No. _____

IN THE

Supreme Court of the United States

CARLOS MAEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Amendment requires that no person be convicted of a felony except on a finding by a jury that the government has proved its case beyond a reasonable doubt for every element of a crime. Appellate courts agree that conviction in violation of this provision is error. They disagree, however, on whether to remedy such errors when applying the fourth prong of the *Olano* plain error test. *United States v. Olano*, 507 U.S. 725 (1993). They further disagree as to which materials appellate courts can consider when deciding this question.

The fourth prong of *Olano* asks whether an error seriously affects the fairness, integrity or public reputation of judicial proceedings.

The questions presented are:

1. Did the Seventh Circuit err in using Mr. Maez's stipulation to one element of the offense as proof of another element of the offense, effectively relieving the government of its burden of proof under the third prong of the *Olano* test?

2. Does a conviction following incorrect jury instructions, failure of the petit jury to make a finding on an essential element of a crime, and an appellate court's reliance on facts not shown to the jury, seriously affect the fairness, integrity or public reputation of judicial proceedings?

3. In applying the fourth prong of the plain error test from *United States v. Olano* to a jury verdict with a missing element, can appellate judges rely on information that was not presented to the jury in the first instance?

DIRECTLY RELATED CASES

Court	Case Name	Case Number
United States Court of Appeals for the Seventh Circuit	*United States v. Maez*	19-1287
United States District Court for the Northern District of Indiana	*United States v. Maez*	3:16-cr-57

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IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS MAEZ,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

Petitioner Carlos Maez respectfully petitions for a writ of certiorari to review the published decision of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 960 F.3d 949 and appears in Appendix A to this Petition.[1] Pet. App. 1a.

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[1] The Seventh Circuit decided Mr. Maez's case in a joint opinion along with Defendant-Appellants Mathew R. Jones (case no. 19-1768), and Cameron Battiste

The May 23, 2018, spoken and written jury instructions from the United States District Court for the Northern District of Indiana were not reported, but are reproduced in relevant part in Appendix B. Pet. App. 35a.

JURISDICTION

The Seventh Circuit entered its judgment on June 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days. This petition is filed within 150 days of June 1, 2020.

LEGAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Const. amend. VI.

Federal Rule of Criminal Procedure 52(b) provides:

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Title 18 Section 922(g)(1) of the United States Code provides, in relevant part:

(case no. 19-2049). Both parties are filing petitions for certiorari with this Court, stemming from the Seventh Circuit's single opinion.

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm or ammunition which has been shipped or transported in interstate or foreign commerce . . . .

Finally, Title 18 Section 924(a)(2) of the United States Code provides, in relevant part:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

INTRODUCTION

The Constitution guarantees an individual's right for a grand jury and petit jury to stand between him and the state's judgment. U.S. Const. amend. V, VI. As the Fourth Circuit recognized in *United States v. Medley*, these constitutional guarantees afford defendants, and society at large, confidence in the fairness, integrity, and public reputation of the system. 972 F.3d 399, 416–17 (4th Cir. 2020). When some courts consider those guarantees inviolate, while others treat them as mere procedural inefficiencies, confidence in the entire system suffers. With different rules, the Constitution and laws become subjective, with rules applied differently based on where the defendant happens to find himself in the country.

This case arises in the context of 18 U.S.C. § 922(g)(1), and *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Prior to *Rehaif*, and at the time of Mr. Maez's trial, prevailing Seventh Circuit precedent only required proof of three elements for a § 922(g)(1) conviction: a prior felony conviction, knowing possession of a firearm, and an interstate nexus for the gun. In *Rehaif*, this Court held that, to sustain a

conviction under § 922(g), the government must prove that the defendant knew he was a prohibited person when he possessed the firearm. 139 S. Ct. at 2194.

Mr. Maez was indicted for violating § 922(g)(1), went to trial before *Rehaif*, and his direct appeal was pending when *Rehaif* was decided. On appeal, he challenged the sufficiency of his indictment and the jury instructions. Many defendants across the country had near-identical situations, and raised the same claims in federal circuit courts.

