No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Edgar Espinoza,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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December 3, 2020.

Questions Presented for Review

1. Circuit courts are split on whether federal courts have jurisdiction over a criminal matter when the charging document omits an essential mens rea element of the offense. The indictment charging Espinoza with unlawful firearm possession under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) failed to allege the requisite element that Espinoza necessarily knew of his relevant status as a person prohibited from possessing a firearm at the time of possession. By omitting the essential mens rea element of the offense, did the indictment fail to allege any federal offense at all, thereby depriving the federal courts of jurisdiction?

2. The indictment's omission of the essential mens rea element deprived Espinoza of his Fifth Amendment right to indictment by grand jury and his Sixth Amendment right to notice of the charge against him. Did the Ninth Circuit run afoul of this Court's precedent by erroneously deeming these fundamental deprivations as non-jurisdictional and antecedent constitutional defects, thereby finding Espinoza's guilty plea waived any challenge to the violations?

3. Circuit courts are split on whether a defendant's guilty plea to unlawful firearm possession under 18 U.S.C. §§ 922(g)(1) and 924(a)(2), made without knowledge or notice of the essential mens rea element, constitutes structural error. Espinoza pleaded guilty to the single-count defective indictment without an understanding or notice of the government's obligation to prove the uncharged mens rea element. The district court's failure to inform him of the missing element resulted in a constitutionally invalid guilty plea, made involuntarily and unintelligently. Did the Ninth Circuit erroneously fail to analyze this fundamental flaw as structural error, which warranted automatic relief?

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Petition for Writ of Certiorari

Petitioner Edgar Espinoza respectfully petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Ninth Circuit.

Related Proceedings and Orders Below

The district court for the District of Nevada issued final judgment in *United States v. Espinoza*, No. 2:18-cr-00328-JAD-NKJ, on June 25, 2019. Dist. Ct. Dkt. No. 37. The decision affirming judgment in the United States Court of Appeals for the Ninth Circuit, *United States v. Espinoza*, No. 19-10219, App. Ct. Dkt. No. 42 (9th Cir. June 1, 2020), and the order denying panel and en banc rehearing in the United States Court of Appeals for the Ninth Circuit, *United States v. Espinoza*, No. 19-10219, App. Ct. Dkt. No. 49 (9th Cir. Aug. 11, 2020), are attached in the Appendix.

Jurisdiction

The United States Court of Appeals for the Ninth Circuit issued a decision affirming Espinoza's conviction on June 1, 2020 (Appendix A) and denied panel and en banc rehearing on August 11, 2020 (Appendix B). The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Supreme Court Rules 13.1 and 13.3, and this Court's Order dated March 19, 2020, regarding modified procedures in light of COVID-19.

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution guarantees:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution guarantees:

> 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.

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

> (g) 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 of the United States Code, Section 924(a)(2), provides: "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

Title 18 of the United States Code, Section 3231, provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

Statement of the Case

Petitioner Edgar Espinoza is currently serving a 32-month carceral sentence, unconstitutionally imposed. Espinoza was convicted pursuant to his guilty plea of unlawful firearm possession, even though a grand jury did not charge, Espinoza did not receive notice of, and the government did not prove the necessary mens rea element of the offense. Espinoza therefore asks this Court to vacate his conviction and dismiss the indictment as fatally defective.

I. The indictment omitted the material mens rea element for the federal offense of being a prohibited person in possession of a firearm.

A federal grand jury returned a single-count indictment against Espinoza for unlawful possession of a firearm by a person previously convicted of a crime punishable by a term of imprisonment exceeding one year. *See* 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The indictment alleged Espinoza was a person "having been convicted of a crime punishable by imprisonment for a term exceeding one

year" who "did knowingly possess a firearm . . . having been shipped and transported in interstate and foreign commerce" in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Dist. Ct. Dkt. No. 1.

