No. 20-5773

IN THE
Supreme Court of the United States

WILLIAM C. MCGEE,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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1. The petition for certiorari presents a related but distinct question from the government's petition for certiorari in *United States v. Gary*. Both should be granted and decided by this Court.

The government concedes there is a circuit split warranting this Court's review over a related but distinct question — "whether a defendant who *pleaded guilty* after a plea colloquy during which he was not informed of the knowledge-of-status element discussed in Rehaif is automatically entitled to relief on plain-error review." U.S. Br. at 2, citing to government's petition for certiorari in *United States v. Gary*, No. 20-444 (emphasis added). Petitioner agrees the question presented regarding guilty pleas in *Gary* should be heard by this Court.

However, *Gary* will not answer the question presented in this case pertaining to *Rehaif* error in jury trials. The government admits that the "guilty plea and trial context are not identical" U.S. Br. at 2, but that understates how different these areas of the criminal law are. This Court needs a separate vehicle to answer this question that implicates the right to a jury trial and grand jury indictment enshrined in the Fifth and Sixth Amendments to the Constitution. Pet. 9-16. Critically, this is the issue that was *expressly reserved* by this Court in *Rehaif*, whether "any error in the jury instructions in this case was harmless." 139 S.Ct. at 2200. Petitioner's case will allow this Court to answer that precise question.

The Fourth Circuit did not reach the *Rehaif* jury trial error issue in *Gary* — it instead reached it in *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020). *Medley* was decided by the Fourth Circuit after *Gary*, but the Fourth Circuit placed little

emphasis on *Gary* in its analysis in *Medley*. Instead, the Fourth Circuit painstakingly analyzed the constitutional rights of the accused, and how those rights were violated because the *Rehaif* element was not "charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" as required by this Court's case law. *Medley*, 972 F.3d at 416, citing *Jones v. United States*, 526 U.S. 227, 243 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

The government is correct that *Rehaif* error implicates certain similar core due process concerns in jury trials and guilty pleas. *See Gary* Pet. pg. 24 (arguing that the holding of *Gary* is "likely" to impact jury trials). Therefore, the question presented in this case is just as compelling as the one in *Gary*, if not more so, because petitioner exercised his jury trial right and directly contested the allegations in the indictment. This Court has repeatedly acknowledged, in differing contexts, that the right to a jury trial is sacrosanct. *See, for example, Mathis v. United States*, 136 S.Ct. 2243, 2259 (2016) (J. Thomas, concurring) (urging that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) be reconsidered because "depending on judge-found facts" at sentencing "violates the Sixth Amendment.").

Often, when this Court is presented two distinct, but related issues for certiorari, it grants both at the same time to resolve the issues in distinct vehicles. *See, for example, Trump v. Vance*, 140 S.Ct. 2412 (2020)*; see also Trump v. Mazars USA LLP*, 140 S.Ct. 2019 (2020). Although both *Vance* and *Mazars* dealt with the same broad subject of issuing subpoenas to a sitting President, the analysis of the distinct legal issues in the two different cases was stark. *Id*. In short, it would have

been chaotic for this Court to resolve the differing issues in *Vance* and *Mazars* in one case.

The same is true as it pertains to *Rehaif* error in the distinct contexts of jury trials and guilty pleas. Failing to grant certiorari in this case — or another case that presents the distinct issue of *Rehaif* error in a jury trial — raises the real possibility this Court would have to revisit the question in another Term in the future. Based on principles of judicial economy, this Court should resolve this exceptionally important question in this case contemporaneously with *Gary*.

2. This petition of certiorari squarely raises the circuit split issue pertaining to instructional error reserved by this Court in *Rehaif*.

The government does not dispute that the outcome of who receives *Rehaif* relief after a jury trial error turns solely on the happenstance of geography, with the Fourth Circuit vacating and remanding defendant's convictions and sentences, while the Eighth Circuit is summarily affirming indistinguishable defendant's cases on direct appeal. *See* Pet. 8-11. Nor could it, because it argued in its petition for rehearing before the Fourth Circuit that *Medley* created a circuit split that "upset countless challenges to felon-in-possession convictions, and will have a profound impact on the application of the plain error standard going forward." Gov't petition for rehearing *en banc* in Medley, pg. 2-3 (filed October 5, 2020). The government further argued this question is "of exceptional importance." *Id.*

But the government makes the opposite argument before this Court, that the question presented in this case "does not warrant this Court's review at this time." U.S. Br. at 2. If the issue is of exceptional importance before the Fourth Circuit *en*

banc, it is hard to discern why this issue would not warrant this Court's prompt attention, especially since the government has already filed a petition for certiorari before this Court on the related issue in *Gary*.

