No. 20-1369

In the Supreme Court of the United States

MOHAMMED JABATEH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to plain-error relief on his forfeited challenge to his convictions for fraud with respect to a material fact in an immigration application, in violation of 18 U.S.C. 1546(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. *Jabbateh*, No. 16-cr-88 (May 23, 2018)

United States Court of Appeals (3d Cir.):

United States v. *Jabateh*, No. 18-1981 (Sept. 8, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 974 F.3d 281.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2020. A petition for rehearing was denied on October 27, 2020 (Pet. App. 45a-46a). The petition for a writ of certiorari was filed on March 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of fraud with respect to a material fact in an immigration application, in violation of 18 U.S.C. 1546(a), and two counts of perjury, in

violation of 18 U.S.C. 1621(1). C.A. App. 2a. The district court sentenced petitioner to 360 months of imprisonment, to be followed by a three-year term of supervised release. *Id.* at 3a-4a. The court of appeals affirmed. Pet. App. 1a-44a.

1. a. From 1992 through 1995, petitioner engaged in "brazen violence and wanton atrocities" while serving as a rebel commander in the Liberian civil war. Pet. App. 1a; see *id.* at 4a. During that period, petitioner led a battalion of the United Liberation Movement of Liberia (ULIMO) at the front lines of the conflict in Western Liberia. *Id.* at 4a. Petitioner and fighters acting under his direction "routinely tortured and murdered their adversaries, real or assumed." *Ibid.*; see *id.* at 4a-6a. "Their crimes were breathtaking in their scope and cruelty, including murder, rape, torture, ritual cannibalism, and human enslavement." *Id.* at 4a.

On one occasion, petitioner "ordered a child soldier to place tires around two prisoners' necks, douse the tires in gasoline, and set them on fire." Pet. App. 5a. "As the prisoners screamed in agony, [petitioner's] fighters shot them, then left their bodies to burn." *Ibid.* On another occasion, petitioner told his soldiers that they could "take" a group of captured women for themselves and kill the women when they refused. *Ibid.* (citation omitted). The soldiers then raped a woman "who was eight months pregnant, causing her to suffer a miscarriage." *Ibid.* On a third occasion, petitioner's forces captured a 13-year-old girl and her family, and the girl witnessed petitioner "give the order to kill a suspected spy, remove his heart, and feed the organ to [petitioner] and his fighters." *Ibid.* Petitioner then "ordered his soldiers to 'have' the [captured] women," and petitioner "'assigned' [the 13-year-old girl] to an adult soldier who

raped her for the next month and a half." *Ibid.* (citations omitted).

After the ULIMO split along tribal lines, petitioner and his fighters targeted, tortured, and killed members of the rival faction. Pet. App. 5a-6a. During one attack, petitioner's troops targeted a pregnant woman who was the girlfriend of a rival commander. *Id.* at 6a. As the half-naked woman bled from a gunshot wound, petitioner dragged her by her hair from her home into the street. *Ibid.* Petitioner then beat and stabbed the woman as he interrogated her about her boyfriend's location. *Ibid.* When the woman insisted that she did not know where her boyfriend was, petitioner inserted his gun into the woman's vagina and fired, killing her. *Ibid.* Petitioner then ordered a child soldier to guard the woman's body in the street to ensure that no one moved the body until it had rotted. *Ibid.*

When residents of one town complained to the Economic Community of West African States Monitoring Group about the killing, violence, and looting carried out by petitioner's faction of ULIMO, petitioner and his troops "returned to mete out punishment." Pet. App. 6a. Petitioner's soldiers pressed the townspeople into slavery and, "[f]or little more than sport," ordered the execution of several villagers, including the village chief. *Ibid.* "Grim acts of cannibalism followed." *Ibid.*

b. Petitioner committed other "atrocities" as well, and he continued to commit them throughout the Liberian civil war. Pet. App. 4a; see *id.* at 6a ("The record goes on and on, but we will not. It is enough to say without exaggeration that the atrocities documented at trial, and found by a jury, paint a portrait of a madman."). When the war ended, a rebel group led by Charles Taylor emerged victorious, and petitioner faced a possible

reckoning for his crimes. *Id.* at 3a, 6a-7a. Petitioner accordingly left Liberia and applied for asylum in the United States. *Id.* at 7a.