II. Espinoza pleaded guilty to the defective indictment without knowledge or notice of the omitted mens rea element.

Following indictment, Espinoza informed the district court of his intent to plead guilty without a plea agreement. The parties submitted memoranda in support of Espinoza's plea, neither of which included any mens rea element other than that Espinoza knowingly possessed a firearm. At the change of plea hearing, the district court explained the essential elements of the offense as (1) Espinoza knowingly possessed a firearm (2) that had been transported in interstate commerce (3) and at the time of possession, Espinoza had previously been convicted of an offense punishable by imprisonment for a term exceeding 1 year. Espinoza admitted to the elements as explained by the court and a corresponding factual basis. Though undisputed that Espinoza was, in fact, previously convicted of a felony, he was never informed of any element requiring knowledge of that felony status when he possessed the firearm nor did he admit to having such knowledge. Espinoza pleaded guilty to unlawful firearm possession.

After his plea, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), specifying the required elements for unlawful firearm possession offenses under 18 U.S.C. §§ 922(g) and 924(a)(2). Specifically, *Rehaif* held the government must prove a defendant both knew he possessed a firearm and, at the time of that

possession, knew he "belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. *Rehaif* overturned decades of circuit precedent.[1] Espinoza's indictment failed to allege—and he did not plead to—this *Rehaif* mens rea element that he knew at the time of the firearm possession that he "belonged to the relevant category of persons barred from possessing a firearm." *Id.*

III. Espinoza appealed and the Ninth Circuit affirmed.

Espinoza timely appealed his conviction and sentence because, among other issues, the indictment omitted the requisite *Rehaif* mens rea element. The government had neither alleged nor proven Espinoza knew his prohibited status at the time of alleged firearm possession. The indictment's failure to charge the essential mens rea element deprived the district court of jurisdiction because the indictment failed to allege a federal crime. The defect further deprived Espinoza of his substantial Fifth Amendment right to indictment by grand jury and Sixth

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[1] In the Ninth Circuit, pre-*Rehaif* precedent held the government did not need to prove knowledge of the prohibited status to convict a defendant of being a prohibited person in possession of a firearm. *See United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997). In fact, pre-*Rehaif*, every Circuit to reach this issue held that 18 U.S.C. § 922(g)'s mens rea knowledge requirement did not apply to the status element. *See United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012); *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States v. Schmidt*, 487 F.3d 253, 254 (5th Cir. 2007); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); *United States v. Langley*, 62 F.3d 602, 604-08 (4th Cir. 1995) (en banc); *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991). Other Circuits had not expressly addressed the issue but did not list knowledge of prohibitive status as an element of § 922(g). *See United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007); *United States v. Smith*, 160 F.3d 117, 121 n.2 (2d Cir. 1998).

Amendment right to adequate notice of the charge against him. Finally, the district court's failure to adequately ensure Espinoza understood each essential element of the offense to which he pled guilty resulted in an unknowing and unintelligent guilty plea.

Acknowledging the error, the Ninth Circuit panel held "the indictment's omission of the knowledge of status requirement did not deprive the district court of jurisdiction." *United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020). The panel further invoked waiver to avoid addressing whether Espinoza's invalid plea constituted structural error, and held under plain error review that although "the district court's omission of the knowledge of status element from the indictment and plea colloquy constituted error that was plain, meeting the first two prongs of plain error analysis," the third prong required Espinoza to "show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* (citation and alteration omitted). Finding the record did not support a reasonable probability that Espinoza would have elected to take his case to trial rather than plead guilty had he known of the omitted element, the panel denied relief. *Id.* Finally, the panel declined to reach the Fifth and Sixth Amendment violations "because [a]n unconditional guilty plea waives all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea." *Id.* at 85 (citation and internal quotation marks omitted) (alteration in original).

Espinoza unsuccessfully petitioned for panel rehearing and rehearing en banc. *See* Appendix B. Espinoza now respectfully petitions this Court for a writ of certiorari.

Reasons for Granting the Petition

It is undisputed that Espinoza had, in fact, sustained a felony conviction prior to possessing a firearm. But as this Court recently clarified in *Rehaif*, a prohibited status alone does not suffice to render firearm possession unlawful. In prosecutions under 18 U.S.C. §§ 922(g) and 924(a)(2), the government must prove the defendant *knew*—at the time of the alleged firearm possession—he or she "belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200.