The results are inconsistent. In the Seventh Circuit, Mr. Maez lost his appeal because the circuit court held that the jury instruction error in his case did not seriously affect the fairness, integrity, or reputation of judicial proceedings. This finding was made under the fourth prong of the plain error standard this Court set forth in *United States v. Olano*. *Olano* laid out a four-pronged test for reversing unpreserved errors: (1) there must be an error; (2) the error must be "plain" or obvious; and (3) the error must affect the defendant's substantial rights. *Olano*, 507 U.S. at 732. Once the reviewing court establishes these first 3 prongs, it may use its discretion to correct the error if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Most circuits align with the Seventh Circuit. The Seventh Circuit held that *Olano*'s fairness, integrity, and judicial reputation prong ("*Olano*'s fourth prong") is not met when a person is convicted using jury instructions that omit an essential element, as long as judges can confidently reach a decision after relying on facts that juries did not consider. *See* Pet. App. 17a–23a.

If Mr. Maez's case had arisen in the Fourth Circuit, however, his conviction would likely have been overturned. There, similar errors were held to seriously affect the fairness, integrity, and reputation of judicial proceedings. *See Medley*, 972 F.3d at 403; *United States v. Green*, 973 F.3d 208, 211 (4th Cir. 2020). The Fourth Circuit does not rely on facts outside the trial record when applying the fourth prong of *Olano*. *Medley*, 972 F.3d at 418.

Though the split arises under *Rehaif* and § 922(g), it has implications for every circuit's execution of plain error review, whenever courts are confronted with jury instructions that omit essential elements and a lack of notice to the defendant that the government has to prove a particular element to secure a valid conviction. Resolving this split will bring consistency to the application of *Olano* prong four on plain error review.

For these reasons, and for those explained below, this Court should grant certiorari, then vacate Mr. Maez's conviction using the approach taken by the Fourth Circuit in *United States v. Medley*.

STATEMENT OF THE CASE

I. Indictment and Trial

On October 11, 2017, a federal grand jury in the Northern District of Indiana charged Mr. Maez by superseding indictment with armed bank robbery, in violation of 18 U.S.C. § 2113(d), carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 38a–40a. The District Court had jurisdiction over his case pursuant to 18 U.S.C. § 3231.

Mr. Maez pleaded not guilty and went to trial in May 2018. He had not objected to the sufficiency of the indictment under Fed. R. Crim. P. 12(b)(3)(B). The jury instructions did not charge the jury with finding Mr. Maez's knowledge of his prohibited status. Pet. App. 35a–37a. Mr. Maez did not object to the jury instructions.

Mr. Maez filed a timely notice of appeal.

II. The Seventh Circuit's Decision Below

The Seventh Circuit had jurisdiction over Mr. Maez's appeal pursuant to 28 U.S.C. § 1291. On appeal, he relied on *Rehaif* to challenge the indictment and jury instructions.[2] With respect to the jury instructions, he argued that omitting § 922(g)(1)'s knowledge element violated his Sixth Amendment rights. Since he had not objected in the district court, his claims were reviewed for plain error. Pet. App. 8a–10a. The circuit court applied the plain error test from *United States v. Olano*. *Olano* provides that, where a party has not objected to a claimed error, an appellate court may reverse where the following four prongs are met: (1) there must be error; (2) the error must be "plain" or obvious; (3) the error must affect the defendant's substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. 507 U.S. at 732.

[2] The Seventh Circuit found that the indictment in Mr. Maez's case tracked the statutory language closely enough that it was sufficient and, therefore, found no error. Mr. Maez does not challenge that finding in this petition, though he does not concede that, given the state of the law when he was indicted and went to trial, he had notice of the full charge against him.

The Seventh Circuit held that the omission of an element from the jury instructions satisfied the first two *Olano* prongs. Pet. App. 24a. That is, omitting the element from the jury instructions was an error (prong one), that was plain, or obvious (prong two). It held, however, that the error failed to satisfy *Olano*'s third prong, concluding that other evidence from trial proved the omitted element. Pet. App. 24a–25a. Specifically, the court found that three pieces of "undisputed evidence" before the jury "strongly support[ed] an inference that Maez knew he was a felon." Pet. App. 24a. The court cited to the *Old Chief* stipulation entered into between the parties that he had "previously been convicted of a felony crime punishable by more than a year of imprisonment." Pet. App. 24a–25a. Additionally, the court found that testimony by Mr. Maez's daughter that she had no relationship with him in childhood because he had spent most of that time incarcerated, as well as testimony from his parole officer that he was on parole at the time of the offense, both supported an inference that he "knew he had been convicted of at least one prior felony." Pet. App. 25a.