"In the personal statement accompanying his asylum application," petitioner "spun a tale that reimagined his role during the war and diffidently cast himself as an innocent victim of ethnic persecution." Pet. App. 8a. Petitioner never mentioned military combat and instead claimed that he had done largely clerical and administrative work, first at ULIMO's executive headquarters and later as part of the security detail for ULIMO's leader. *Ibid.* Petitioner additionally attested that he had never "caused harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion" and had never "ordered, assisted, or otherwise participated in such acts." *Id.* at 7a (citation omitted). "In short, fabrications and falsehoods filled his written statements." *Id.* at 8a. Based on his application and a subsequent interview during which he confirmed the substance of his written answers, petitioner was granted asylum in the United States. *Id.* at 8a-9a.

In 2001, petitioner used Form I-485 to apply for permanent residency in the United States. Pet. App. 9a. In his written application, petitioner's answers again "ignored the truth." *Ibid.* For example, question eight on Form I-485 asked, "[H]ave you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion?" *Ibid.* (citation omitted). Question ten on Form I-485 asked, "[H]ave you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the U.S.

or any immigration benefit?" *Ibid.* (citation omitted). Petitioner answered "no" to both questions. *Id.* at 10a (citation omitted).

In 2011, a United States Citizenship and Immigration Services officer interviewed petitioner under oath about his application for permanent residency. Pet. App. 9a. The officer reviewed and confirmed petitioner's responses in his Form I-485, tailoring the interview to focus on the questions that were "actually applicable" to petitioner. *Ibid.* (citation omitted). While petitioner was still under oath, the officer asked petitioner certain questions from Form I-485 verbatim. *Ibid.*

As relevant here, the officer read question eight from Form I-485 to petitioner, asking him, "Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion?" Pet. App. 10a (citation omitted). Petitioner responded "no." *Ibid.* (citation omitted). The officer also repeated question ten from Form I-485 verbatim, asking, "[H]ave you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the U.S. or any immigration benefit?" *Ibid.* (citation omitted). Petitioner again answered "no." *Ibid.* (citation omitted). Using a blue pen, the officer made marks on petitioner's Form I-485 application to reflect the questions that he had reviewed with petitioner and the answers that petitioner had given. C.A. App. 622a-623a. The officer later explained that petitioner's false answers were "critical" because "'somebody who takes up arms and engages in certain wartime acts would be inadmissible to the United States.'" Pet. App. 10a (citation omitted).

2. In 2016, a grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of fraud with respect to material facts in an immigration application, in violation of 18 U.S.C. 1546(a), and two counts of perjury, in violation of 18 U.S.C. 1621. C.A. App. 66a-79a; see Pet. App. 10a & n.8. By the time of the indictment, the statute of limitations had run on any illegal conduct that petitioner engaged in when he filed his Form I-485 application for permanent residency in 2001. Pet. App. 11a. The charges in the indictment accordingly related to the false statements that petitioner had made during the 2011 interview. *Ibid.*; see C.A. App. 75a-76a. In particular, the two Section 1546(a) counts charged that, during the 2011 interview, petitioner "knowingly made under oath, and knowingly certified as true under penalty of perjury, a false statement with respect to a material fact in an application and document required by the immigration laws and regulations prescribed thereunder, that is, a Form I-485." C.A. App. 75a-76a; see Pet. App. 12a.