Rehaif rests in part on a "presumption in favor of scienter" and fundamental fairness. *Id.* at 2195 (citing *Black's Law Dictionary* 1547 (10th ed. 2014)). The scienter presumption applies to criminal statutes because criminal liability cannot be imposed "on persons who, due to lack of knowledge, did not have a wrongful mental state." *Id.* at 2198. Possessing a firearm can be an "entirely innocent" act: if a defendant lacks knowledge of the facts and circumstances making his possession unlawful, he "lack[s] the intent needed to make his behavior wrongful." *Id.* at 2197. Here, because the indictment omitted the required status mens rea, Espinoza was charged with and convicted of "an innocent mistake to which criminal sanctions normally do not attach"—not a cognizable federal crime. *Id.*

Numerous issues arose from the defective indictment, issues seemingly certain to arise again as split circuit courts grapple with the import and application of *Rehaif* to cases currently on review.

First, there is a circuit split over whether federal courts have jurisdiction to adjudicate a criminal matter for which the charging document omits an essential mens rea element. This split results in disparate outcomes for similarly situated defendants. This Court should grant certiorari to address the circuit split and clarify when a defective indictment deprives a federal court of jurisdiction.

Second, the panel erroneously declined to analyze Espinoza's challenges to the violations of his Fifth and Sixth Amendment rights, finding the challenges went to non-jurisdictional and antecedent constitutional defects waived by his guilty plea. This holding misapplies and directly contradicts this Court's precedent. This Court should instruct the Ninth Circuit on which constitutional challenges are relinquished by guilty plea and which challenges cannot be waived.

Third, there is a circuit split over whether a defendant's pre-*Rehaif* guilty plea made without notice of the knowledge-of-status essential mens rea element constitutes structural error, requiring relief. This split also results in disparate outcomes for similarly situated defendants. This Court should grant certiorari to resolve the circuit split and clarify whether an involuntary and unintelligent guilty plea of this serious nature is a structural error affecting the framework of the proceedings, for which relief is automatic.

I. This Court should resolve the circuit split on whether federal courts have jurisdiction over a criminal matter when the charging document omits an essential mens rea element of the offense.

Congress limits federal judicial jurisdiction, stating the "district courts of the United States shall have original jurisdiction . . . of all offenses *against the laws of the United States*." 18 U.S.C. § 3231 (emphasis added). It therefore follows that if an indictment fails to allege a federal crime *at all*, that indictment fails to confer jurisdiction on the federal courts. However, there is a mature circuit split regarding indictment defects and their jurisdictional import. *See United States v. Muresanu*, 951 F.3d 833, 838 (7th Cir. 2020) (recognizing split). Some circuits hold that certain defects in an indictment render the courts without jurisdiction, while others hold that defects, no matter how severe, do not impact jurisdiction.

This split is particularly troublesome following this Court's *Rehaif* decision, as defendants like Espinoza, indicted pre-*Rehaif* without any allegation of the necessary mens rea element, sustained convictions pursuant to proceedings lacking jurisdiction. This Court should grant certiorari to resolve the split.

This split stems from this Court's decision addressing a defective indictment in *United States v. Cotton*, 535 U.S. 625 (2002). In *Cotton*, the indictment did "not allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)." *Id.* at 628. This Court held such "defects in an indictment do not deprive a court of its power to adjudicate a case." *Id.* at 630.

Thus, the defect present there did not deprive the district court of jurisdiction. *Id.* at 632.

Cotton based its jurisdictional holding on *Lamar v. United States*, 240 U.S. 60 (1916). In *Lamar*, the defendant argued the indictment failed to allege a crime against him, leaving the court without jurisdiction. *Id.* at 64. The *Lamar* indictment charged the defendant with "falsely pretend[ing] to be an officer of the Government of the United States, to wit, a member of the House of Representatives . . . ." *Id.* Because a congressperson is not a United States officer, the defendant argued the indictment did not charge a crime and the court therefore did not have jurisdiction. *Id.* The *Lamar* Court rejected the defendant's jurisdictional argument:

> [T]he district court, which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 65 (internal citation omitted).