Moreover, the Seventh Circuit found that, even if Mr. Maez could show prejudice at prong three of the test, it would not exercise its discretion to correct the error under prong four, concluding that "[a]ffirmance in this instance protects rather than harms 'the fairness, integrity or public reputation of judicial proceedings.'" *Id.* The Seventh Circuit made critical underlying decisions that led to its ruling. Most importantly, the circuit court held that for the fourth *Olano* prong, the panel could rely on the trial records *and* "a narrow category of highly reliable

information outside the trial records," from the PSR. Pet. App. 23a. This meant that the appellate panel's analysis on the missing element relied on facts that the jury did not see; rather than reviewing a lower decision, the court made a factual finding in the first instance.

After weighing the evidence before the jury and the inculpatory evidence from the PSR, the circuit court held that Mr. Maez could not satisfy *Olano* prong four on the error in the jury instructions. Pet. App. 25a. The court added information from the PSR about Mr. Maez's criminal history to the evidence presented in trial, noting that he had been convicted of at least 5 felonies, and sentenced to more than a year in prison at least three times. *Id.* Adding the PSR to information the jury did see, the panel was "confident" that Mr. Maez knew he was a felon. *Id.*

REASONS FOR GRANTING THE PETITION

There are three circuit splits in this case. First, the Fourth Circuit and Seventh Circuit are split as to how to weigh a stipulation under *Old Chief* as evidence of a defendant's state of mind when he possessed a firearm, and what weight to give other "uncontested evidence" of knowledge, when a defendant is not on notice that the government must prove knowledge of his status.

Second, the courts are split as to how *Olano* prong four applies to incomplete or incorrect jury instructions. The split concerns vital questions of the constitutional rights to have questions of fact decided by a jury. The scope of those guarantees must be consistent across the country.

Third, there is a split as to what information an appellate court may rely upon when reviewing a jury's decision under *Olano*'s fourth prong. Specifically, can circuit courts' factual analyses rely on material that the juries did not see?

On all three questions, the Fourth Circuit's decision in *United States v. Medley* is incompatible with the Seventh Circuit's decision in *Maez*.

I. The Fourth Circuit's decision in *United States v. Medley* is at odds with the Seventh Circuit's decision in *United States v. Maez*.

The Fourth Circuit decided *Medley* about eight weeks after the Seventh Circuit decided *Maez*, but adopted almost none of the Seventh Circuit's approach. In *Medley*, the Fourth Circuit reviewed a trial conviction for a violation of 18 U.S.C. § 922(g)(1). 972 F.3d at 402. Like Mr. Maez, Mr. Medley's trial took place before *Rehaif*, and his direct appeal was pending when *Rehaif* came out. *Medley*, 972 F.3d at 402.

In *Medley*, the court identified two errors: 1) the indictment did not mention knowledge of his prohibited status, and 2) the jury instructions did not require a finding on knowledge of his prohibited status. *Id.* at 404. *Medley* even shared factual similarities with *Maez*, including an *Old Chief* stipulation to a prior conviction, and prior charges and sentences on his PSR, including serving a more than decade-long sentence. *See* Pet. App. 25a, and *Medley*, 972 F.3d at 414, 417.

Medley's claimed errors also mirrored those made by Mr. Maez. Medley sought relief for violation of his Fifth Amendment right to grand jury indictment, claiming that the flawed indictment did not give him notice of the government's allegations. *Medley*, 972 F.3d at 406-407. He also claimed that failure to instruct the petit jury on an essential element warranted relief, because it violated his Sixth Amendment right to have a jury determine facts beyond a reasonable doubt. *Id.* at 411. Last, just like Mr. Maez, Mr. Medley did not object to the indictment or jury instructions in district court, so the Fourth Circuit reviewed his appeal for plain error. That required application of *Olano*'s four-prong test. *Id*. at 405.

