offense showed that he had not been using marijuana at that time. See 10-30571, Document No. 511313422, at 1 (5th Cir. Dec. 6, 2010). Petitioner stated, however, that he "ha[d] had a drug problem for many years," "was never in a drug treatment program," and "may very well benefit from such a program at this point in his life." *Ibid.* In a subsequent sentencing memorandum, petitioner further stated that he "need[ed] professional treatment for drug abuse" and urged the court, on behalf of "his family and friends," to "do whatever [was] in its power to have treatment ordered for [him]." *Id.* at 8. At the sentencing hearing, petitioner again emphasized

to the court his "need for that drug treatment." Doc. No. 54, at 5 (July 14, 2010) (sentencing transcript).[1]

b. The district court sentenced petitioner to an above-Guidelines sentence of 60 months of imprisonment, to be followed by three years of supervised release. See Pet. App. 39a-40a; see also Doc. No. 54, at 28-29. The court found a "logical and easy connection" between petitioner's "criminal activities and drug use." *Id.* at 13. The court was "convinced" that if petitioner did not address his drug-abuse problem immediately, he would "be one of the people in the future whose life will be thrown away" and who would "face perpetual incarceration." *Id.* at 15. The "dilemma," the court observed, was that a term of imprisonment within the advisory Guidelines range would not leave petitioner in federal custody long enough to qualify for placement in the Bureau of Prisons' 500-hour Residential Drug Abuse Program. *Id.* at 12-13, 16, 21. The court therefore questioned whether it should order a longer period of imprisonment "because he needs that treatment," or instead "shorten [petitioner's] sentence just to get him out of the system more quickly?" *Id.* at 16-17.

The district court ultimately decided to impose the longer period of imprisonment in order to allow petitioner to obtain drug abuse treatment while in prison. The court explained that it was "not trying to be purely punitive," but that instead its goal was "to try to help" petitioner by providing him "with needed * * * medi-

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[1] Petitioner's letter to the Probation Office and his subsequent sentencing memorandum were not docketed in the district court, but that court considered them at the sentencing hearing. See Doc. No. 54, at 2-6. The court of appeals granted the government's unopposed motion to supplement the record on appeal with both documents. See 10-30571, Document No. 511315922, at 1 (5th Cir. Dec. 7, 2010).

cal care, or other correctional treatment in the most effective manner." Doc. No. 54, at 24 (quoting 18 U.S.C. 3553(a)(2)(D)). The court reiterated that it was imposing a non-Guidelines sentence "because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system." *Id.* at 28; see *id.* at 29 (explaining that the court had "to give him that length of time to do the programming and the treatment and the counselling that this defendant needs right now"). The court stated that the 500-hour treatment program "will be the best available" for petitioner and expressed its hope that he would receive treatment within that program. *Id.* at 28. When the court asked defense counsel for "any reason why that sentence as stated should not be imposed," counsel replied, "[p]rocedurally, no." *Id.* at 30.

c. Eight days after the sentencing hearing, petitioner filed a motion to correct his sentence pursuant to Federal Rule of Criminal Procedure 35. Rule 35 provides that, "[w]ithin 14 days" of a sentencing court's oral announcement of its sentence, "the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a); see Fed. R. Crim. P. 35(c). Petitioner argued in relevant part that the district court had committed a "clear error" within the meaning of Rule 35 when it had increased his sentence to make him eligible for drug treatment. According to petitioner, that increase was not permitted by 18 U.S.C. 3582(a), which states that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Following briefing from the parties, the court denied petitioner's motion. The court concluded that it "no longer ha[d] jurisdiction to correct any alleged error in [petitioner's] sentence pursuant to Rule

35(a), as almost sixty days ha[d] passed since the oral announcement of sentence." Pet. App. 6a.

3. a. The court of appeals affirmed. Pet. App. 1a-4a. The court first held that its review was for plain error, because petitioner's Rule 35 motion had not preserved his claim. *Id.* at 3a-4a.[2] Conducting plain-error review, the court recognized that this Court's intervening decision in *Tapia* v. *United States*, 131 S. Ct. 2382 (2011), had held that "it is error for a court to 'impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.'" Pet. App. 4a (quoting *Tapia*, 131 S. Ct. at 2393). The court of appeals therefore agreed with petitioner that the district court had erred in increasing his sentence so that he would be eligible for the Bureau of Prisons' drug treatment program. The court of appeals explained, however, that the error was plain "only if it 'was clear under current law *at the time of trial*.'" *Ibid.* (quoting *United States* v. *Jackson*, 549 F.3d 963, 977 (5th Cir. 2008), cert. denied, 130 S. Ct. 51 (2009)). Because at the time of petitioner's sentencing this Court "had not yet decided *Tapia*" and the court of appeals "had not yet addressed the question," the court of appeals concluded that "any error cannot be plain" and affirmed petitioner's sentence. *Ibid.*

b. The court of appeals denied rehearing en banc by a divided vote. Pet. App. 8a. Judge Haynes, joined by Judge Dennis, dissented from the denial of rehearing en banc. *Id.* at 9a-18a. Judge Haynes argued in relevant part that the case was "worthy of the full court's consideration," because in her view the question of "whether

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[2] Petitioner does not dispute (Pet. 6 n.2) the court of appeals' conclusion that his Rule 35 motion failed to preserve his claim of error and that the claim was therefore forfeited.

the 'obviousness' of [an] error made is judged at the time of the error or at the time of appeal" was the subject of both an intra-circuit and inter-circuit conflict. *Id.* at 12a-13a, 18a.

4. Shortly after the filing of the petition in this case, the court of appeals sua sponte granted initial hearing en banc to consider in another case the question presented here. See *United States* v. *Escalante-Reyes*, 11-40632, Document No. 511798245 (5th Cir. Mar. 22, 2012). The government notified the Court of that development in its brief at the certiorari stage, although in its view plenary review of this case was warranted in light of the deep circuit conflict (which *Escalante-Reyes* could not eliminate) and petitioner's impending release date in May 2013 (which counseled against deferring review). See Gov't Br. 16-17.

On July 25, 2012, after this Court had granted a writ of certiorari but before petitioner filed his merits brief, the en banc court of appeals ruled in a divided opinion that "where the law is unsettled at the time of trial but settled by the time of appeal, the 'plainness' of the error should be judged by the law at the time of appeal." *United States* v. *Escalante-Reyes*, 689 F.3d 415, 423 (5th Cir. 2012). Judge Smith, joined by Chief Judge Jones and Judge Clement, and joined in relevant part by Judge Garza, dissented on the ground that the plainness of an error should be judged based on the law at the time of forfeiture. See *id.* at 426-431. Judge Garza, joined by Chief Judge Jones and Judges King, Smith, and Clement, dissented on the ground that "[b]y creating an exception to the forfeiture rule in cases where an objection would have served an important function, * * * the majority has turned the basic rules of error preservation upside down." *Id.* at 454. Judge Owen dis-

sented on the ground that although in her view the error was plain, the error did not seriously affect the fairness, integrity, or public reputation of the proceedings in light of the facts of the case. *Id.* at 455.

SUMMARY OF ARGUMENT

In this case, the relevant law was unsettled at the time of sentencing, petitioner did not object and call the legal issue to the attention of the prosecutor and district court, and the court sentenced petitioner in a way that was debatably correct at the time but became clearly incorrect by the time of appeal. In those circumstances, the court of appeals correctly held that the error was not clear or obvious for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b).

A. In federal criminal cases, a defendant ordinarily is precluded from challenging any error to which he did not timely object during his trial or sentencing. That requirement of a contemporaneous objection serves vital judicial interests, including the avoidance of inefficient appeals and remands by permitting district courts to remedy errors in the first instance. Rule 52(b) provides a limited and strictly circumscribed exception to that general rule by allowing courts to correct forfeited errors in exceptional circumstances involving particularly egregious mistakes. But the situation here—where the law is unsettled at the time of trial but clear by the time of appeal—is not an exceptional circumstance; rather, it is a common one. As a result, the text, structure, history, and purposes of Rule 52(b) all indicate that an error is not plain when the law is unsettled at the time the defendant forfeits his claim of error.

Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered, even though it was

not brought to the court's attention." By its terms, the rule specifies that what is being "considered" and what was "not brought to the court's attention" are identical: "plain error." That reading of Rule 52(b)'s text is consistent with this Court's understanding of the rule as a remedy for error "so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). It is also consistent with Rule 52(b)'s restatement of existing law, which had applied the plain-error doctrine to forfeited errors whose plainness would have been the same at trial as on appeal. Moreover, it furthers each of the policies that underpins Rule 52(b) by promoting judicial economy, ensuring development of the record, safeguarding the district court's role as the court of first instance, minimizing strategic timing of objections, and allowing for correction of obvious miscarriages of justice.

B. Petitioner and his amicus are virtually silent with respect to the text, history, and purposes of Rule 52(b). But none of the considerations on which they do rely—not this Court's decision on Rule 52(b) in *Johnson* v. *United States*, 520 U.S. 461 (1997), nor its decision on retroactivity in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), nor various policy rationales—supports the result petitioner seeks. *Johnson* relaxed the plain-error standard when a timely objection would be pointless under contrary controlling precedent, but that holding does not extend to cases like this one in which a timely objection could be quite helpful. Even assuming *Johnson* interprets the plain-error standard generally, it requires examining the purposes underlying Rule 52(b), and here those purposes cut strongly in favor of correct-

ing only forfeited errors whose plainness would have been apparent at trial. With respect to principles of retroactivity, they are relevant to the substantive law that applies at the first prong of plain-error review (*i.e.*, whether error occurred), but they shed no light on the second prong of plain-error review (*i.e.*, whether the error was obvious). Finally, the various policy rationales advanced by amicus lack merit and do not fully account for all of the purposes of plain-error review.

ARGUMENT

UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 52(b), AN ERROR IS NOT PLAIN WHEN THE LAW IS UNSETTLED AT THE TIME THE CLAIM OF ERROR IS FORFEITED

If a defendant in a criminal case forfeits a claim of error by failing to object at the time the error occurs, he may obtain relief on appeal only by satisfying the rigorous requirements of the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b). That standard requires, among other things, that the error at issue be clear or obvious. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The question presented here, which this Court reserved in *Olano*, is whether an error is obvious if "the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Ibid.* Petitioner answers that question yes. He contends that the district court's sentence in this case should be reversed, even though he did not object at the time and even though his sentence was not obviously incorrect under then-existing law, because the court's sentencing error became clear by the time that he appealed.

That contention is at odds with the basic premise of the Federal Rules, which is that a defendant must pre-

serve his claim of error in the district court. Rule 52(b) provides a narrow and limited exception to that general rule when an objection would be futile (because the law is settled against the defendant) or when an objection should be unnecessary (because the error is obvious under existing law). But when the law is unsettled on a debatable legal question, that is the classic case when an objection can be helpful to the court and the parties. In that circumstance, a contemporaneous objection has all of its usual benefits, including that it may spur the court to avoid the error in the first place (as this case illustrates). Accordingly, Rule 52(b)'s text, structure, history, and purposes all indicate that an error is not plain if the law is unsettled at the time when the error occurs.

A. The Structure, Text, History, And Purposes Of Rule 52(b) Indicate That An Error Is Not Plain When The Law Is Unsettled At The Time Of Forfeiture

In federal criminal cases, a defendant ordinarily is precluded from challenging any error to which he did not timely object during his trial or sentencing. That requirement of a contemporaneous objection serves vital judicial interests. A central purpose is avoiding wasteful appeals and remands by permitting district courts to remedy errors in the first instance. Rule 52(b) provides a limited and strictly circumscribed exception to that general rule; it allows courts to correct forfeited errors in exceptional circumstances involving particularly egregious mistakes. But the situation here—where the law is unsettled at the time of trial but clear by the time of appeal—is not an exceptional circumstance. It is instead a common one, in which the failure to timely object precludes relief under Rule 52(b).

1. Rule 52(b) grants courts the limited authority to correct forfeited errors in exceptional circumstances involving particularly egregious mistakes

a. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); see *Frady*, 456 U.S. at 162-163. In criminal cases, that principle is embodied in Federal Rule of Criminal Procedure 51(b). That rule "tells parties how to preserve claims of error: 'by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting Fed. R. Crim. P. 51(b)). "Failure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error." *Ibid.* (citing *United States* v. *Young*, 470 U.S. 1, 15 & n.12 (1985)).

Beyond Rule 51(b), the requirement of a contemporaneous objection appears throughout the Federal Rules of Criminal Procedure, many of which require a defendant to object to a particular aspect of the proceedings in order to preserve a claim of error. See, *e.g.*, Fed. R. Crim. P. 12(e) (requiring an objection for certain pretrial rulings); Fed. R. Crim. P. 15(g) (requiring an objection to deposition testimony); Fed. R. Crim. P. 29 (setting time limits for filing a motion for a judgment of acquittal); Fed. R. Crim. P. 30(d) (requiring an objection to jury instructions); Fed. R. Crim. P. 32(f) (requiring

the parties to object in writing to the Presentence Report within 14 days of issuance); Fed. R. Crim. P. 33(b) (setting time limits for filing a motion for a new trial). The same contemporaneous-objection requirement applies in the context of the Federal Rules of Civil Procedure and Evidence. See Fed. R. Civ. P. 46 (requiring an objection to rulings in a civil action); Fed. R. Evid. 103(a) (requiring an objection for evidentiary rulings).

As all of those Rules recognize, the requirement of a contemporaneous objection serves critical judicial interests. By objecting, a defendant "may prevent an error from happening in the first place, either because the judge sustains the defendant's objection or the prosecutor backs off, fearing that a trial-level victory might sow the seeds for a later appellate reversal." Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 958 (2006) (Heytens); see *Puckett*, 556 U.S. at 134; *Wainwright* v. *Sykes*, 433 U.S. 72, 88 (1977). In addition, the district court "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Puckett*, 556 U.S. at 134. Timely objections therefore conserve scarce judicial resources and "reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004).

Moreover, "even when the judge and prosecutor disagree with the defendant's view of the law, a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, [] state on the record the basis for [the court's decision]," or provide alternative grounds for that decision. Heytens 958; see *Puckett*, 556 U.S. at

134; *Wainwright*, 433 U.S. at 89. Requiring a contemporaneous objection thus "ensures full development of the record, prevents strategic timing of objections meant to secure a 'second bite at the apple,' gives incentives for the diligence and zealousness of trial counsel and the defendant, minimizes the 'sandbagging' of trial courts, * * * and safeguards the district court's role as the court of first instance in our federal system." *United States* v. *Escalante-Reyes*, 689 F.3d 415, 434 (5th Cir. 2012) (Smith, J., dissenting); see *Puckett*, 556 U.S. at 134, 140.

As petitioner recognizes (Br. 9-10, 13), the basic difference between a defendant's preservation of a claim of error and forfeiture of the claim is reflected in Federal Rule of Criminal Procedure 52. When the defendant preserves his claim of error, it is governed by the harmless-error standard of Rule 52(a). See *Olano*, 507 U.S. at 731. But when the defendant forfeits his claim of error, it is governed by the more demanding plain-error standard of Rule 52(b). *Ibid.* The dividing line between Rule 52(a) and (b) is what occurred at the trial level—specifically whether the defendant raised a timely objection to the claimed error. See *id.* at 742 (Kennedy, J., concurring) (noting "the difference under Rule 52 between those cases where an objection has been preserved and those where it has not"). Broadly speaking, the issue here is whether what took place at trial—*i.e.*, whether an error was debatable or clear under the law at the time—continues to be relevant in determining whether an error is plain when applying Rule 52(b).

b. In construing Rule 52(b), this Court has recognized that it provides "a limited exception to" the preclusive effect of failing to preserve error at trial. *Puckett*,

556 U.S. at 135; see *id.* at 134 ("If an error is not properly preserved, appellate-court authority to remedy the error * * * is strictly circumscribed."). The Court has therefore long emphasized that the power to correct forfeited errors should be exercised only in "exceptional circumstances," *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); it should be "used sparingly" to set aside only "particularly egregious errors," *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163 & n.14). The Court has "repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135 (quoting *Young*, 470 U.S. at 15). Satisfying the plain-error standard "is difficult, 'as it should be.'" *Ibid.* (quoting *Dominguez Benitez*, 542 U.S. at 83 n.9).

Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." To qualify for relief under that standard, a criminal defendant must establish there was "an error or defect * * * that has not been intentionally relinquished or abandoned"; the error was "clear or obvious, rather than subject to reasonable dispute"; and the error "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Puckett*, 556 U.S. at 135 (internal quotation marks omitted). Even "if the above three prongs are satisfied," the court "has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks and brackets omitted).

c. The question presented here concerns the second prong of plain-error review, *i.e.*, whether a claimed legal error is clear or obvious. Specifically, the question is when during the criminal proceedings to assess the error's obviousness. In *Olano*, this Court recognized that, "[a]t a minimum," an error must be "clear under current law." 507 U.S. at 734. The *Olano* Court, however, expressly reserved judgment on the case "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Ibid.* In other words, the Court in *Olano* left open the question of whether a forfeited error must be obvious at the time when it occurs *as well as* at the time when it is considered for correction.

In *Johnson* v. *United States*, 520 U.S. 461 (1997), the Court addressed how to apply the plain-error rule when the law is settled against the defendant at the time of trial but changes in his favor by the time of appeal. The Court reasoned that requiring a defendant to object in that circumstance "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." *Id.* at 468. The Court thus held that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration." *Ibid.*[3] As in *Olano*, however, the Court in *John-*

[3] Justice Scalia did not join that portion of the Court's opinion finding the error to be plain, nor did he join the Court's discussion of whether the error (which was submitting the issue of materiality in a perjury prosecution to the judge rather than the jury) had affected the defendant's substantial rights. See *Johnson*, 520 U.S. at 463 n.*. The Court was unanimous, however, that even if the error had affected substantial rights, it did not warrant reversal of the defendant's conviction because

son did not address whether an error can be plain if the law is unsettled at the time of the error but becomes clear at some later point in the proceedings.

Petitioner and his amicus characterize the choice as between a time-of-trial rule and a time-of-appeal rule. See Pet. Br. i; NACDL Amicus Br. 3. Rule 52(b), however, applies equally at the trial level; it is not a rule of appellate procedure. See Fed. R. Crim. P. 1(a)(1); *Frady*, 456 U.S. at 179 (Brennan, J., dissenting) (noting that Rule 52(b) is "applicable to all stages of all criminal proceedings in federal courts"); *United States* v. *Thompson*, 27 F.3d 671, 673 (D.C. Cir.) (reviewing a claim raised for the first time in a post-verdict motion for plain error), cert. denied, 513 U.S. 1050 (1994). The issue here equally can face a district court, which may realize that an earlier ruling has become incorrect in light of an intervening decision from this Court or a court of appeals. The precise question is therefore whether (as petitioner contends) an error that is debatable when it is committed only needs to be plain at the time of its consideration or whether (as the government contends) an error must be plain both when it is committed and when it is later considered for correction.[4]

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the error had not seriously affected the fairness, integrity, or public reputation of the proceedings. See *id.* at 469-470.

[4] This case involves only a claim of sentencing error under *Tapia* v. *United States*, 131 S. Ct. 2382 (2011). It therefore does not present the question whether an error should be corrected on plain-error review, even when the law was unclear when the alleged error occurred, where an intervening decision establishes that the defendant was convicted "for an act that the law does not make criminal," which "inherently results in a complete miscarriage of justice." *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (granting relief on that basis under 28 U.S.C. 2255); cf. *Frady*, 456 U.S. at 166 (making clear that "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would

2. The text of Rule 52(b) indicates that an error must be plain when it occurs to qualify for relief

a. The text of Rule 52(b) indicates that an error must be plain both at the time of forfeiture and at the time of review. Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[5] By its terms, Rule 52(b) specifies two different times at which a "plain error" might be identified: first, at the time it occurs, when the obvious error could have been (but was not) "brought to the court's attention"; and, second, at some later point in time, when the obvious error may nonetheless be "considered." In each case, the subject that is "not brought to the court's attention" but may still be "considered" is identical: it is "plain error." Put another way, an error cannot be "considered" under Rule 52(b) unless it had the same character at the time of forfeiture as at the time of review: it must have been "plain" then as now.

Although the first clause of Rule 52(b) is phrased in the present tense—"plain error that affects substantial rights"—that does not mean the error only needs to be

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exist on direct appeal" under the plain-error rule); *Bousley* v. *United States*, 523 U.S. 614, 623 (1998) (noting that actual innocence is an exception to procedural default by failing to raise an issue on direct appeal). Petitioner's claim is not one of actual innocence based on an intervening decision.

[5] Until 2002, Rule 52(b) provided that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b) (1950). In 2002, Rule 52(b) was amended to delete the reference to "defects," but the amendment was "intended to be stylistic only" and did not alter the rule's meaning. Fed. R. Crim. P. 52(b) advisory committee's note (2002 Amendments).

plain at the time of review. Such a reading would fail to account for Rule 52(b)'s second clause, which states that a plain error may be considered, "*even though it was not brought to the court's attention*." Fed. R. Crim. P. 52(b) (emphasis added). The second clause is backward-looking; it uses the past tense to indicate that what is being "considered"—"plain error"—is the same thing that "was not brought to the court's attention." The second clause thus signals that the error subject to correction has retained its plain character from the time of forfeiture to the time of review. Cf. *Greene* v. *Fisher*, 132 S. Ct. 38, 44 (2011) (use of "backward-looking language" in federal habeas statute required assessing law as of the time that state courts rendered their decision).

In *Escalante-Reyes*, the court of appeals asserted that "a more natural reading" of the second clause "is that 'it' refers back" only to the noun "error" and not to the entire antecedent noun phrase "plain error that affects substantial rights." 689 F.3d at 419. But the court offered nothing in support of that assertion, nor has any other court to adopt petitioner's reading done so based on the text of Rule 52(b). A pronoun is a substitute for a noun or noun phrase whose referent is named or understood in context. See, *e.g.*, *The Cambridge Encyclopedia of the English Language* 467 (2d ed. 2003). Here, nothing suggests that the pronoun "it" in the second clause plucks out only the noun "error" in the first clause as a referent; rather, the pronoun "it" refers naturally in context to the entire antecedent noun phrase, "plain error that affects substantial rights." Accordingly, the ordinary meaning of Rule 52(b) indicates that an error must be "plain" both when "it was not brought to the court's attention" and when it is subsequently "considered" for correction.

b. That reading of Rule 52(b)'s text is consistent with this Court's understanding of the plain-error rule. In *Frady*, the Court stated that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." 456 U.S. at 163. The courts of appeals have often repeated that characterization of the narrow scope of plain-error review. See, *e.g.*, *United States* v. *Delgado*, 672 F.3d 320, 330 (5th Cir. 2012) (en banc), petition for cert. pending, No. 11-10492 (filed May 22, 2012); *United States* v. *Turner*, 651 F.3d 743, 748 (7th Cir.), cert. denied, 132 S. Ct. 863 (2011); *United States* v. *Boyd*, 640 F.3d 657, 669 (6th Cir.), cert. denied, 132 S. Ct. 271 (2011); *United States* v. *King*, 559 F.3d 810, 814 (8th Cir.), cert. denied, 130 S. Ct. 167 (2009); *United States* v. *Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007).

That focus on participants in the trial court proceedings necessarily forecloses relief under the plain-error standard when an error becomes "plain" only at some later point in time. As the Ninth Circuit has explained, plain error is "error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection." *United States* v. *Turman*, 122 F.3d 1167, 1170 (1997). District judges are expected to be "knowledgeable, not clairvoyant." *Ibid.* "When the law is such that an experienced district judge cannot be expected to detect the error on his own, that is precisely when it is most important for the parties to object." *Ibid.* Or as the Fourth Circuit has put it, "[i]f the contemporaneous objection requirement is to have any real force, presumably an objection would be required (and review would be barred for failure to object) in the

circumstance where the law at the time of trial is unclear as to whether the district court's proposed course would constitute error." *United States* v. *David*, 83 F.3d 638, 643 (1996).

More generally, treating an error as plain on appeal even though it was debatable at trial would be at odds with this Court's restrictive approach to plain-error review. The courts of appeals repeatedly have recognized that, under this Court's plain-error decisions, "only the clearest and most serious of forfeited errors should be corrected on appellate review." *United States* v. *Padilla*, 415 F.3d 211, 223 (1st Cir. 2005) (en banc); see *United States* v. *Robinson*, 627 F.3d 941, 956 (4th Cir. 2010) ("Plain error review exists to correct only the most grievous of unnoticed errors."); *United States* v. *Conley*, 291 F.3d 464, 470 (7th Cir. 2002) ("It is well-established that the plain error standard allows appellate courts to correct only particularly egregious errors for the purpose of preventing a miscarriage of justice."). Plain-error review "concentrates on 'blockbusters'" and "notice[s] unpreserved errors only in the most egregious circumstances." *United States* v. *Taylor*, 54 F.3d 967, 972-973 (1st Cir. 1995).