But in rejecting the defendants' jurisdictional challenge in light of the indictment defects present in those cases, both *Lamar* and *Cotton* adhere to § 3231's jurisdictional mandate. In *Lamar*, the indictment alleged all essential elements of "falsely pretend[ing] to be an officer," thus alleging a cognizable crime. 240 U.S. at 64. Though the *Lamar* defendant argued the method for proving one element, "officer," did not meet the statutory requirements, this argument went to his

innocence, not whether the indictment alleged a cognizable crime. *Id.* The indictment in *Cotton*—which charged the defendant with conspiracy and possession with intent to distribute cocaine and cocaine base under 21 U.S.C. §§ 846 and 841(a)(1), but failed to "allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)"—also alleged a cognizable offense. *Cotton*, 535 U.S. at 628. Because conspiring and possessing with intent to distribute *any* amount of cocaine and cocaine base violates United States law, alleged drug quantity controlled only the statutory sentencing range, not the conviction for a cognizable crime itself. *See* § 841(a) and (b). Thus, although the indictment failed to allege the quantity of drugs possessed and thus was defective, the quantity of drugs possessed did not determine if the defendant was charged with a cognizable federal offense. *Cotton*, 535 U.S. at 627-29.

Adhering to this reasoning, the Eleventh Circuit finds that, when an indictment fails to allege a violation of valid federal law because of a defect, the defect renders the district court without jurisdiction. *United States v. Peter*, 310 F.3d 709, 713-14 (11th Cir. 2002) (holding *Cotton* "did not address whether the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges, and on which a subsequent guilty plea is based, describe conduct that is not proscribed by the charging statute"); *but see United States v. Moore*, 954 F.3d 1322, 1336 (11th Cir. 2020) (holding, in context of *Rehaif*, "[s]o long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction"). The Sixth Circuit has similarly held a

jurisdictional challenge will be successful where "a defendant who enters a guilty plea must establish that the face of the indictment failed to charge the elements of a federal offense," *United States v. Martin*, 526 F.3d 926, 934 (6th Cir. 2008), though it has since broadly held—without acknowledging its decision in *Martin*—that an indictment's omission of the *Rehaif* mens rea element does not deprive the court of jurisdiction. *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *but see United States v. Howard*, 947 F.3d 936, 942 (6th Cir. 2020) (citing *Martin* favorably for the proposition "that a defendant challenges the court's jurisdiction when he asserts that the 'indictment failed to charge the elements of a federal offense'").

There does not appear to be a published Fourth Circuit case addressing whether indictment defects can affect jurisdiction. *But see United States v. Carr*, 303 F.3d 539, 543 (4th Cir. 2002) (defendant conceded at oral argument, after *Cotton* issued, that indictment defects do not preclude jurisdiction). However, district courts within the Fourth Circuit, relying on pre-*Cotton* Fourth Circuit precedent, recognize an indictment that omits an essential element of an offense fails to confer jurisdiction. *See, e.g., United States v. Woodley*, No. 4:17-cr-128, 2018 WL 773423, at *1 (E.D. Va. Feb. 7, 2018); *United States v. McTague*, No. 5:14-cr-055, 2017 WL 1378425, at *11 (W.D. Va. Apr. 10, 2017); *United States v. Weaver*, No. 2:09-cr-222, 2010 WL 1633319, at *1 (S.D.W. Va. Apr. 20, 2010).

Conversely, the First, Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits rely on *Cotton*'s language that "defects in an indictment do not deprive a court of its power to adjudicate a case" and *Lamar*'s language that "[t]he objection

that the indictment does not charge a crime against the United States goes only to the merits of the case" to find indictment defects, including omitted essential elements, do not affect jurisdiction. *See, e.g., United States v. Lara*, 970 F.3d 68, 85-86 (1st Cir. 2020); *United States v. Balde*, 943 F.3d 73, 91-92 (2d Cir. 2019); *United States v. Scruggs*, 714 F.3d 258, 262-64 (5th Cir. 2013); *United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020); *United States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019); *United States v. Velasco-Medina*, 305 F.3d 839, 845-46 (9th Cir. 2002); *United States v. De Vaughn*, 694 F.3d 1141, 1147-48 (10th Cir. 2012). The Third Circuit has not squarely addressed the question, but has indicated it reads *Cotton* similarly. *See United States v. Al Hedaithy*, 392 F.3d 580, 588 (3d Cir. 2004).