The Fourth Circuit found that both errors satisfied the first two *Olano* prongs. As to the jury instruction claim, the court acknowledged that, where there is "overwhelming evidence" as to Mr. Medley's knowledge of his prohibited status, the error would not affect his substantial rights. *See Medley*, 972 F.3d at 413. However, the court concluded that "where, as here, we do not have a contested element 'because the element emerged as a consequence of a change in the law after trial,' . . . it is inappropriate to speculate whether a defendant could have challenged

the element that was not then at issue." *Id.* (quoting *United States v. Brown*, 202 F.3d 691, 700 (4th Cir. 2000)). The court noted that, due to settled circuit law at the time of trial, "any attempt to contest [Medley's] lack of knowledge would have been futile," just as it would have been for Mr. Maez. *Medley*, 972 F.3d at 413; Pet. App. 7a (acknowledging that "*Rehaif* changed governing law"). Though the government in *Medley* argued that it would have easily proven the defendant's knowledge of his prohibited status, the court concluded that, at the time the case was tried, "Medley's knowledge of his prohibited status was orthogonal to the issues raised at trial," and to speculate as to how he would have defended against an element not at issue would represent "an untoward leap of logic." *Medley*, 972 F.3d at 413. The Seventh Circuit, by contrast, took seemingly no account of the futility of introducing evidence contesting Mr. Maez's knowledge of his status, but proceeded directly with an evaluation of the trial record. Pet. App. 24a–25a.

However, even the approaches taken to the trial record diverged. The Fourth Circuit considered the evidence presented at trial and held that it was inappropriate to construe knowledge of felon status from an *Old Chief* stipulation, as this "would render the Supreme Court's language in *Rehaif* pointless." *Medley*, 972 F.3d at 414. Conversely, the Seventh Circuit pointed to Mr. Maez's stipulation that, at the time he possessed the firearm, he had "previously been convicted of a felony crime punishable by more than a year of imprisonment," as evidence supporting the conclusion that he knew he was a felon, as "a felony conviction is a life experience unlikely to be forgotten." Pet. App. 24a–25a. Moreover, the facts that

Mr. Maez was on parole and had spent much of his daughter's youth incarcerated do not necessarily point to his knowledge or understanding of any prior convictions and certainly does not provide the overwhelming evidence of Mr. Maez's mental state, particularly where he had no incentive or notice that he could introduce counter evidence. *See* Pet. App. 25a. By relying on a stipulation to one element of the offense as "powerful circumstantial evidence" of another element, one which Mr. Maez had no notice the government had to prove, improperly relieves the government of its burden of proof as to an entire element of the offense. The Fourth Circuit's decision recognizes the prejudice suffered by a defendant where the district court failed to instruct the jury that it had to find the defendant knew his prohibited status and the government failed to present sufficient evidence on that point at trial. *Medley*, 972 F.3d at 415.

As to prong four of the *Olano* test, both the Fourth and Seventh Circuits addressed a fundamental question: Would affirmance of the conviction despite these errors seriously affect the fairness, integrity, or public reputation of judicial proceedings? *Medley*, 972 F.3d at 416; Pet. App. 25a. Again, they reached opposite conclusions.

The Fourth Circuit held that the Fifth and Sixth Amendment concerns raised by the jury's non-consideration of an essential element were "just as important to protecting the fairness, integrity, and public reputation of our judicial proceedings." *Id.* at 416. Noting that all facts must be given to a jury and proven beyond a reasonable doubt, the Fourth Circuit held that the "most important element" of the

right to a jury trial is having "the jury, rather than the judge, reach the requisite finding of guilty." *Medley*, 972 F.3d at 417 (internal citations omitted); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Crucial to these determinations were two analytical decisions. First, for purposes of *Olano* prong four, the Fourth Circuit did not rely on information that the juries did not see, even though it acknowledged that there was "substantial post-trial evidence supporting Medley's knowledge of his prohibited status," including a 16-year prison term for second-degree murder. *Id.* at 417. For the Fourth Circuit, reliance on post-trial evidence to affirm Medley's conviction would be to "usurp the role of both the grand and petit juries and engage in *inappropriate* judicial factfinding." *Id.* at 418 (emphasis added). The circuit court acknowledged that affirmance would be "convenient" and even that "it may appear . . . that the Government could have proven the additional element . . . ." *Id.* at 418. However, the court refused to proceed with this "judges know best" approach. *Id.* It held that such a "level of judicial factfinding" would "cast a defendant's constitutional rights aside and trample over the grand jury and petit jury's function." *Id.*

