No. 20-5646

IN THE
Supreme Court of the United States

SEAN JUSTIN OWENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITONER

In *United States v. Gary*, No. 20-444, the government has asked this Court to resolve the circuit conflict arising from the plain-error review of guilty pleas entered before *Rehaif v. United States*, 139 S. Ct. 2191 (2019). But as to trials held before *Rehaif*, such as Petitioner Owens's, the government has contended that this Court's review is not warranted "at this time," in light of the Fourth Circuit's order granting rehearing en banc in *United States v. Medley*, 972 F.3d 399 (2020). *See* U.S. Memo. 2.

After the parties' filings in Mr. Owens's case, the Third Circuit held en banc that its plain-error review of a pre-*Rehaif* trial would "consider only what the government offered in evidence at the trial." *United States v. Nasir*, 982 F.3d 144, 162 (3d Cir. 2020) (en banc); *see* Supreme Court Rule 15.8. The Third Circuit's decision expressly conflicts with other circuits' decisions, including the Eleventh Circuit's published decision that controlled the decision in Mr. Owens's case. *Nasir*, 982 F.3d at 164-70 & nn.23, 25 (disagreeing with the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, citing *inter alia United States v. Reed*, 941 F.3d 1018 (11th Cir. 2019)); *see* Pet. App. 4a ("Our decision in *Reed* controls this case and forecloses Owens's argument."). Unlike the Eleventh Circuit, the Third Circuit rejected the government's request that it, as an appellate court, find an element of the offense based on information never admitted at trial, recognizing the Fifth and Sixth Amendment problems with such an approach. *Nasir*, 982 F.3d at 161-64. As the Third Circuit explained:

> To rule otherwise would give us free rein to speculate whether the government *could have proven* each element of the offense beyond a reasonable doubt at a *hypothetical* trial that established a different trial record. But no precedent of the Supreme Court or our own has ever sanctioned such an approach.

Id. at 163. And having confined its review to the trial evidence in Nasir's case, the Third Circuit found plain error, vacated the defendant's conviction, and remanded for a new trial. *Id.* at 170-76 & n.29.

The circuits are thus intractably divided on the question presented in Mr. Owens's petition. Mr. Owens's case is a good vehicle to resolve this conflict. The Eleventh Circuit found the element that Mr. Owens knew his felon status by relying on information never admitted at his trial. Pet. App. 4a. *Nasir* makes clear that the Eleventh Circuit's published decision in *Reed*, which controlled the decision below in Mr. Owens's case, is not supported by any decision of this Court. *See Nasir*, 982 F.3d at 162-67; Pet. 11-12, *Reed v. United States*, No. 19-8679; Reply to Br. Opp. 3-5, *Reed v. United States*, No. 19-8679.[1] Mr. Owens accordingly maintains his request for this Court's review.

Respectfully submitted,

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[1] Because *Reed* controlled the decision in Mr. Owens's case, Mr. Owens adopts the arguments made by Petitioner Reed in his petition for a writ of certiorari and reply to the brief in opposition.