Here, the panel summarily rejected Espinoza's jurisdictional argument, citing to *Cotton*, 535 U.S. at 631, and the Ninth Circuit's decision in *Velasco-Medina*, 305 F.3d at 845-46. *Espinoza*, 816 F. App'x at 84. As wrongfully convicted defendants like Espinoza challenge their unlawful firearm possession convictions under this Court's decision in *Rehaif*, the circuit split concerning the jurisdictional impact of defective indictments—indictments that fail to allege a federal offense—will continue to create discord among the lower courts. It is imperative for this Court to resolve the split.

II. The defective indictment and resulting proceedings deprived Espinoza of his Fifth Amendment right to indictment by grand jury and his Sixth Amendment right to notice of the accusation.

The Founders believed the grand jury function "so essential to basic liberties" they placed it in the Constitution. *United States v. Calandra*, 414 U.S. 338, 343

(1974). The basic purpose of the grand jury is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Russell v. United States*, 369 U.S. 749, 761 (1962).

"Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution." *Russell*, 369 U.S. at 760. The Fifth Amendment mandates "that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *Calandra*, 414 U.S. at 343; U.S. Const. amend. V. The deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury . . . is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

Relatedly, the Sixth Amendment guarantees an accused "the constitutional right 'to be informed of the nature and cause of the accusation.'" *United States v. Cruikshank*, 92 U.S. 542, 557-58 (1875) (quoting U.S. Const. amend. VI). Together, the Fifth and Sixth Amendments guarantee "substantial safeguards to a criminal defendant, which an indictment is designed to provide." *Russell*, 369 U.S. at 763 (internal quotation marks omitted).

Given the gravity of the protections at stake, mere recitation of statutory language in an indictment is insufficient to ensure these foundational guarantees. "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the

language of the criminal statute." *Russell*, 369 U.S. at 764. The indictment must set forth *all* necessary elements and facts to provide sufficient notice and allow preparation of an adequate defense. Otherwise, "a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Id.* at 770. Our system of justice does not "allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment," for such subsequent determination "would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Id.*

While a conviction may stand where the indictment contains "'minor and technical deficiencies which did not prejudice the accused," *Russell*, 369 U.S. at 763 (quoting *Smith v. United States*, 360 U.S. 1, 9 (1959)), a conviction *cannot* stand if the indictment's omission "deprive[s] the defendant of one of the significant protections which the guaranty of a grand jury indictment was intended to confer," *id.* One such "significant safeguard" that an indictment must provide is notice of the elements of the offense so the defendant knows "what he must be prepared to meet." *Id.*; *see also Henderson v. Morgan*, 426 U.S. 637, 647 (1976) (automatically reversing where defendant lacked notice of second-degree murder mens rea element). Thus, where conviction requires identification and proof of a specific allegation, the indictment's omission of that allegation violates the defendant's grand jury and associated notice rights, requiring vacatur of the conviction.

This Court so held in *Russell*, where the defendants were convicted of refusing to answer questions when summoned before a congressional subcommittee, yet the indictments did not identify which areas of inquiry the defendants refused to answer. 369 U.S. at 751-52, 764. Recognizing the "very core of criminality" under the charged statute turned on the "subject under inquiry of the questions which the defendant refused to answer," this Court held the indictment's omission violated the defendants' grand jury rights and vacated their convictions. *Id.* at 764-65.

The same grand jury and notice rights are implicated here, where Espinoza's indictment omitted the crucial mens rea element. It is specific knowledge of one's prohibited status *at the time of possession* that differentiates the commission of an offense from conduct that could be "entirely innocent." *Rehaif*, 139 S. Ct. at 2198. If a defendant lacks knowledge of the facts and circumstances making his possession unlawful, he "lack[s] the intent needed to make his behavior wrongful." *Id.* Without alleging any mens rea as to prohibited status, the indictment charged Espinoza with nothing more than "an innocent mistake to which criminal sanctions normally do not attach." *Id.* at 2197.