The second analytical step that the Fourth Circuit employed on the fourth prong was evaluating the errors in the aggregate, as opposed to taking them one-by-one. *Id.* at 417. As the Fourth Circuit saw it, without notice of a state of mind allegation, or notice that the factfinder would consider whether he contested his state of mind, the defense had no incentive "to contest that element during pretrial, trial, or sentencing proceedings." *Id.* at 417. In other words, Medley had no burden

to carry on the knowledge element, and the government should not be awarded that element by default.[3] In its "substantial rights" inquiry under *Olano* prong three, the court held that

> Here, the errors occurred at the inception of the Government's case against Medley and continued throughout. Put another way, the error was not just a single, simple procedural error—but a combination of errors that tainted many of the basic protections that permit us to regard criminal punishment as fundamentally fair.

Medley, 972 F.3d at 415. Though that comment applied *Olano* prong three, it applies equally to prong four.

In summarizing its *Olano* prong four holding, the Fourth Circuit held that "too much went wrong here," to permit affirmance:

> Sustaining Medley's conviction under the present circumstances would deprive Medley of several constitutional protections, prohibit him from ever mounting a defense to the knowledge-of-status element, require inappropriate appellate factfinding, and do serious harm to the judicial process.

Medley, 972 F.3d at 403.

II. There is a clear circuit split on *Olano*'s fourth prong.

The Fourth Circuit is in stark opposition to the other circuits, including the Seventh Circuit below, on how to apply *Olano* prong four to these constitutional

[3] In Mr. Maez's case, though the indictment was not as flawed as Mr. Medley's, the same principles still apply: Mr. Maez functionally had no notice that the government had to prove the requisite mental state, and had he attempted to introduce evidence as to his lack of knowledge of his prohibited status would have been futile, given settled circuit law at the time. *See Medley*, 972 F.3d at 413.

violations. It is an intolerable conflict with such significant constitutional rights at issue.

Like *Maez* and *Medley*, at least the First, Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts have applied *Olano* prong four to a § 922(g)(1) trial conviction where the indictment or jury instructions, or both, lacked an essential element. *See United States v. Lara*, 970 F.3d 68, 87-90 (1st Cir. 2020) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at *Olano*'s fourth prong); *United States v. Ward*, 957 F.3d 691, 694-695 (6th Cir. 2020) (indictment lacked essential element, jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at fourth prong); *United States v. Huntsberry*, 956 F.3d 270, 283–286 (5th Cir. 2020) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at fourth prong); *United States v. Miller*, 954 F.3d 551, 558-560 (2d Cir. 2020) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at fourth prong); *United States v. Reed*, 941 F.3d 1018, 1021-1022 (11th Cir. 2019) (indictment lacked essential element, jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at third and fourth prong); *United States v. Hollingshed*, 940 F.3d 410, 415–417 (8th Cir. 2019) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at third and fourth prong); *United States v.*

Benamor, 937 F.3d 1182, 1189 (9th Cir. 2019) (judges made findings of fact from materials jury did not see; plain error review fails at third and fourth prong).

The foregoing appeals all came up in the context of § 922(g) jury convictions that predated *Rehaif*, and suffered from errors that were plain at the time of review. Each circuit court reviewed the *Rehaif* claims for plain error. Each court found "error" that was "plain," and had to decide whether the Fifth and or Sixth Amendment violations seriously affected the fairness, integrity, or respect for judicial proceedings under *Olano*'s fourth prong. *Medley* and *Green*, the two reported Fourth Circuit cases, stand in conflict with the other decisions. *United States v. Medley*, 972 F.3d 399 (2020); *United States v. Green*, 973 F.3d 211 (2020).

Dissenting from the Fourth Circuit's decision in *Medley*, Judge Quattlebaum highlighted exactly this split, and the opposing results for identical circumstances. *Medley*, 972 F.3d at 426 (Quattlebaum, J., dissenting). Judge Quattlebaum specifically cited *Maez* and noted that "every other circuit—literally, every one" conflicts with the *Medley* ruling on *Olano*'s third and fourth prongs. *Id.* at 426. Similarly situated defendants, like Mr. Maez and Mr. Medley, are getting opposite results in different circuits.

