No. 19-6517

IN THE SUPREME COURT OF THE UNITED STATES

LYNDEN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-8) that his conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), is infirm because the courts below did not recognize that knowledge of status is an element of that offense. Petitioner asks that this Court grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings (GVR) in light of this Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), which held that the mens rea of knowledge under Sections 922(g) and

924(a)(2) applies "both to the defendant's conduct and to the defendant's status." Id. at 2194.

That course is not warranted in this case. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Applying that rule here would preclude a grant of certiorari because, as petitioner acknowledges (Pet. 6), he did not challenge his conviction below on the ground that he lacked knowledge regarding his status as a felon.

This Court has sometimes entered a GVR order in cases where an "intervening" event has given new vitality to an argument that was not previously raised. See Lawrence v. Chater, 516 U.S. 163, 167-168 (1996) (per curiam) (describing this Court's "intervening development" GVR practice); see also id. at 180-181 (Scalia, J., dissenting) (explaining that the Court's "intervening event" GVR practice involves "a postjudgment decision of this Court" or, occasionally, a decision of this Court that "preceded the judgment in question, but by so little time that the lower court might have been unaware of it") (emphasis omitted). Here, however, this Court decided Rehaif on June 21, 2019, while petitioner's direct appeal was pending, and petitioner had over six weeks to raise any Rehaif-

based contentions before the court of appeals rendered its decision on August 6, 2019. See Pet. App. A. He failed to do so, and he then failed to seek panel rehearing or rehearing en banc in order to raise a belated Rehaif-based claim before the mandate issued on August 28, 2019 -- more than two months after Rehaif was decided.

In these circumstances, nothing warrants a departure from this Court's ordinary practice of granting certiorari with regard only to claims that were pressed or passed upon below. Cf. Leon v. United States, 139 S. Ct. 56 (2018) (No. 17-8008) (denying petition for writ of certiorari invoking, inter alia, a recently decided Supreme Court case that was available but not brought to the attention of the court of appeals while petitioner's direct appeal remained pending). The petition for a writ of certiorari should be denied.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JANUARY 2020

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.