Nothing exceptional or egregious characterizes the circumstance presented here, *i.e.*, when the relevant law was unclear at the time of trial and no objection was made to the prosecutor's actions or court's ruling, but it has become clear by the time of appeal that the prosecutor or judge erred. That circumstance is not only commonplace in federal criminal cases; it is a structural feature of a tiered judicial system with appellate review. Parties are expected to develop the law by alerting trial courts to their positions on open issues and appealing if courts do not resolve the issues in their favor. It is un-

exceptional for a judge to overlook an issue not resolved by precedent when no one raises it. The fact that petitioner claims a type of error that is routine, and that a reasonably experienced district judge could not have anticipated it under then-existing law, confirms what the text of Rule 52(b) says: it is not the sort of "plain error" that although "not brought to the court's attention" may still be "considered."

3. The history of plain-error review and Rule 52(b) confirms that an error must be plain when it occurs to qualify for relief

a. In *Atkinson*, the Court explained that the plain-error doctrine provides for only limited review of forfeited claims. The Court emphasized that unpreserved errors ordinarily do not merit reversal, based on "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." 297 U.S. at 159. Although the Court recognized that forfeited errors may be corrected "[i]n exceptional circumstances, especially in criminal cases," the Court placed strict and familiar limits on such review: the forfeited errors must be "obvious" and they must "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 160. On the facts of *Atkinson* itself, the Court found that standard unmet and declined to grant relief. See *ibid.*

In 1944, eight years after *Atkinson*, Rule 52(b) was adopted as part of the original Federal Rules of Criminal Procedure. As both this Court and the Advisory Committee have stated, Rule 52(b) "was intended as 'a restatement of existing law.'" *Olano*, 507 U.S. at 731 (quoting Fed. R. Crim. P. 52(b) advisory committee's

note (1944 Adoption)). Rule 52(b) thus codified "the standard laid down in [*Atkinson*]," and as a result this Court "repeatedly ha[s] quoted the *Atkinson* language in describing plain-error review." *Id.* at 736 (quoting in part *Young*, 470 U.S. at 7); see *Young*, 470 U.S. at 15 (referring to principles in *Atkinson* to describe plain-error review); *Frady*, 456 U.S. at 163 n.13 (same); *Silber* v. *United States*, 370 U.S. 717, 718 (1962) (per curiam) (same); *Johnson* v. *United States*, 318 U.S. 189, 200 (1943) (same); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) (same).

At the time Rule 52(b) was adopted, this Court applied the plain-error doctrine to errors that would have been as incorrect at trial as on appeal. As far as the government is aware, in this Court's pre-1944 cases involving the plain-error rule, the putative errors at issue would have been obviously incorrect both at trial and on appeal (if they were obviously incorrect at all).[6] None of those cases appears to have involved any relevant change of law between the time of trial and appeal. Nor has petitioner or his amicus pointed to any pre-1944 decision in which this Court considered, let alone granted

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[6] See, *e.g.*, *Mahler* v. *Eby*, 264 U.S. 32, 45 (1924) (plain-error review of a defective deportation warrant); *Pierce* v. *United States*, 255 U.S. 398, 406 (1921) (plain-error review of an award of interest that was inconsistent with the governing statute and common-law rule); *Crawford* v. *United States*, 212 U.S. 183, 193-194 (1909) (plain-error review of a juror's qualifications); *Clyatt* v. *United States*, 197 U.S. 207, 221-222 (1905) (plain-error review of sufficiency of the evidence to sustain defendants' convictions); *Wiborg* v. *United States*, 163 U.S. 632, 658-660 (1896) (plain-error review of sufficiency of the evidence to sustain defendants' convictions); cf. *Hemphill* v. *United States*, 312 U.S. 657, 657 (1941) (remanding two cases for the court of appeals to consider whether there was sufficient evidence to sustain the defendants' convictions).

relief for, an error that became obvious only on appeal. That is why when Rule 52(b) was adopted to restate existing law, it was natural for the rule to state that "plain error" could have been (but was not) "brought to the court's attention." Fed. R. Crim. P. 52(b).

b. The drafting history of Rule 52(b) confirms that understanding. A plain-error rule was not included in the Advisory Committee's initial preliminary draft in May 1942, but at this Court's suggestion, the Committee included such a rule in a subsequent preliminary draft in May 1943. See 1 *Drafting History of the Federal Rules of Criminal Procedure* 13, 24 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) (*Drafting History*); Advisory Comm. on Rules of Criminal Procedure, *Federal Rules of Criminal Procedure, Preliminary Draft* 117, 197 (May 1943) (*1943 Preliminary Draft*), reprinted in *Drafting History*. The rule stated that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Ibid.* Like the text of the current version, the language of the 1943 version permitted "[p]lain errors or defects" to be "noticed" even though "they were not brought to the attention of the court." From the beginning of the rule, then, it has been "[p]lain errors or defects" that could have been (but were not) "brought to the attention of the court."

In addition, the Advisory Committee Note accompanying the draft rule cited several cases applying plain-error review, but as explained above, those cases involved errors whose plainness would not have changed between trial and appeal. The Advisory Committee acknowledged that "[t]he concept of plain error has served to relieve the harshness of the general rule that an appellate court will not consider alleged errors to which

objection and exception were not interposed at the trial." See *1943 Preliminary Draft* 198, reprinted in *Drafting History*. But the Advisory Committee also emphasized that "justice to [subordinate] courts requires that their alleged errors should be called directly to their attention, and their errors should not be reversed upon questions which the astuteness of counsel has evolved from the record." *Ibid.* (quoting *Robinson & Co.* v. *Belt*, 187 U.S. 41, 50 (1902)). The Advisory Committee thus recognized that "justice to [subordinate] courts" meant only "revers[ing]" them in narrow circumstances. See *Robinson & Co.*, 187 U.S. at 50 (declining to reverse judgment on plain-error review).

By the time the plain-error rule was adopted the following year, the Advisory Committee had replaced much of the draft note with the statement that the rule "[was] a restatement of existing law." Fed. R. Crim. P. 52(b) advisory committee's note (1944 Adoption). But the Advisory Committee Note retained citations to *Wiborg* v. *United States*, 163 U.S. 632 (1896), and *Hemphill* v. *United States*, 312 U.S. 657 (1941)—both of which dealt with sufficiency-of-the-evidence questions, not errors whose plainness could conceivably have changed between trial and appeal. In the end, this Court's pre-1944 cases do not suggest that the plain-error rule extends to trial errors that were debatably correct at the time (although they are clearly incorrect now), and in fact Rule 52(b)'s text and the legal landscape that it codified point in the opposite direction.

c. Petitioner contends that it is not possible to discern the "legislative intent" underlying Rule 52(b) because the Federal Rules of Criminal Procedure "are not the product of legislative committees." Br. 6 (emphasis omitted). This Court, however, has recognized that "the

Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *United States* v. *Vonn*, 535 U.S. 55, 64 n.6 (2002); see *Corley* v. *United States*, 556 U.S. 303, 321 (2009) (observing that "[t]he Advisory Committee's Notes * * * were before Congress when it enacted the Rules of Evidence and * * * we have relied on [them] in the past to interpret the rules"); *Herrera* v. *Collins*, 506 U.S. 390, 409 & n.7 (1993) (discussing drafting history of Federal Rule of Criminal Procedure 33).

Indeed, the Court has looked to Rule 52(b)'s history, including the Advisory Committee Notes, in interpreting that rule in the past. See *Greenlaw* v. *United States*, 554 U.S. 237, 247 (2008) ("Nothing in the text or history of Rule 52(b) suggests that the rulemakers, in codifying the plain-error doctrine, meant to override the cross-appeal requirement."); *Olano*, 507 U.S. at 731 (relying on the Advisory Committee Notes to Rule 52(b)); *Young*, 470 U.S. at 15 n.12 (conducting "[a] review of the drafting that led to" Rule 52(b)). It is therefore relevant that Rule 52(b) was a restatement of existing law, and this Court's cases at the time had not extended the plain-error doctrine to situations in which the error was debatable at trial but had become clear by the time of appeal.

d. Surveying some of those pre-1944 decisions, petitioner asserts (Br. 9-11, 36) that the purpose of the plain-error rule is to remedy injustice. That is certainly one purpose of the plain-error rule, but it has other purposes as well, among them "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact."