While different results are sometimes acceptable, important constitutional issues like jury rights must have consistency. *See Martin v. Hunter's Lessee,* 14 U.S. 304, 347–48, 4 L. Ed. 97 (1816) (noting "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution . . . The public mischiefs that would attend [a

disjointed interpretation of the Constitution] would be truly deplorable . . . ."). Mr. Maez and Mr. Medley suffered identical violations of their petit jury rights. This Court should clarify whether these are serious constitutional violations, or just procedural hiccups.

III. This Court should resolve the circuit split regarding which records appellate courts can consider in applying *Olano*'s fourth prong.

A. There is no precedent from the Court concerning the record of review for *Olano*'s fourth prong.

There is also a split on whether, when considering the fourth prong of the *Olano* test *for jury verdicts*, appellate courts can rely on materials that were never presented to the jury, an issue that has arisen in each circuit that has grappled with *Rehaif* challenges to jury verdicts. This Court has permitted unfettered consultation of the record for plain error review of *guilty pleas*. *United States v. Vonn*, 535 U.S. 55, 74–75 (2002) ("in assessing the effect of Rule 11 error, a reviewing court must look to the entire record, not to the plea proceedings, alone."). But when applying *Olano*'s fourth prong[4] to trial errors, this Court has not given the circuits instruction.

The Seventh Circuit acknowledged the split, and lack of clarity, stating:

> The circuits have taken different approaches to the record for plain-error review of *jury verdicts* in light of *Rehaif*. [The Sixth, Eleventh, Eighth, and Ninth Circuits] have freely consulted materials not before the jury—in particular, criminal histories from defendants' presentence investigation reports (PSRs)—without discussing the propriety of thus expanding the record . . . The Second Circuit took a more cautious approach . . .

[4] It is also unclear whether *Vonn* applies to *Olano* prong three's "substantial rights" analysis for trials.

> [and the] Fifth Circuit acknowledged this issue but declined to take a side . . . .

Pet. App. 17a (Emphasis in original). The Seventh Circuit elected to restrict itself

> to the trial record and a narrow category of highly reliable information outside the trial records: the defendants' prior offenses and sentences served in prison, as reflected in undisputed portions of their PSRs.

Pet. App. 23a.

Other circuit courts have also noted that this Court has never ruled on this issue. After *Maez*, but before *Medley*, the First Circuit grappled with this question in *Lara*:

> [The] evidence [of past convictions and thus, knowledge], it is true, is not in the trial record. We note, however, that we regularly take judicial notice of such state court records given their presumed reliability . . . Moreover, the Supreme Court has never suggested that we are categorically barred from taking into account evidence not introduced at trial in considering whether an instructional error satisfies the fourth prong of plain error review.

970 F.3d at 88-89. The Fifth Circuit decided similarly to the First, by highlighting the split and lack of controlling precedent, but ultimately settled on taking judicial notice of the defendant's state court records. *Huntsberry*, 956 F.3d at 286.

The Sixth and Eleventh Circuits relied on *Vonn*, notwithstanding its applicability to guilty pleas, as opposed to trials. Both cited *Vonn*, then implicitly extended it to trial errors, without extensive discussion. *Ward*, 957 F.3d at 695 & n.1; *Reed,* 941 F.3d at 1021. Similarly, the Eighth and Ninth Circuits essentially

extended *Vonn* to trials, but without citation to *Vonn* or discussion of the extension. *Hollingshed,* 940 F.3d at 415–16; *Benamor*, 937 F.3d 1189.

As noted above, the Fourth Circuit did not rely on post-trial information in *Medley*, finding that it would "usurp the role of both the grand and petit juries and engage in *inappropriate* judicial factfinding." *Medley*, 972 F.3d at 418 (emphasis added). Thus, the approach to this issue varies dramatically depending on where a defendant finds himself hauled into court.

B. The approaches of the Fourth and Seventh Circuits regarding consideration of post-trial information provide this Court with a clear contrast.

In *Medley*, the Fourth Circuit only relied on evidence that the jury saw. *See Medley*, 972 F.3d at 417-418 (acknowledging the weight of "post-trial" evidence, but declining to act on it). An important part of *Medley*'s approach is its treatment of *United States v. Cotton*, 535 U.S. 625 (2002), and *Johnson v. United States*, 520 U.S. 461 (1997). In both *Cotton* and *Johnson*, this Court resolved *Olano*'s fourth prong by reference to "one-sided and overwhelming" evidence *that the jury saw*. *See Cotton*, 525 U.S. at 633 (testimony on missing element was "overwhelming"); *Johnson*, 520 U.S. at 470 (evidence on missing element was "overwhelming").

