No. 20-1295

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TIMOTHY ZACHARY GREEN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

Cullen Macbeth
Assistant Federal Public
Defender
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
6411 Ivy Lane
Suite 710
Greenbelt, MD 20770
(301) 344-0600
cullen_macbeth@fd.org

QUESTION PRESENTED

Whether, on plain-error review, a court of appeals may affirm a conviction for unlawful firearm possession under 18 U.S.C. § 922(g)(1) where the indictment did not allege, the jury was not instructed to find, and the government introduced no evidence to prove the defendant's knowledge of his prohibited status, as required by this Court's opinion in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

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STATEMENT OF THE CASE

On November 6, 2017, a grand jury in the District of Maryland charged respondent Timothy Green with one count of being a felon in possession of a firearm, under 18 U.S.C. § 922(g)(1). J.A. 13. The one-count indictment alleged that Green, "having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm in and affecting commerce." J.A. 13. It did not allege that at the time he possessed the firearm, Green knew he had been convicted of a crime punishable by more than one year in prison.

At trial, the parties stipulated that before the date of the offense, Green "had been convicted of a crime punishable by imprisonment for a term exceeding one year." J.A. 664. The stipulation did not address whether, at the time of the offense, Green knew he had been convicted of such a crime. The district court instructed the jury that to convict, it had to find, among other things, that Green had been "convicted, in any court, of a crime punishable by imprisonment for a term exceeding one year." J.A. 753. But, the court added, the government was "not required to prove that [Green] . . . knew that he had been previously convicted of a crime punishable by imprisonment for more than one year." J.A. 755-56. The jury returned a guilty verdict, and the district court sentenced Green to 84 months in prison. J.A. 892, 1096.

A month after Green filed his notice of appeal, this Court issued its decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). That case held that in a prosecution under § 922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it," e.g., that the defendant knew he had previ-

ously been convicted of a felony. *Rehaif*, 139 S. Ct. at 2194. The Court's *Rehaif* opinion abrogated Fourth Circuit precedent holding the government need not prove knowledge of status to secure a § 922(g) conviction. *United States v. Langley*, 62 F.3d 602, 605-06 (4th Cir. 1995) (en banc). Green argued on appeal that *Rehaif* required vacating his conviction because (1) the indictment did not allege he knew of his felon status, (2) the district court did not include the knowledge-of-status element in the jury instructions, and (3) the government introduced insufficient evidence to prove knowledge of status beyond a reasonable doubt. C.A. Br. 16, 42-55.

The Fourth Circuit accepted the government's concession that the district court plainly erred by entering a judgment of conviction against Green. Pet. App. 5a-7a. Citing its recent opinion in *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020), the court concluded at the third prong of plain-error review that the errors prejudiced Green because the "indictment failed to provide him with notice that the Government would attempt to prove that he knew his prohibited status" and because "[a]t trial, there was little—if any—evidence presented that would support that Green knew his prohibited status." Pet. App. 6a-7a. And "[b]ecause these combined errors were suf-ficient to undermine the confidence in the outcomes of the proceedings," the court "exercised [its] discretion to correct the error" at the fourth plain-error prong. Pet. App. 6a.

The government filed a petition for rehearing en banc, which the Fourth Circuit denied on October 19, 2020. Pet. App. 8a. The mandate issued on November 2, 2020. C.A. Dkt. #58. On November 12, 2020, the Fourth Circuit granted the government's petition for en banc rehearing in *Medley*, but it subsequently placed

that appeal in abeyance pending this Court's decision in *United States v. Greer*, cert granted, No. 19-8709 (oral argument scheduled for April 20, 2021). *United States v. Medley*, C.A. No. 18-4789, Dkt. #77, 101. *Greer* presents the question whether, at the third and fourth steps of plain-error review, an appellate court may consider evidence not introduced at trial when reviewing indictment, jury-instruction, and sufficiency-of-the-evidence errors.

On December 18, 2020, Green moved the district court to dismiss the indictment in his case without prejudice, consistent with the Fourth Circuit's mandate. Dist. Ct. Dkt. #148. The government did not file an opposition to that motion. On December 21, 2020, the district court granted Green's motion, dismissing his indictment and ordering his release from federal custody. Dist. Ct. Dkt. #149. The government did not move for reconsideration of that order, and it has not reindicted Green.

The government filed a petition for certiorari on March 17, 2021. The government argues the petition should "be held pending the Court's decision in *Greer*, and then disposed of as appropriate in light of that decision." Pet. 6.

REASONS FOR DENYING THE WRIT

This case is moot. Under Article III of the Constitution, federal courts lack jurisdiction to adjudicate disputes that do not present a live "Case[]" or "Controvers[y]" between the parties. Yet any case or controversy between Green and the government was extinguished when the district court dismissed the indictment. Because it is impossible for this Court to grant

the government any relief at all, this case is moot and the petition for certiorari should be denied.

No live controversy exists between the parties.