Atkinson, 297 U.S. at 159. The plain-error rule furthers those interests in finality and judicial economy by permitting the correction of forfeited errors only in "exceptional circumstances." *Id.* at 160. Petitioner wants to take the sweet without the bitter. And unless Rule 52(b) provides a remedy for every mistake at trial, then petitioner must still explain why the type of error at issue here falls within the ambit of the rule.

Petitioner cites (Br. 10) this Court's decision in *Wiborg*, but there the Court simply set aside the convictions of two defendants for insufficiency of the evidence. See 163 U.S. at 659. Petitioner also cites (Br. 11) the dissent in *O'Neil* v. *Vermont*, 144 U.S. 323 (1892), but there the Court dismissed for want of a federal question (while noting that petitioner had failed to preserve his claim of error under state law). See *id.* at 336-337. Accordingly, neither *Wiborg* nor *O'Neil* casts any doubt on the state of the law leading up to *Atkinson* and the adoption of Rule 52(b). If anything, *Wiborg* and other plain-error cases only confirm that the doctrine historically applied to errors that were plain both at the time of forfeiture and at the time of review.

4. Requiring an error to be plain at the time it occurs furthers the purposes of the plain-error doctrine

Requiring an error to be plain at the time of forfeiture encourages defendants to object in circumstances where a timely objection might prevent error from occurring in the first place. See, *e.g.*, *Dominguez Benitez*, 542 U.S. at 82 ("[T]he [plain-error] standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error."). In addition to promoting judicial

economy by reducing appeals and remands, requiring an error to be plain at the time of forfeiture also ensures full development of the record, safeguards the district court's role as the court of first instance, minimizes strategic timing of objections and "sandbagging" of trial courts, and allows for correction of obvious miscarriages of justice. See *Puckett*, 556 U.S. at 140; *Escalante-Reyes*, 689 F.3d at 434 (Smith, J., dissenting).

a. As a threshold matter, the narrowly tailored forfeiture provisions of Rule 52(b) provide the means for enforcing the contemporaneous-objection requirement. See *Puckett*, 556 U.S. at 134. If a defendant who has failed to lodge a contemporaneous objection in the district court is unable to satisfy all four demanding prongs of the plain-error standard, he is not entitled to any relief. "This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *Ibid.* In this way, the forfeiture rule gives teeth to the contemporaneous-objection requirement by providing a high hurdle to obtain review of unpreserved claims, while allowing for the correction of "only 'particularly egregious errors.'" *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163); see Daniel J. Meltzer, *State Court Forfeiture of Federal Rights*, 99 Harv. L. Rev. 1128, 1135 (1986) (forfeiture provisions supply "a necessary bite" to claim-preservation rules).

Interpreting Rule 52(b) to require that an error be plain at the time of forfeiture when the law is then unsettled serves all of the purposes underlying the contemporaneous-objection requirement. Most importantly, a defendant who objects in the face of unsettled law "may prevent an error from happening in the first place, either because the judge sustains the defendant's

objection or the prosecutor backs off, fearing that a trial-level victory might sow the seeds for a later appellate reversal." Heytens 958; see *Puckett*, 556 U.S. at 134 ("In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."); *Wainwright*, 433 U.S. at 88 ("A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation.").

This case is an excellent example. Petitioner, who was 26 years old at sentencing, admitted to using marijuana since he was 14 and to doing so "daily prior to his arrest for the instant offense." PSR para. 39. In a letter to the Probation Office, petitioner stated that he "ha[d] had a drug problem for many years," "was never in a drug treatment program," and "may very well benefit from such a program at this point in his life." 10-30571, Document No. 511313422, at 1 (5th Cir. Dec. 6, 2010). In a subsequent sentencing memorandum to the district court, petitioner further stated that he "need[ed] professional treatment for drug abuse" and urged the court to "do whatever [was] in its power to have treatment ordered for [him]." *Id.* at 8. At the sentencing hearing, petitioner again emphasized to the court his "need for that drug treatment." Doc. No. 54, at 5.

At that hearing, the district court was candid about the "dilemma" it faced: a term of imprisonment within the advisory Guidelines range would not leave petitioner in federal custody long enough to qualify for placement in the Bureau of Prisons' 500-hour Residential Drug Abuse Program. Doc. No. 54, at 12-13, 16, 21. The court therefore questioned whether it should order a longer period of imprisonment "because he needs that treat-

ment," or instead "shorten [petitioner's] sentence just to get him out of the system more quickly?" *Id.* at 16-17. Although the court was inclined to lengthen petitioner's sentence, the court invited petitioner's counsel to comment. See *id.* at 17. At that point, if counsel had raised 18 U.S.C. 3582(a), which states that "imprisonment is not an appropriate means of promoting correction and rehabilitation," it is entirely possible that the court would not have imposed an above-Guidelines sentence. Similarly, when the court later asked petitioner's counsel for "any reason why th[e] sentence as stated should not be imposed," and counsel replied, "[p]rocedurally, no," that deprived the court of an opportunity to avoid its error. Doc. No. 54, at 30.

Nor was petitioner foreclosed from objecting under then-existing law. Petitioner was sentenced on June 2, 2010, about a month before the petition for a writ of certiorari was filed in *Tapia* v. *United States*, 131 S. Ct. 2382 (2011). At that time, there was a conflict among the circuits regarding whether rehabilitation could be used as a factor in determining the length of a defendant's prison sentence. See Pet. at 2, *Tapia*, *supra* (No. 10-5400); Gov't Br. in Opp. at 7-8, *Tapia*, *supra* (No. 10-5400). The Fifth Circuit had not addressed the question, see Pet. App. 4a, which meant that had petitioner objected, it would have "alert[ed] the district court to potential error at a moment when the court [could have taken] remedial action." *United States* v. *Mouling*, 557 F.3d 658, 664 (D.C. Cir.), cert. denied, 130 S. Ct. 795 (2009). "Thus the interest in requiring parties to present their objections to the trial court, which underlies plain error review, applies with full force." *Ibid.*; see *Turman*, 122 F.3d at 1170 ("An objection affords the judge an opportunity to focus on the

issue and hopefully avoid the error, thereby saving the time and expense of an appeal and retrial.").

b. In addition, even when a defendant's objection is not successful, "a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, [] state on the record the basis for [the court's decision]," or provide alternative grounds for that decision. Heytens 958; see *Puckett*, 556 U.S. at 134; *Wainwright*, 433 U.S. at 89. All of those outcomes not only further the public interest in the finality of criminal litigation, but they also "safeguard[] the district court's role as the court of first instance in our federal system." *Escalante-Reyes*, 689 F.3d at 434 (Smith, J., dissenting). The district court "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Puckett*, 556 U.S. at 134. Requiring a contemporaneous objection when the law is unsettled ensures that the district court is able to develop a complete factual and legal record for appellate review.

Indeed, when the governing law is unclear at the time of trial, that is precisely when a contemporaneous objection is most necessary. See *Turman*, 122 F.3d at 1170 ("When the law is such that an experienced district judge cannot be expected to detect the error on his own, that is precisely when it is most important for the parties to object."); *David*, 83 F.3d at 643 (observing that when the law is unsettled at the time of trial, that "is precisely the circumstance where it is most obvious that [plain-error] review should not be authorized"). As the Fourth Circuit has explained, "[i]f the contemporaneous objection requirement is to have any real force, presumably an objection would be required (and review would

be barred for failure to object) in the circumstance where the law at the time of trial is unclear as to whether the district court's proposed course would constitute error." *Ibid.* When the legal issue is open and debatable, a timely objection provides the district court with an opportunity to consider and address it—which is a central purpose of the contemporaneous-objection requirement. *Ibid.*

c. Requiring an error to be plain at the time of forfeiture also minimizes strategic timing of objections and "sandbagging" of trial courts. See *Puckett*, 556 U.S. at 134 ("[T]he contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."); *David*, 83 F.3d at 643. To be sure, there is no evidence in this case to indicate that petitioner was aware of his objection and withheld it for any reason. Petitioner moved to correct his sentence eight days after the sentencing hearing, which may mean only that petitioner belatedly realized that he had a potentially meritorious objection to his sentence. But a case like this one will be impossible to distinguish from one in which a defendant belatedly objects because he is displeased with the sentence once pronounced. See *Vonn*, 535 U.S. at 72. And, in any event, it would not distinguish this case from any other case in which a defendant fails to timely object on grounds that might have been sustained.

d. Finally, requiring an error to be plain at the time of forfeiture permits courts to remedy the obvious miscarriages of justice for which Rule 52(b) is designed. Plain-error review "is not a run-of-the-mill remedy." *Frady*, 456 U.S. at 163 n.14 (internal quotation marks omitted). Rather, it corrects "only 'particularly egre-

gious errors.'" *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163); see *Atkinson*, 297 U.S. at 160 (courts' authority to correct forfeited errors should be exercised only in "exceptional circumstances"). That characterization does not readily describe a sentencing practice—*i.e.*, using rehabilitation as a factor in determining the length of a defendant's term of imprisonment—that appears to have been common for an extended period of time and that inspired different views among courts of appeals during the 1990s and 2000s. Of the defendants affected by that practice whose sentences became final before *Tapia* was decided, petitioner has no special claim to more favorable treatment; to the contrary, he did not preserve his claim and thus deprived the district court, the court of appeals, and even this Court of the opportunity to address the question and clarify the law.