The Fourth Circuit noted:

> As revealed by those decisions, a defect in an indictment or a jury instruction will generally not be corrected at *Olano's* fourth prong when the record evidence related to the defective part of the indictment or instruction is "overwhelming" *and* "essentially uncontroverted."

Medley, 972 F.3d at 417 (Emphasis in original). The court went on to note that, in the case of a *Rehaif* error, evidence of defendant's knowledge was only

uncontroverted because the defendant did not know he had to contest the evidence on knowledge of status. *Id.* at 417–18. Reliance on post-trial information to pass the "overwhelming" bar would have further muddled the issue. Specifically, by failing to raise the missing element in the indictment and by failing to submit overwhelming evidence to the jury, the government took away the defendant's incentive to controvert it. *Id.* The circuit court did not want to shift the burden and punish the defendant for not fighting an allegation that was never made, or to answer a question for the jury that was never asked.

Conversely, in *Maez*, the Seventh Circuit assigned no significance to Mr. Maez's lack of true notice, which deprived him of an opportunity to present evidence as to a lack of knowledge of his status. Though the court held that Mr. Maez could not meet prong three of the *Olano* test, due to "overwhelming evidence" before the jury, it did so using inappropriate inferences. Pet. App. 24a–25a; *supra* at Sec. I. As to the fourth prong, however, the Seventh Circuit held that the PSR was dispositive, invoking Mr. Maez's checkered past, without consideration of the fact that he would have had no reason to introduce any evidence that contravened an assumption of his knowledge. Pet. App. 25a. If *Medley* correctly applied *Cotton* and *Johnson* to this situation, the Seventh Circuit should have declined to weigh PSR evidence supporting the knowledge-of-status element that remained "essentially uncontroverted," because Mr. Maez "had no reason to contest that element during pre-trial, trial, or sentencing proceedings." *Medley*, 972 F.3d at 417.

It is important to recall the chronology between *Maez* and *Medley*. *Maez* was decided mere weeks before *Medley*. The Fourth Circuit had every opportunity to follow *Maez* by relying on post-trial information. In *Medley*, the Fourth Circuit had significant PSR evidence of Mr. Medley's prior convictions, including a 16-year sentence for second degree murder. *Medley*, 972 F.3d at 416. As the *Medley* dissent noted, "if ever there were a case" to look at things the jury did not see, *Medley* was the case. *Id*. at 420 (Quattlebaum, J., dissenting) (also noting that no other circuits took the Fourth Circuit's approach).

By rejecting the Seventh Circuit's approach to post-trial evidence, the Fourth Circuit took a hard line on what it would, and would not, rely upon when applying *Olano*'s fourth prong. It is the only circuit to draw this line, and conflicts with the Seventh Circuit's decision in *Maez*.

IV. This case raises important constitutional questions.

A constitutionally sound jury trial is a bedrock guarantee of our Constitution.

> The jury-trial guarantee reflects 'a profound judgment about the way in which law should be enforced and justice administered . . . The Sixth Amendment represents a "deep commitment of the Nation to the right of jury trial in serious criminal cases . . . ."

Codispoti v. Pennsylvania, 418 U.S. 506, 515–16 (1974) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). More recently, Justice Sotomayor has written that "the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment" is "among the most essential" constitutional protections. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1409 (2020) (Sotomayor, J., concurring).

In the Fourth Circuit, *Olano*'s fourth prong compels courts to enforce individuals' constitutional protections, even when it is easier for an appellate panel to assume what a jury would do. Justice Scalia has also defended the inefficiency attendant to jury guarantees, because the Constitution went out of its way to vest guilt and innocence decisions with juries, not judges:

> [T]he guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury," has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.

Apprendi, 530 U.S. at 499 (Scalia, J., concurring) (citing U.S. Const. amend. VI).

Conversely, the Seventh Circuit's opinion in *Maez* illustrates how, in other circuits, *Olano*'s fourth prong has been reduced to a vehicle to ensure the most efficient result, no matter what the jury saw nor what constitutional violations may have occurred. Violations of individuals' Fifth and Sixth Amendment rights are less troublesome in those circuits, because the government can always fall back on judges' hypotheses about how a trial would have gone, with different allegations, if the juries had only seen different evidence.

