NO. 19-7388

IN THE SUPREME COURT OF THE UNITED STATES

AARON PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

REPLY TO PETITION FOR WRIT OF CERTIORARI

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The government's memorandum in opposition only addresses Petitioner Aaron Perez's claim for relief under *Rehaif v. United States*, 139 S. Ct. 2191 (2019); Mr. Perez limits his reply accordingly. The government's argument raises a circuit split that warrants the Court's review of Mr. Perez's petition. The Fourth Circuit and the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits are split on whether a *Rehaif* error should be reviewed for prejudice under the plain error standard in *United States v. Olano*, 507 U.S. 725, 732 (1993).

The Fourth Circuit has held that a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights. *United States v. Gary*, No. 18-4578, 2020 WL 1443528, at *2 (4th Cir. Mar. 25, 2020). The Fourth Circuit's conclusion correctly interprets the Court's precedent on structural error. *Id.* at *7-8.

Under the provisions of 18 U.S.C. § 922(g), "the defendant's status is the 'crucial element' separating innocent from wrongful conduct." *Rehaif*, 139 S. Ct. at 2197 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)). For this and other reasons, the Court held the government must show that the defendant "knew he had the relevant status when he possessed" a firearm. *Id.* at 2194. Uninformed of this crucial element of the offense, Mr. Perez made the fundamental yet unintelligent decisions to waive his right to a jury trial and stipulate to testimony and facts in a bench trial. Failure to inform Mr. Perez that knowledge of his prohibited status was an element of the offense deprived him of the "opportunity to decide whether to mount a defense to this element of his

§ 922(g)(1) charges—as it was his sole right to do," and whether to do it before a jury of his peers. *Gary*, 2020 WL 1443528, at *6. As the Court has recognized in a related context, these fundamental decisions regarding Mr. Perez's defense are integral to his Fifth and Sixth Amendment autonomy interests. *Id.* at *7 (citing *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (in capital case, it was structural error for trial counsel to admit defendant's guilt over defendant's objection)). This deprivation of Mr. Perez's autonomy interests has consequences that "are necessarily unquantifiable and indeterminate" – rendering it unsuitable for a harmless error analysis. *Id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (structural error to erroneously deprive criminal defendant of the right to counsel of choice)). As in *McCoy* and *Gonzalez-Lopez*, the *Rehaif* error in Mr. Perez's case is similarly structural and affects a defendant's substantial rights, satisfying the third prong of the *Olano* inquiry.

In contrast, under the plain error analysis advocated by the government – and adopted by the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits – there is no effect on a defendant's substantial rights where evidence outside of the record of conviction, shows that the defendant knew of his status as a prohibited person at the time of his gun possession. Opp'n at 2-3; *see United States v. Burghardt*, 939 F.3d 397, 404 (1st Cir. 2019); *United States v. Denson*, 774 F. App'x 184, 184-85 (5th Cir. 2019) (unpublished); *United States v. Bowens*, 938 F.3d 790, 797 (6th Cir. 2019); *United States v. Williams*, 946 F.3d 968, 973 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019); *United States v. Benamor*, 937

F.3d 1182, 1189 (9th Cir. 2019); *United States v. Reed*, 941 F.3d 1018, 1021–22 (11th Cir. 2019). In the majority of the circuits then, a defendant who, like Mr. Perez, had previously served a prison sentence, cannot meet *Olano*'s third prong – despite the fact that no evidence of a prison sentence was introduced at trial or admitted as the factual basis for a guilty plea. *See* Opp'n at 3. The majority of the circuits splits with the Fourth Circuit's application of *McCoy* and *Gonzalez-Lopez*. The Court should grant review to resolve this circuit conflict consistent with its precedent on structural error.

Alternatively, even if the *Rehaif* error in Mr. Perez's case is amenable to prejudice analysis, the question is whether a rational factfinder could have found proof beyond a reasonable doubt "upon the record evidence adduced at the trial." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The government's contention that Mr. Perez's prior prison sentences render the *Rehaif* error harmless relies on impermissible, extra-record evidence that was not presented at Mr. Perez's bench trial. *See* Opp'n at 3 (citing Presentence Investigation Report). In contrast, the evidence introduced at Mr. Perez's bench trial was not sufficient to prove, either directly or circumstantially, knowledge of felon status, as required by *Rehaif*. *See* Amended Stipulation and Waivers for Bench Trials (Case No. 4:16-cr-00223-JSW-1, Dkt. 47 ¶ 7) (stipulating "that before April 20, 2016, defendant Aaron David Perez had been convicted of a felony, i.e., a crime punishable by imprisonment for a term exceeding one year"). *Rehaif* never suggested that knowledge of status could be proved by the mere fact that the defendant had been convicted of a felony. *Cf.* 139 S.

Ct. at 2200 (not considering "what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here"); *id.* at 2209 (Alito, J., dissenting) (noting possible conflict with *Old Chief v. United States*, 519 U.S. 172 (1997), because government will be required to prove not just fact but also knowledge of prior felony conviction); *id.* at 2213 (Alito, J., dissenting) ("Those for whom direct review has not ended likely will be entitled to a new trial."). Therefore, a rational factfinder could not have found Mr. Perez guilty of violating § 922(g)(1) based on the trial record.

Finally, the government speculates that the Ninth Circuit denied relief on the basis of Mr. Perez's *Rehaif* claim. Opp'n at 2. To the contrary, the Ninth Circuit's discretionary, summary denial of Mr. Perez's petition for rehearing, contains no indication that the court of appeals considered the merits of Mr. Perez's *Rehaif* claim. Pet. App. 9a.

For the aforementioned reasons, as well as the reasons set forth in Mr. Perez's petition for a writ of certiorari, the Court should grant the petition and reverse the court of appeals.

Dated: April 1, 2020

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