The only reason given by the government as to why Mr. McGee's petition for certiorari "does not warrant this Court's review" is to cross-reference its response in another petition for certiorari. U.S. Br. at 2, citing to *Greer v. United States*, No. 19-8709. But when turning to the government's response in *Greer*, one discovers that it does not address petitioner's question presented, because *Greer* raised a much narrower question of whether "a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights." *See Greer*, No. 19-8709, Question Presented. In its response in *Greer*, the government acknowledged the overarching circuit split regarding *Rehaif* jury trial error. *See Greer* U.S. Br. at 16 ("*Medley* appears to be at odds with the decision below."). However, it explained why *Greer* was a poor vehicle to resolve the circuit split because "the procedural question presented" in *Greer* was limited to "whether evidence outside the trial record is relevant to plain-error review of a Rehaif error." *Greer* U.S. Br. at 15-16; *see also Reed v. United Stated*, 19-8679, U.S. Br at 9 ("[T]his case presents a poor vehicle for further review because petitioner has only challenged the court of appeals' consideration of the whole record in evaluating the third requirement of the plain-error standard.").

Mr. McGee's petition for certiorari does not suffer from these same defects. In fact, the question presented in this case is precisely the broad issue presented in

Medley, "[w]hether omitting an essential element of the crime in both the indictment and jury instructions may be reviewed for harmlessness . . . or whether they are structural errors that violate a defendant's substantial rights and undermine confidence in the outcome of trial proceedings. . . " *See* McGee Pet., Question Presented. Again, this issue was reserved by this Court in *Rehaif*, one that is indisputably important. *Rehaif,* 139 S.Ct. at 2200.

The government's other vehicle argument — that "Medley does not provide a basis for granting the petition for a writ of certiorari" because "the government has filed a petition for rehearing en banc in that case." *Greer*, U.S. Br. at 16-17; *Reed*, U.S. Br. at 9 — should also be rejected by this Court. It is unlikely that the petition for rehearing will be granted in *Medley* because the Fourth Circuit denied the government's similar petition for rehearing in *Gary*. Notably, in its petition for rehearing in *Medley*, the government fails to even cite to *Gary*, let alone explain how the Fourth Circuit could rule in favor of the government in *Medley*, having already ruled against it in *Gary*.

However, out of abundance of caution, this Court may simply hold this petition for certiorari until the first conference next year on January 8, 2021, to determine the outcome of the petition for rehearing in *Medley*. By then, it is likely that the Fourth Circuit will have decided whether to deny rehearing. Waiting to conference this case until January 2021 will also have the added benefit of allowing this Court to conference this case along with the government's petition for certiorari in *Gary*, where the parties agreed to have the briefing completed so this Court may

conference the case on January 8, 2021. *See Gary*, 20-444, motion for continuance, filed October 13, 2020.

3. Petitioner' case is a suitable vehicle to resolve this issue promptly this Term.

Were the government to lose its petition for rehearing before the Fourth Circuit in *Medley*, it would not be surprising if the government filed a petition for certiorari to review the acknowledged circuit split. But it would be an unsuitable vehicle for this Court to resolve this issue promptly this Term.

The government stressed that it filed the petition for certiorari in *Gary* "at a time calculated to allow for the Court to grant certiorari and decide the case on the merits during the current Term." *Gary* Pet. 21. The petition for rehearing in *Medley* was just fully briefed by the parties in the Fourth Circuit at the end of October. Even if the Fourth Circuit swiftly ruled on the petition, the government would need time to draft the petition for certiorari, and opposing counsel would need at least thirty days (if not more) to file a response. Based on this timeline, it is difficult to imagine how that case could be briefed and argued this Term.

To be sure, the Fourth Circuit's analysis of the question in *Medley* was much more comprehensive that the Eighth Circuit's analysis, but that is because of the improper summary affirmance by the Eighth Circuit. Pet. 12-15. Petitioner did not have the opportunity to fully brief all the issues on appeal analyzed by the Fourth Circuit in *Medley*, such as the cumulative effect of the indictment and trial errors. *See Medley*, 972 F.3d at 415. But this does not make this case an unsuitable vehicle, because petitioner focused on the instructional error issue at trial, reserved by this

Court in *Rehaif*. 139 S.Ct. at 2200.[1] Ultimately, the Eighth Circuit's failure to fully address and analyze the merits of petitioner's appeal should not evade this Court's review, because of its incomplete analysis. To do so, would encourage the Eighth Circuit to continue to issue summary affirmances of important legal issues, even in the face of an acknowledged circuit split among its sister circuits.

Alternatively, if this Court does not intend to grant certiorari in this case but does intend to review the issue he raises (or the related issue in *Gary*), petitioner asks that his petition be held pending resolution of this Court's chosen vehicle.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] If there any lingering concerns of issue preservation after the petition for certiorari is granted, this Court could later remand this case after it hears the merits of the question presented. The lower court would then be "free to determine whether [petitioner] properly presented the argument, and to decide the merits, if appropriate." *United States v. Stitt*, 139 S.Ct. 399, 407 (2018) (remanding Mr. Sims' case to the Eighth Circuit for further consideration).