When the government must defend constitutional violations of this magnitude, there should be consistent standards across the country. It cannot be that depriving individuals of notice and the right to a jury's judgment is inconsequential in the Seventh Circuit and elsewhere, but it does "serious harm to the judicial process" in the Fourth Circuit. *See Medley*, 972 F.3d at 403.

V. This problem will be repeated.

The circuit split over which evidence can be considered in deciding whether affirmance harms the fairness, integrity, or public reputation of judicial proceedings under the fourth prong of the *Olano* test will resurface as long as courts continue to hold jury trials. Though prosecutors, judges, and defense attorneys do their best, there will always be forfeited indictment challenges, misstated or omitted elements, and unintentional constitutional violations. In short, there will always be plain error review and a need to apply *Olano*'s fourth prong to a jury verdict.

This issue arose in *Cotton*, when this Court's decision in *Apprendi* affected pending appeals for drug quantities. 535 U.S. at 628–29. It came up in *Johnson*, when this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995), affected pending appeals on the issue of materiality in perjury prosecutions. 520 U.S. at 464. It came up here, when *Rehaif* affected a bevy of pending appeals of convictions pursuant to 18 U.S.C. § 922(g). *See* Pet. App. 3a. It will come up again, and courts will face the question of which parts of the record on appeal are to be considered. It is only a matter of time.

The Seventh Circuit and the *Medley* dissent noted that there is a split on what information to review. This Court should settle the question.

VI. The circuit courts are not resolving the split on their own.

The Seventh Circuit and Fourth Circuit are not moving towards a unified theory. *Medley*, itself, came out in full knowledge of *Maez*, and the *Medley* dissent explicitly cited *Maez*. 972 F.3d at 427 (Quattlebaum, J., dissenting). Later, the Fourth Circuit recommitted itself to the *Medley* decision, in *United States v. Green*,

973 F.3d 208 (2020). For its part, the Seventh Circuit recommitted itself to *Maez* after *Medley* and *Green*. *United States v. Pulliam*, 973 F.3d 775 (7th Cir. 2020). In *Pulliam*, the Seventh Circuit again held that an incomplete indictment and incorrect jury instructions did not warrant plain error relief because the judges were "confident" of what the grand jury and jury would have done, in a different trial with different evidence. *Id.* at 782.

Absent a decision from this Court, it appears that, at the least, the Fourth and Seventh Circuits will continue their divergent paths on how to apply *Olano*'s fourth prong.

VII. This case is an excellent vehicle to resolve these issues.

This case represents a good vehicle for review, for several reasons. First, it allows this Court to address the appropriate inferences to draw from *Old Chief* stipulations, which has surfaced in many plain error cases applying *Rehaif*.

Second, this case also tackles the fourth prong of the plain error test and, as such, is representative of the many cases that have turned on *Olano*'s fourth prong since *Rehaif*. It is clear that Mr. Maez was not on notice that the government must prove that he knew of his status, and the jury instructions clearly did not reference all of the § 922(g)(1) elements. Since the Seventh Circuit relied on the PSR, this Court can squarely address what to do with post-trial evidence when applying *Olano* prong four to jury verdicts and indictments.

Moreover, the Seventh Circuit methodically considered each step it took in making its *Olano* prong four decision. Rather than elide the preliminary decisions on the way to *Olano*, the Seventh Circuit considered each issue that Mr. Maez

raised, and weighed how it would apply those rules. It walked through what evidence to review, the precise nature of the constitutional errors, and application to the specifics of Mr. Maez's case. It also noted specific places where it lacked definitive direction from this Court, highlighting the scope of the appropriate record to review when considering a plain error challenge after a trial. Pet. App. 16a-23a.

The Fourth and Seventh Circuits are starkly opposed on how to apply *Olano*'s fourth prong, which concerns fairness, integrity, and respect for judicial proceedings. They reach their opposite applications by taking different approaches to the constitutional rights at issue in this case. They are also split on the proper record courts can review in grappling with this question. Mr. Maez's claims are representative of others in his position. They will be repeated the next time this Court issues a decision that affects elements of a crime.

This Court should grant the petition, and remand for the Seventh Circuit to adopt the Fourth Circuit's approach to resolving *Olano* prong four.

CONCLUSION

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

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