Standing doctrine, derived from Article III, § 2, of the Constitution, "limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving the legal rights of litigants in actual controversies." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). "To satisfy the irreducible constitutional minimum of Article III standing, a [party] must not only establish (1) an injury in fact (2) that is fairly traceable to the challenged conduct, but he must also seek (3) a remedy that is likely to redress that injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021). "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018).

Mootness doctrine "demand[s] that an actual controversy . . . be extant at all stages of review, not merely at the time" the case begins. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the [case], at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp.*, 569 U.S. at 72. A case is moot "if it is impossible for a court to grant any effectual relief whatever" to the prevailing party. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). "A case that becomes moot at any point during the proceedings is no longer a 'Case' or 'Controversy' for purposes of Article

III, and is outside the jurisdiction of the federal courts." *Sanchez-Gomez*, 138 S. Ct. at 1537.

"Intervening circumstances" have made it impossible for the Court to grant the government any relief for the errors it claims in this case. *Genesis Healthcare Corp.*, 569 U.S. at 72. Without objection from the government, the district court dismissed the indictment against Green on December 21, 2020. At that point, Green's case was officially closed, and the controversy between him and the government was no longer "extant." *Campbell-Ewald Co.*, 577 U.S. at 160. There is no longer any live dispute in which this Court can afford the government relief. The Court should therefore dismiss the petition for certiorari on mootness grounds.

This Court's opinion in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), does not require a different result. There, the Fifth Circuit reversed the defendants' convictions for various drug-trafficking charges after concluding the government had obtained crucial evidence in violation of the Fourth Amendment. *Villamonte-Marquez*, 462 U.S. at 583-84. Following issuance of the Fifth Circuit's mandate, the government filed a motion in district court to dismiss the indictment, which the district court granted. *Id.* at 594-95 (Brennan, J., dissenting). One month later, the government filed a petition for certiorari, arguing the Fifth Circuit erred by reversing the defendants' convictions. *Id.* at 581 n.2, 595.

This Court held that notwithstanding "the absence of an indictment," the case was not moot, since "the preliminary steps in a criminal proceeding are merged into a sentence once the defendant is convicted and sentenced." *Id.* at 581 n.2. Therefore, the Court wrote, upon the defendants' "conviction and sentence, the indictment that was returned against them was merged into their convictions and sentences, thus obviating

any need for a separate reinstatement of the original indictment." *Id.*

Dissenting, Justice Brennan contended that under this Court's opinion in *Ex parte Bain*, 121 U.S. 1 (1887), "a live, valid indictment is the *sine qua non* of any felony prosecution or sentence." *Id.* at 597-98 & n.5 (Brennan, J., dissenting). The case was therefore moot, Justice Brennan believed, because "[t]his prosecution has terminated, and this Court is entirely without power to revive it, or the convictions or sentences that arose out of it and died with it." *Id.* at 598. The majority distinguished *Bain* on the ground that "[i]n the present case, there is no doubt whatever that *a valid indictment was returned by the grand jury*, the case was tried on that indictment, and . . . a judgment pursuant to Federal Rule of Criminal Procedure 32 was entered on the jury verdict of guilty." *Id.* at 581 n.2 (emphasis added). Accordingly, "the indictment was merged into the judgment, and a successful effort on the part of the Government to reverse the judgment of the Court of Appeals would have the effect of reinstating the judgment of conviction." *Id.*

Thus *Villamonte-Marquez* indicates that dismissal of an indictment on remand from the court of appeals does not render a case moot—as long as the indictment is "valid." Where the indictment is invalid, however, it does not merge into the judgment, and dismissal of the indictment moots the case.

An indictment is invalid if it omits an element of the crime charged. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) ("[A]n indictment must set forth each element of the crime that it charges."). Here, the indictment against Green is invalid, as it failed to allege the knowledge-of-status element required by *Rehaif*. The government has conceded as much. In its

briefing to the Fourth Circuit, the government "agree[d] with Green that in light of the Court's intervening decision in *Rehaif*, the first two elements of the plain error standard [we]re satisfied" with respect to Green's claim of indictment error. C.A. Govt. Br. 40 n.17. Likewise, the government's petition for certiorari acknowledges that in the Fourth Circuit, "the parties . . . agreed that the first two requirements of the plain-error test were satisfied." Pet. 4. The government has therefore recognized not only that Green's indictment was invalid, but also that it was clearly or obviously so. *See Johnson v. United States*, 520 U.S. 461, 467 (1997) ("[T]he word 'plain' is synonymous with 'clear' or, equivalently, 'obvious.'").

Because the district court dismissed the indictment against Green, *Villamonte-Marquez* dictates that this case no longer presents an "actual and concrete dispute[], the resolution[] of which [will] have direct consequences on the parties involved." *Sanchez-Gomez*, 138 S. Ct. at 1537. The Court should therefore deny the government's petition for certiorari.

Alternatively, the Court should hold the petition pending this Court's decision in *Greer* v. *United States*, No. 19-8709.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

Cullen Macbeth
Assistant Federal Public Defender
OFFICE OF THE FEDERAL PUBLIC DEFENDER
6411 Ivy Lane
Suite 710
Greenbelt, MD 20770
(301) 344-0600
cullen_macbeth@fd.org

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