The need for error correction in the service of justice is at its lowest ebb in this context. When the law is clearly settled in favor of a defendant (and thus an objection by his counsel should be unnecessary), or when the law is clearly settled against a defendant (and thus an objection by his counsel should be futile), the ends of justice may warrant correction of the error (if the defendant can satisfy the remaining prongs of the plain-error standard), because the integrity of the proceedings has been called into question by an error that the prosecutor and court should not have countenanced or by an error that the defendant was powerless to prevent. By contrast, when the law is unsettled at the time of the district court proceedings, the prosecutor and the court have not been "derelict" in allowing the error to happen, and the defendant had a ready means of attempting to avoid the error. *Frady*, 456 U.S. at 163. In that circumstance, treating the error as plain "would disturb the

careful balance [Rule 52(b)] strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135.

B. The Arguments Of Petitioner And His Amicus That The Plainness Of An Error Should Be Assessed Only At The Time Of Review Lack Merit

Petitioner and his amicus are virtually silent with respect to the text, structure, and history of Rule 52(b). But none of the legal considerations on which they do rely—not this Court's decision on Rule 52(b) in *Johnson*, nor principles of retroactivity, nor various policy rationales—requires a different result.

1. This Court in Johnson *relaxed the plain-error standard only in cases, unlike this one, where an objection would be pointless under settled contrary law*

a. Petitioner acknowledges (Pet. 7) that this Court's decision in *Johnson* leaves open the question presented here. His amicus, however, argues that *Johnson*, which concerned cases "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal," 520 U.S. at 468, should apply equally to cases like this one in which the law at the time of forfeiture was unsettled. See NACDL Amicus Br. 4-6. But even courts that have adopted petitioner's interpretation of Rule 52(b) have recognized that "*Johnson* brings no clarity to cases" in which the law is unsettled at the time of forfeiture but becomes clear at some later point in the proceedings. *United States* v. *Cordery*, 656 F.3d 1103, 1107 (10th Cir. 2011); see *Escalante-Reyes*, 689 F.3d at 420. This Court in *Johnson* relaxed the plain-error standard when a contemporaneous objection would be pointless under contrary controlling precedent, but that does not justify a further modification when a contemporaneous

objection, far from being pointless, could serve a number of important objectives.

In *Johnson*, the defendant was charged with perjury for making false statements to a grand jury. See 520 U.S. at 463. At the close of the trial, the district court determined that the defendant's statements were material, which was consistent at the time with "near-uniform precedent both from this Court and from the [c]ourts of [a]ppeals." *Id.* at 464, 467-468 & n.1. The jury then found the defendant guilty of perjury. See *id.* at 464. Following the defendant's conviction but before her appeal, this Court held in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that the element of materiality in a false-statement prosecution under 18 U.S.C. 1001 must be submitted to the jury rather than decided by the trial judge. See *Johnson*, 520 U.S. at 464. The defendant in *Johnson* therefore contended on appeal that the district court's failure to submit the issue of materiality to the jury constituted reversible plain error under Rule 52(b). *Ibid.*

This Court disagreed. It held that the district court's error had not seriously affected the fairness, integrity, or public reputation of the proceedings, because the evidence supporting materiality was overwhelming. See *Johnson*, 520 U.S. at 469-470. The Court agreed with the defendant, however, that she had satisfied the second prong of plain-error review, *i.e.*, that the district court's error was clear and obvious. See *id.* at 467-468. In light of the "near-uniform precedent" from this Court and the courts of appeals, any objection at trial from the defendant would have been pointless. Requiring an objection in that circumstance, the Court explained, "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." *Id.* at 468. The Court concluded "that in a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *Ibid.*

b. It is clear from the Court's discussion in *Johnson* that it did not resolve cases like this one in which the law is unsettled at the time of forfeiture. The Court began by recognizing that "*Olano* refrained from deciding when an error must be plain to be reviewable." 520 U.S. at 467 (emphasis omitted). "'At a minimum,' *Olano* [had] concluded, the error must be plain 'under current law.'" *Ibid.* But that left the question of whether the error also had to be plain at the time it occurred. The Court in *Olano* had expressly reserved judgment on that question, declining to address cases "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." 507 U.S. at 734. And the Court in *Johnson* did not address the question either. The *Johnson* Court could have announced a rule that would govern cases (like that one) in which the law was settled at the time of forfeiture *and* cases (like this one) in which the law was unsettled at the time of forfeiture. But the *Johnson* Court took care to limit its holding to a "case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." 520 U.S. at 468.

The Court in *Johnson* had good reason not to extend its holding to cases in which the relevant law is unsettled at the time of forfeiture. When the law is settled against a defendant at the time of trial, requiring her to object would result in "a long and virtually useless laundry list

of objections." *Johnson*, 520 U.S. at 468. Absent the rule in *Johnson*, the defendant would have to object and preserve her claim of error; otherwise, in the event of a change in the applicable law, the defendant would be unable to seek a remedy under Rule 52(b): the error would not have been plain at the time of forfeiture, and thus the defendant would never be able to satisfy the second prong of plain-error review. By contrast, when the law is unsettled at trial, the need for a contemporaneous objection is at its zenith: it allows the trial court to address the potential error in the first instance, which serves a host of important interests. See, *e.g.*, *Mouling*, 557 F.3d at 664. The rationale of *Johnson* thus provides no basis for relaxing the plain-error standard in cases where a contemporaneous objection, far from being pointless or futile, could be quite useful. Indeed, the considerations of judicial economy that drove the Court's analysis in *Johnson* cut in precisely the opposite direction here.

c. Amicus argues (Br. 4-6) that *Johnson* interpreted the text of Rule 52(b) to measure plainness at the time of appeal and the rule's text cannot be given a different meaning in this case. No court of appeals has accepted that argument and held that petitioner's interpretation is compelled by *Johnson*. That is because *Johnson* did not discuss the text of Rule 52(b) or this Court's previous recognition that Rule 52(b) is a remedy for egregious errors clear at the time they occurred. See *Frady*, 456 U.S. at 163. Rather, *Johnson* rested its holding instead on a concern with judicial economy—*i.e.*, parties should not be required to make futile objections in the face of contrary settled precedent—that does not apply in this context. Amicus cites (Br. 4) *Clark* v. *Martinez*, 543 U.S. 371 (2005), but the Court in *Johnson* did not

give the text of Rule 52(b) a limiting construction based on constitutional concerns that now must govern other applications of the rule. Rather, *Johnson* relaxed the general rule that an error must be plain at the time of forfeiture, and it did so to cover a particular circumstance: when a timely objection would have been futile in the face of contrary controlling precedent.

It does not matter whether *Johnson* is viewed as describing an exception to the plain-error standard or as interpreting that standard generally. *Johnson* should not be read as foreclosing consideration of Rule 52(b)'s text and history in addition to its purposes; but even assuming that *Johnson* implicitly regarded the text and history of Rule 52(b) as not controlling of the analysis, and held instead that whether an error is "plain" for purposes of Rule 52(b) rests solely on policy concerns (like judicial economy), the Court's opinion makes clear that those policy concerns can change depending on the context. Amicus cannot have it both ways, by taking off the interpretive table everything but the rule's purposes and then foreclosing an examination of how those purposes are best served in this particular context (*i.e.*, when the relevant law is unsettled at the time of trial). At the very least, *Johnson* requires asking whose interpretation—petitioner's or the government's—enforces the policies that underpin Rule 52(b).