Petitioner proceeded to trial. See Pet. App. 11a. "For those who suffered under [petitioner's] command, the two-week jury trial provided a vivid public rebuke from seventeen Liberian eyewitnesses whose 'demeanor and bearing . . . underscored the almost inconceivable horrors and indignities they had endured.'" *Ibid.* (citation omitted). The trial evidence established that, as a rebel commander during the Liberian civil war, petitioner "personally committed or ordered his troops to commit murder, enslavement, rape, and torture 'because of race, religion, nationality, ethnic origin or political opinion.'" *Ibid.* (citation omitted). The jury

found petitioner guilty on all four counts. *Ibid.* The district court later sentenced petitioner to a statutory-maximum term of 360 months of imprisonment, consisting of a 120-month term of imprisonment on each Section 1546(a) count and a 60-month term of imprisonment on each perjury count, with all terms run consecutively, to be followed by a three-year term of supervised release. C.A. App. 3a-4a; see Pet. App. 11a.

3. The court of appeals affirmed. Pet. App. 1a-44a. As relevant here, petitioner argued for the first time on appeal that 18 U.S.C. 1546(a) does not encompass false oral statements and thus that his immigration-fraud convictions were invalid. Pet. App. 2a, 27a. After examining that claim at length, the court of appeals ultimately agreed with petitioner that "the text, context, and history of § 1546(a) show that the best reading of the statute applies only to material, false statements made in a document under oath or under penalty of perjury, not false statements made orally under oath about that document." *Id.* at 26a; see *id.* at 12a-26a. The court accordingly concluded that Section 1546(a) "cannot be read to reach the conduct charged" in the immigration-fraud counts in petitioner's case. *Id.* at 12a. Because petitioner had not challenged the application of Section 1546(a) in the district court, however, the court of appeals affirmed petitioner's Section 1546(a) convictions because it determined that petitioner had not met "the stringent standards for reversal for 'plain error'" under Federal Rule of Criminal Procedure 52(b). Pet. App. 2a; see *id.* at 27a-31a.

In denying plain-error relief, the court of appeals found that petitioner had not satisfied the requirement to show a "clear, plain error," observing that petitioner's Section 1546(a) claim presented "a new issue of

interpretation, where only a close interpretive inquiry reveals the best reading of § 1546(a)." Pet. App. 30a-31a. The court explained that "it cannot be said that the meaning of § 1546(a) was 'clear' as we normally understand clarity in legal interpretation, for the meaning of § 1546(a) was unsettled both at [petitioner's] trial and throughout this appeal." *Id.* at 30a. And the court found "no instance of any other court considering the ordinary meaning of § 1546(a)" and no "controlling or persuasively clear 'legal norm' on the meaning of the provision." *Ibid.* (citation omitted). "Given the novelty of the interpretive question, and the lack of persuasive, let alone authoritative, guidance," the court determined that the error it perceived in petitioner's Section 1546(a) convictions was not a plain error that required reversal. *Id.* at 2a.

ARGUMENT

Petitioner contends (Pet. 9-27) that his convictions for fraud with respect to a material fact in an immigration application, in violation of 18 U.S.C. 1546(a), are plainly erroneous on the theory that Section 1546(a) does not reach his conduct in this case. Petitioner's view of Section 1546(a) is incorrect, and petitioner thus has not shown that his convictions constitute error, much less the clear and obvious error required by the second element of the plain-error test. The court of appeals thus correctly rejected petitioner's forfeited challenge to his Section 1546(a) convictions, and no conflict exists between its decision and any decision of this Court or another court of appeals. In addition, petitioner's case would be an unsuitable vehicle for addressing the application of the plain-error test because the Court would first have to resolve the threshold question, to which the court of appeals devoted a substantial portion of its

opinion, of whether Section 1546(a) covered petitioner's conduct. Further review is unwarranted.

1. Because petitioner did not raise his current challenge to the scope of Section 1546(a) in district court, he may obtain relief on that forfeited claim only by satisfying the requirements of plain-error review. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner would have to demonstrate (1) error; (2) that is clear or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 732-736; see, *e.g.*, *Greer* v. *United States*, Nos. 19-8709 & 20-444 (June 14, 2021), slip op. 3-4; *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). An appellant satisfies the first two of those requirements by showing an error that is clear at the time of the appeal. *Henderson* v. *United States*, 568 U.S. 266, 269 (2013). Here, however, petitioner cannot demonstrate any error, much less a "clear or obvious" error. *Puckett*, 556 U.S. at 135.