That question is not a close one. The plain-error doctrine encourages contemporaneous objections primarily because of the efficiency gains in remedying potential errors on the spot. A defendant who fails to object therefore will not be able to raise an error for the first time on appeal, unless the error was plain at the time it occurred, it affected his substantial rights, and it seriously affected the fairness, integrity, or public reputa-

tion of judicial proceedings. If those conditions are satisfied, the plain-error doctrine recognizes important countervailing interests, such as encouraging prosecutors and judges to avoid obvious miscarriages of justice. The efficiency gains that form the basis for the plain-error rule, however, are cancelled out in a case like *Johnson*, because it would be inefficient to require parties to object when the objection is futile. That would only bog down trial proceedings. But those same gains are not cancelled out in a case like this one, where an objection would not have been useless and in fact could have been quite helpful. Accordingly, in that circumstance, neither *Johnson*'s holding nor its rationale provides any basis for assessing the plainness of an error solely at the time of review.

2. Principles of retroactivity bear on the existence of error but not on the obviousness of that error

a. Petitioner and his amicus contend that the retroactivity principles of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), require measuring the plainness of an error solely at the time of review under Rule 52(b). See Pet. Br. 23-31; NACDL Amicus Br. 8-10. That is incorrect. *Griffith* holds that a ruling of this Court applies to all criminal cases that are not final at the time the ruling is announced, whether or not the decision makes a "clear break" with prior law. 479 U.S. at 328. *Griffith* thus dictates the substantive law that applies to the disposition of criminal cases pending on direct appeal. It does not bear, however, on whether error committed on an earlier occasion is clear or obvious. In other words, *Griffith* is relevant to the first prong of plain-error review (*i.e.*, whether there has been an error), but it is not

relevant to the second prong of plain-error review (*i.e.*, whether the error is clear or obvious).

In *Griffith* itself, the defendants had preserved their claims of error at trial, see 479 U.S. at 317, 319, and as a result the Court had no reason to address the relationship between retroactivity and forfeiture principles. Nothing in *Griffith* suggests that a defendant who has forfeited a claim of error is excused, once favorable new precedent appears, from satisfying the remaining three components of the plain-error test. The Court, however, did address the relationship between retroactivity and forfeiture in *Johnson*, because there the defendant had not preserved her claim of error at trial. In *Johnson*, the Court found error under the first prong of plain-error review, because *Griffith* required application of the intervening decision in *Gaudin*. See 520 U.S. at 467. But in assessing the second prong of plain-error review—whether the error was clear or obvious—the Court made no mention of *Griffith*. See *id.* at 467-468. If petitioner and amicus were correct that *Griffith* requires measuring the plainness of an error at the time when the error is reviewed under Rule 52(b), the Court in *Johnson* would have said so.

For those reasons, courts and commentators correctly have recognized that *Griffith* is not relevant to the question presented here. See, *e.g.*, *Escalante-Reyes*, 689 F.3d at 420 n.4 ("[I]n *Johnson*, the Supreme Court applied *Griffith* to the first prong of plain error analysis, *not* the second prong."); *David*, 83 F.3d at 643 n.6 ("*Griffith*'s holding that a defendant whose direct appeal is pending receives the benefit of a new rule for purposes of determining whether the district court erred, bears not at all on the second requirement of *Olano*, that the error be 'plain.'"); see also Heytens 954 (explaining

that forfeiture rules "are themselves part of the presently existing 'law' that reviewing courts must apply" under *Griffith*); *id.* at 955 ("In short, *Griffith* has nothing to say about the proper method for applying plain error review when judicial understandings of the law's requirements have changed between the time of trial and appellate review.").[7]

b. Amicus incorrectly argues (Br. 8-10) that requiring an error to be plain at the time of forfeiture (when the law was then unsettled) contravenes *Griffith*'s goal of "treating similarly situated defendants the same." 479 U.S. at 327. A defendant who preserves an objection is not similarly situated to one who does not. See *David*, 83 F.3d at 643 n.6 ("[A] defendant who objects to an alleged error (as did the defendant in *Griffith*) is not similarly situated to a defendant who did not, and so a new rule created for the former need not be deemed plain for the latter."). In *Griffith*, the defendants had preserved their claims of error at trial; by permitting them to rely on an intervening case won by another defendant, the Court ensured that "the fortuities of the judicial pro-

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[7] Professor Heytens acknowledges that the government's interpretation of the plain-error standard in this case is "fully consistent with Rule 52(b)'s text" and serves "all three purposes of claim-presentation rules—avoiding error, deterring sandbagging, and creating a complete record," but he endorses petitioner's interpretation on the ground that this Court should revisit *Griffith* and use selective prospectivity rather than forfeiture rules to determine the impact of its decisions on pending cases. Heytens 969, 980-990. Petitioner, however, has neither challenged *Griffith* nor called for that sort of sea change in this Court's retroactivity doctrine. Petitioner relies (Br. 35) on another law review article, see Alison L. LaCroix, *Temporal Imperialism*, 158 U. Pa. L. Rev. 1329 (2010), but that article describes the history of certain temporal doctrines (including retroactivity) without discussing at all the specific question presented here.

cess"—*i.e.*, the happenstance of which case was selected for plenary review—did not determine the defendants' entitlement to relief. 479 U.S. at 327. But distinguishing between defendants who preserve claims of error and those who forfeit them does not make relief turn on circumstances beyond their control. Rather, it "encourage[s] all trial participants to seek a fair and accurate trial the first time around." *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163).

Likewise, a defendant who forfeits an objection in the face of unsettled law is not similarly situated to a defendant who forfeits an objection in the face of settled, contrary law. The former expends scarce judicial resources by withholding a potentially successful objection that could serve several valuable purposes; the latter conserves judicial resources by withholding a futile objection that could serve little purpose. See *David*, 83 F.3d at 644 ("Allowing Rule 52(b) review where an objection at trial would have been baseless in light of then-existing caselaw, unlike allowing review where the error was merely 'unclear' at the time of trial, furthers the substantial interest in the orderly administration of justice that underlies the contemporaneous objection rule."). The reasons for the contemporaneous-objection rule equally justify treating defendants differently based on whether they failed to object in the face of unsettled law or settled contrary law.

3. Various policy considerations do not warrant measuring an error's plainness only at the time of review when the law was unsettled at the time of forfeiture

In addition to relying on *Griffith* and principles of retroactivity, petitioner's amicus offers three policy rationales in support of its interpretation: (a) promoting

the ends of justice; (b) focusing on appellate-level proceedings rather than trial-level proceedings; and (c) avoiding any inquiry into whether the law was unsettled at the time of forfeiture. See NACDL Amicus Br. 7-8, 10-12, 14-15; see also *Escalante-Reyes*, 689 F.3d at 421-423; *United States* v. *Farrell*, 672 F.3d 27, 36-37 (1st Cir. 2012); *Cordery*, 656 F.3d at 1106-1107.[8] Setting aside that none of those rationales is grounded in the text or history of Rule 52(b), they lack merit in their own right and do not fully account for all of the purposes of plain-error review.

a. Amicus asserts that assessing an error's plainness only at the time of appeal allows courts "to remedy obvious injustice." Br. 7 (emphasis omitted). That assertion begs the question presented in this case: it assumes that the obviousness of an error should be measured at the time of appeal and that it is an "injustice" to withhold relief from a defendant who slept on his rights. Amicus thus incorrectly assumes that any error that has become obvious by the time of review (even if the error was de-

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[8] Some of the other courts of appeals to endorse petitioner's interpretation have done so in cases where the law was settled against the defendant at trial. See *United States* v. *Garcia*, 587 F.3d 509, 519-520 (2d Cir. 2009); *United States* v. *Ross*, 77 F.3d 1525, 1538-1539 (7th Cir. 1996). Those cases thus fall within *Johnson*. The Eleventh Circuit adopted petitioner's interpretation, but its decision was subsequently vacated on other grounds by this Court. See *United States* v. *Smith*, 402 F.3d 1303, 1315 n.7, vacated on other grounds, 545 U.S. 1125 (2005). The Fourth, Ninth, and District of Columbia Circuits have adopted the government's interpretation. See *Mouling*, 557 F.3d at 664; *Turman*, 122 F.3d at 1170; *David*, 83 F.3d at 642-644; see also *United States* v. *Greer*, 640 F.3d 1011, 1023 (9th Cir.), cert. denied, 132 S. Ct. 834 (2011); but see *United States* v. *Knight*, 606 F.3d 171, 178 (4th Cir. 2010) (holding an error plain even though, according to the court, the law was unsettled at the time of forfeiture).

batable at the time it occurred) is the type of injustice that Rule 52(b) is meant to remedy. Resolving that question, however, requires more than merely pointing to the interest in error correction, because Rule 52(b) balances that interest against "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *Atkinson*, 297 U.S. at 159; see *Puckett*, 556 U.S. at 135 (noting "the careful balance [Rule 52(b)] strikes between judicial efficiency and the redress of injustice"). Amicus does not supply any reason anchored in the text and history of Rule 52(b), or in the purposes underlying the contemporaneous-objection requirement, to conclude that Rule 52(b) strikes that balance in favor of correcting once-debatable but now-clear errors.

Amicus argues that relaxing the second prong of plain-error review would not have unwelcome effects, because the third and fourth prongs would continue to be "stringent requirements" and "substantial incentives to make contemporaneous objections." Br. 13; see *Escalante-Reyes*, 689 F.3d at 423. That argument fails to focus on the specific purpose of the "plainness" prong: to screen out errors whose correction does not seriously undermine the contemporaneous-objection requirement. Remedying an error raised for the first time on appeal does not seriously undermine that requirement when an objection should have been unnecessary (because the error was obvious under prevailing law) or when an objection would have been futile (because there was no error at all under prevailing law). But granting relief on appeal when the error was debatable and the defendant stood silent is wholly at odds with the purposes of requiring a contemporaneous objection. Moreover, ami-

cus's argument assumes that the prongs of plain-error review work at cross-purposes: the second prong maximizes the set of errors that are eligible for correction, whereas the third and fourth prongs minimize that set. To the contrary, each of the three prongs screens out errors for different but complementary reasons; together, they serve to identify the type of egregious errors for which plain-error review is a remedy.

b. Echoing the Seventh Circuit's decision in *Ross*, amicus argues that plain-error review should focus on "whether the severity of the error's harm demands reversal" rather than "whether the district court's action . . . deserves rebuke." Br. 15 (quoting *Ross*, 77 F.3d at 1539). Again, that argument misunderstands the objective of the second prong of plain-error review, which is not to reprove district courts for their mistakes. If that were the sole aim of plain-error review, this Court would not have held in *Johnson* that a district court may be reversed for following then-prevailing law, simply because that law has completely shifted by the time of appeal. Rather, the objective of *Olano*'s second prong is to isolate errors whose correction does not seriously undermine the contemporaneous-objection requirement, because such an objection should have been unnecessary or would have been futile. It is true that where an objection should be unnecessary because the error is obvious at the time under governing law, one benefit of plain-error review is that it encourages trial courts and prosecutors to diligently observe the law. But that is far from the only interest served by plain-error review.[9]

[9] Relatedly, the Seventh Circuit in *Ross* reasoned that Rule 52(b) should be viewed not as a "measure of district court fault" but as a "means to cabin the appellate court's discretion and to safeguard against erosion of the rule of forfeiture." 77 F.3d at 1539. Rule 52(b),

Amicus's focus on "the severity of the error's harm" under the second prong of plain-error review also fails because that is what the third and fourth prongs do. NACDL Amicus Br. 15. The third prong focuses on the harm to the defendant, *i.e.*, whether the error "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Puckett*, 556 U.S. at 135 (internal quotation marks omitted). The fourth prong focuses on the harm to the federal judicial system, *i.e.*, whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks omitted). Amicus's approach fails to give independent content to the second prong. The plainness of an error simply has no logical relationship to the severity of the error's harm (either to the defendant or to the judicial system).

c. Finally, amicus argues that assessing an error's plainness solely at the time of review avoids a "potentially onerous" inquiry into whether the error also was plain at the time of forfeiture. Br. 10. That argument overstates the difficulty in applying the government's approach. The courts of appeals to consistently do so (the Ninth and District of Columbia Circuits) have not indicated that it is burdensome. Indeed, courts are required to make similar determinations in applying a

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however, applies to both district courts and appellate courts; it is a rule of criminal procedure, not of appellate procedure. See p. 17, *supra*. And the reason that Rule 52(b) cabins courts' discretion, as the Seventh Circuit recognized, is "to safeguard against erosion of the rule of forfeiture." That concern cuts squarely in favor of the government's interpretation, which encourages defendants to timely object in the face of unsettled law for all the same reasons as claim-presentation rules more generally.

number of other doctrines for which relief depends on the state of the law at the time an error occurs.[10] Assessing an error's plainness at the time of forfeiture under Rule 52(b) "would [not] be any more difficult" than those similar determinations that courts "routinely make." *Escalante-Reyes*, 689 F.3d at 430 (Smith, J., dissenting).

Indeed, accounting for an error's plainness at the time of forfeiture will often make plain-error review less onerous for courts. In some cases, it is relatively easy to determine that the second prong of the plain-error rule is not satisfied because the law was unsettled at the time of the district court proceedings. Cf. *Pearson* v. *Callahan*, 555 U.S. 223, 239 (2009) (Courts may be able to "quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional [violation] at all."). In that circumstance, an appellate court is able to reject a forfeited claim with-

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[10] See, *e.g.*, *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011) (stating that in applying 28 U.S.C. 2254(d)(1), which provides that federal habeas corpus relief may not be granted to a state prisoner based on an error of law unless the error was contrary to or an unreasonable application of clearly established federal law, a court must refer to the law at "the time the state court renders its decision"); *Bousley* v. *United States*, 523 U.S. 614, 622-623 (1998) (holding that on collateral review, a court examines the time the error occurred in determining how "novel" a rule is for purposes of providing cause for a procedural default); *Teague* v. *Lane*, 489 U.S. 288, 311-312 (1989) (plurality opinion) (providing that new constitutional rules of criminal procedure are generally not applicable to cases that became final before the new rules were announced, so courts apply prior law on collateral review); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982) (holding that public officials have immunity based on what law was clearly established at the time of their acts, even if the law has changed by the time of appeal).

out engaging in the fact-intensive inquiry usually required to determine whether the third and fourth prongs of the plain-error test are met.

This case is illustrative. It was not difficult for the court of appeals to determine that a *Tapia* error was not plain at the time of sentencing because the law was unsettled at that time. See Pet. App. 4a. But if petitioner were to prevail and the case were remanded, the court of appeals would not be able to resolve his *Tapia* claim without a thorough review of the record to determine whether the error was prejudicial in the context of the sentencing and whether the court should exercise its discretion to correct the error because it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Compare *Escalante-Reyes*, 689 F.3d at 423-426 (holding that defendant who claimed *Tapia* error had satisfied all four prongs of plain-error review) with *id.* at 431-449 (Smith, J., dissenting) (concluding that defendant had failed to satisfy the third and fourth prongs); *id.* at 457-458 (Owen, J. dissenting) (concluding that defendant had failed to satisfy the fourth prong). Such inquiries are fact-intensive and singular to the particular case before the court. See *Puckett*, 556 U.S. at 142-143. By contrast, even if it were difficult to determine whether the law was unsettled at the time of forfeiture in a given case, any resulting decision would likely apply to the class of other defendants whose claims arose at roughly the same time.

It is also exceedingly odd to justify petitioner's approach on grounds of judicial economy, even if it saves some time on review. On the front end, petitioner's approach sacrifices the efficiency gains in remedying potential errors when they occur. On the back end, petitioner's approach would "lower[] the bar for plain-error

review, which [would] undoubtedly result in more remands and new trials." *Escalante-Reyes*, 689 F.3d at 431 (Smith, J., dissenting). Thus, "[e]ven assuming that the rule saves appellate resources, that savings will be more than counter-balanced by the need for new trials and resentencings." *Ibid.* Petitioner's interpretation, then, would be doubly inefficient. That weighs heavily against it, because "the [plain-error] standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *Dominguez Benitez*, 542 U.S. at 82. The Court should therefore hold, consistent with Rule 52(b)'s structure, text, history, and purposes, that when the governing law is unsettled at the time of trial, a forfeited error is not clear or obvious for purposes of plain-error review.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Rule 35 of the Federal Rules of Criminal Procedure provides:

Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after

sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

2. Rule 51 of the Federal Rules of Criminal Procedure provides:

Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court —when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If 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. A

ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

3. Rule 52 of the Federal Rules of Criminal Procedure provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.