a. As relevant here, the fourth paragraph of Section 1546(a) imposes criminal penalties on anyone who "knowingly makes under oath * * * any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder." 18 U.S.C. 1546(a). The plain text of that provision covers the false oral statements petitioner made under oath during his 2011 immigration interview, when he swore that specific statements in his written application to become a lawful permanent resident were true even though he knew those statements were false—namely, his representations that he had never engaged in genocide or other

killings based on protected characteristics and had never sought to procure an immigration benefit (here, asylum) by fraud or willful misrepresentation of a material fact. See Pet. App. 10a. Those oral statements fall within the scope of Section 1546(a) because they were statements that petitioner made "under oath" and "with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder." 18 U.S.C. 1546(a).

To the extent that Section 1546(a) requires that material falsehoods be contained in a written "application, affidavit, or other document," 18 U.S.C. 1546(a), petitioner's falsehoods would qualify because he made written false statements in his I-485 form and then made oral representations under oath that those written statements were true. See Pet. App. 9a-10a. Moreover, even if some doubt existed regarding whether Section 1546(a) covers a sworn oral statement that falsely attests to the truth of material facts in a written immigration application, Section 1546(a) would still prohibit petitioner's conduct because petitioner, through his false oral statements, caused an immigration officer to make additional false statements on petitioner's written immigration application. See Gov't C.A. Supp. Br. 5-9.

b. As the government explained below (Gov't C.A. Supp. Br. 9-16), neither the legislative history of Section 1546(a) nor the historic practices of immigration officials support reading Section 1546(a) to exclude false statements like petitioner's. The court of appeals disagreed, taking the view that the statutory text "as originally enacted" in 1924 and "the import of amendments to that text over time" preclude application of Section 1546(a) to any oral statements at all. Pet. App. 14a; see

id. at 12a-26a. The court nevertheless recognized, however, that petitioner's "novel" statutory argument did not warrant plain-error relief. *Id.* at 30a-31a. That is correct and comports with this Court's precedent.

To satisfy the second element of plain-error review, a defendant must show that an error was "clear or obvious, rather than subject to reasonable dispute." *Puckett*, 556 U.S. at 135. That standard requires the defendant to show that the alleged error was "so 'plain'" under governing law that a court would be "derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see *Henderson*, 568 U.S. at 278 (explaining that "lower court decisions that are questionable but not *plainly* wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule). Petitioner identifies no decision from this Court or any court of appeals that plainly required the court of appeals to take the view that petitioner's false oral statements during his 2011 interview fail to qualify as "false statement[s] with respect to a material fact in" petitioner's application for permanent residency. 18 U.S.C. 1546(a). The court of appeals correctly understood that "the meaning of § 1546(a) was unsettled," rather than "'clear,'" both at petitioner's trial and throughout his appeal. Pet. App. 30a.

Petitioner errs in contending (Pet. 9-12) that the decision below holds that a statutory error qualifies as "'plain'" for purposes of plain-error review only if "authoritative case law" has already adopted the defendant's interpretation of that particular statute. Pet. 11. The court of appeals did not announce such a rule. To the contrary, the court stated that "[i]t is generally true that 'lack of precedent alone will not prevent us from

finding plain error.'" Pet. App. 29a (quoting *United States* v. *Stinson*, 734 F.3d 180, 184 (3d Cir. 2013)). The court additionally acknowledged that a defendant raising a "novel" statutory question could show plain error if "some other 'absolutely clear' legal norm" resolved the question in the defendant's favor. *Id.* at 30a (quoting *United States* v. *Nwoye*, 663 F.3d 460, 466 (D.C. Cir. 2011)). In petitioner's case, however, the court found that no "controlling or persuasively clear 'legal norm'" made the meaning of Section 1546(a) plain. *Ibid.* (citation omitted).

Petitioner disagrees with that determination because he believes that the plain text of Section 1546(a) clearly excludes oral statements. See Pet. 9-10 & n.8. Petitioner further argues (Pet. 11, 13, 15-16) that, even if the language of Section 1546(a) is not clear on its face, the meaning of the statute becomes clear and obvious once a court applies the tools of statutory construction. But even though the court of appeals ultimately agreed with petitioner that his bottom-line view of the statute's scope was "the ordinary and best reading of § 1546(a)," Pet. App. 2a, it emphasized that "only a close interpretative inquiry reveals the best reading of § 1546(a)," *id.* at 30a-31a, and accordingly found that its interpretation did not "meet[] the stringent standards for reversal for 'plain error'" in light of "the novelty of the interpretative question, and the lack of persuasive, let alone authoritative, guidance," *id.* at 2a; see *id.* at 12a-31a.

Petitioner similarly errs in asserting that the court of appeals adopted a rule that a statutory error could be "'clear or obvious'" only if it would be evident to someone "glancing casually at the statute." Pet. 16 (citation omitted). To the contrary, as petitioner himself recognizes (Pet. 15), the court "acknowledge[d] that an error

in applying a federal criminal statute can be 'plain' * * * even when the actions of the district court are seen to be wrong only *after* applying the tools of statutory construction." See Pet. App. 29a (citation omitted). Specifically, the court explained that the process of interpreting a statute "may require more or less rummaging in the 'toolbox'" of statutory construction "to 'seiz[e] everything from which aid can be derived,'" and "the deeper that interpretative inquiry, the less obvious, at least at the outset, the answer." *Ibid.* (citation omitted; brackets in original). That view of the plain-error standard accords with this Court's recognition that "a new rule of law, set forth by an appellate court, cannot automatically lead that court to consider all contrary determinations by trial courts *plainly* erroneous." *Henderson*, 568 U.S. at 278.

2. Petitioner identifies no decision of this Court or any court of appeals that has taken a different approach from the decision below in analogous circumstances involving the application of the plain-error standard to questions of statutory interpretation.

Petitioner contends (Pet. 11-12) that the court of appeals' application of the second element of plain-error review conflicts with this Court's decisions in *Henderson* v. *United States*, *supra*, and *Johnson* v. *United States*, 520 U.S. 461 (1997). No such conflict exists. *Henderson* and *Johnson* addressed whether an error is "'plain'" when the law "had become settled in the defendant's favor" by the time of direct appellate review but was either "unsettled at the time the trial court acted," *Henderson*, 568 U.S. at 269, or was "settled" at the time of trial "and clearly contrary to the law at the time of appeal," *Johnson*, 520 U.S. at 468. In both cases, this Court determined that "the error is 'plain' within

the meaning of" Rule 52(b) "as long as the error was plain as of that later time—the time of appellate review." *Henderson*, 568 U.S. at 269; see *Johnson*, 520 U.S. at 468. In petitioner's case, in contrast, "the meaning of § 1546(a) was unsettled both at [petitioner's] trial and throughout [his] appeal." Pet. App. 30a. Neither *Henderson* nor *Johnson* establishes that an error is "plain" in that circumstance.

Petitioner asserts (Pet. 21-25) that the decision below is contrary to "all authority in the circuits," Pet. 21, but he cites only two decisions as putative examples, neither of which conflicts with the decision below. In *United States* v. *Makkar*, 810 F.3d 1139 (2015) (Gorsuch, J.), the Tenth Circuit determined that a jury-instruction error in a Controlled Substance Analogue Enforcement Act case was plain in part because the government had "concede[d] the error on appeal *and* did so (effectively twice) even before the trial." *Id.* at 1145. And in *United States* v. *Wuliger*, 981 F.2d 1497 (1992), cert. denied, 510 U.S. 1191 (1994), the Sixth Circuit found that the district court's jury instructions on the elements of 18 U.S.C. 2511(1)(d) amounted to plain error because the instructions "were tantamount to directing a verdict against the defendant." 981 F.2d at 1503. Neither case indicates that the Sixth or Tenth Circuit would disagree with the Third Circuit's determination that petitioner has failed to show plain error here.

3. Petitioner suggests (Pet. 12-16) that, in this case, this Court should not adhere to its repeated instruction that an error must be "clear or obvious, rather than subject to reasonable dispute," in order to satisfy the plain-error standard. *Puckett*, 556 U.S. at 135 (citing *Olano*, 507 U.S. at 734); see, *e.g.*, *United States* v. *Marcus*, 560 U.S. 258, 262 (2010). According to petitioner, this

Court's statements recognizing such a requirement are "dictum, and arguably mistaken." Pet. 14 (discussing *Olano*). See Pet. 15-16 (discussing *Puckett* and *Marcus*); see also Pet. 12-13 (discussing *United States* v. *Young*, 470 U.S. 1 (1985)). Petitioner took the opposite position in the court of appeals, however, where he recognized that, "[u]nder the Supreme Court's now-settled elaboration of [Rule] 52(b), a legal error is 'plain' if it * * * is 'clear or obvious, rather than subject to reasonable dispute.'" Pet. C.A. Am. Supp. Br. 1 (quoting *Puckett*, 556 U.S. at 135); see *id.* at 1-3. And the Court's explanation of that standard is correct for the reasons set forth in the Court's decisions.*

Petitioner additionally contends (Pet. 18-21) that principles of due process and the separation of powers require the vacatur of his Section 1546(a) convictions, and that Rule 52(b) would be unconstitutional if it precluded that result. That claim does not warrant review because, *inter alia*, petitioner failed to raise it until his petition for rehearing, after the court of appeals had issued its decision affirming his convictions. See Pet. C.A. Pet. for Reh'g 8-9. It is well established that courts of appeals are not obligated to address matters raised for the first time in petitions for rehearing. See, *e.g.*, *United States* v. *Lewis*, 412 F.3d 614, 615-616 (5th Cir. 2005) (per curiam); *United States* v. *Patzer*, 284 F.3d 1043, 1045 (9th Cir. 2002); *United States* v. *Martinez*, 96 F.3d 473, 475 (11th Cir. 1996) (per curiam). And because this Court "is 'a court of review, not of first view,'"

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* Petitioner also asserts (Pet. 16-17) that the court of appeals misstated the standard of review that applied to his claim that insufficient evidence supported his convictions for perjury, in violation of 18 U.S.C. 1621. As petitioner acknowledges, however, he is not challenging his Section 1621 convictions in this Court. See Pet. 25 n.17.

it rarely reviews matters that were not properly raised before or passed upon by the court of appeals. *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); see *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits"). Petitioner identifies no sound reason for this Court to depart from that practice here.

In any event, petitioner's new constitutional claim lacks merit. "'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)). Accordingly, a defendant who fails properly to preserve a claim in district court has no constitutional right to obtain relief on that claim on appeal. See *Yakus*, 321 U.S. at 444-445. The "seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure," including Rule 52(b), *Johnson*, 520 U.S. at 466, and "federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions," *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). Courts therefore have "no authority" to make exceptions to Rule 52(b)'s plain-error requirements, even for constitutional claims. *Johnson*, 520 U.S. at 466.

4. In any event, petitioner's case would be an unsuitable vehicle for addressing the requirements of the plain-error standard because the question presented involves an extensive threshold dispute about whether

Section 1546(a) applies to petitioner's conduct. Specifically, as the court of appeals recognized, this case presents "the novel question of whether § 1546(a) is best read to include oral statements." Pet. App. 30a. The decision below is the first circuit decision to address that question of statutory interpretation, and the court of appeals arrived at its interpretation of Section 1546(a) only through "a close interpretive inquiry" that included an examination of the statute's history and pre-1952 immigration practices. *Id.* at 30a-31a; see *id.* at 14a-26a. And because the government disagrees with the court of appeals' view that petitioner's conduct is exempt from Section 1546(a), see pp. 9-10, *supra*, any resolution of the question presented would require this Court to address that threshold issue of statutory interpretation. Even if the Court were to agree with the court of appeals' view, moreover, its reasoning might differ in a way that would affect the application of the plain-error standard. That complication makes this case a poor vehicle for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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