Yet the panel here declined to analyze Espinoza's deprivation of Fifth and Sixth Amendment rights, summarily stating "[a]n unconditional guilty plea waives all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea." *Espinoza*, 816 F. App'x at 85 (citation omitted) (alteration in original). The panel's

holding directly contradicts the mandate of this Court and requires correction for at least two reasons.

First, only "a *valid* guilty plea 'forgoes not only a fair trial, but also other accompanying constitutional guarantees.'" *Class v. United States*, 138 S. Ct. 798, 805 (2018) (emphasis added) (quoting *United States v. Ruiz*, 536 U.S. 622, 623 (2002)). "Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *Ruiz*, 536 U.S. at 629 (alteration in original) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Espinoza's plea, however, was undisputedly *in*valid, and therefore, did not operate to preclude his challenge to constitutional defects, jurisdictional or otherwise.

As the panel recognized, "omission of the knowledge of status element from [Espinoza's] indictment and plea colloquy constituted error." *Espinoza*, 816 F. App'x at 84. Though the panel ultimately held, under the third prong of plain error review, the error did not warrant relief because the panel believed it was not "reasonably probable [Espinoza] would have gone to trial instead of pleading guilty if he had been aware that the Government would need to prove that he knew his prior convictions were for crimes punishable by more than one year in prison," *id.*, that Espinoza entered an involuntary, unknowing, and unintelligent plea is

undisputed. Because Espinoza's plea was invalid, it cannot bar review of the constitutional deficiencies in his proceedings.

Second, even valid guilty pleas only relinquish *some* claims—such as challenges to "the constitutionality of case-related government conduct that takes place before the plea is entered" and "the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers"—but cannot waive "privileges which exist beyond the confines of the trial." *Class*, 138 S. Ct. at 805 (quoting *Mitchell v. United States*, 526 U.S. 314, 324 (1999)). "Relinquishment derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty." *United States v. Broce*, 488 U.S. 563, 573-74 (1989). Thus, while "a valid guilty plea relinquishes any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty,'" where, as here, the constitutional challenge "is consistent with [the defendant's] admission that he engaged in the conduct alleged in the indictment" and "does not in any way deny that he engaged in the conduct to which he admitted," even a valid guilty plea cannot relinquish the claim. *Class*, 138 S. Ct. at 805 (citations omitted).

Here, Espinoza raised violations of his constitutional rights to indictment by grand jury and notice of the accusation against him—claims which challenge his conviction on bases independent of factual guilt. His "challenge does not in any way deny that he engaged in the conduct to which he admitted," and "is consistent with [Espinoza's] admission that he engaged in the conduct alleged in the

indictment." *Class*, 138 S. Ct. at 805. Rather, "[t]he very initiation of the proceedings against [Espinoza] . . . operated to deny him due process of law," *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974), because the grand jury did not find cause on all required elements, and Espinoza did not receive requisite notice of them. *See Menna v. New York*, 423 U.S. 61, 63 n.2 (1975) ("[A] plea of guilty to a charge does not waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute.").

"[L]ike the defendants in *Blackledge* and *Menna*, [Espinoza] seeks to raise a claim which, 'judged on its face' based upon the existing record, would extinguish the government's power to 'constitutionally prosecute' [him] if the claim were successful." *Class*, 138 S. Ct. at 806. Espinoza's guilty plea thus did not preclude his constitutional challenges to conviction. By summarily labeling (and then rejecting) Espinoza's Fifth and Sixth Amendment claims as "non-jurisdictional" or "antecedent," the panel misapplied established law.

* * *

The panel's failure to analyze Espinoza's proper challenge to the violations of his Fifth and Sixth Amendment guarantees constituted a glaring departure from this Court's precedent. It is imperative that this Court correct this error that is amplified by the fundamental importance of the rights at stake.

III. Espinoza's conviction by an involuntary and unintelligent guilty plea constitutes structural error, warranting automatic relief.

There is a circuit split regarding whether a defendant's invalid pre-*Rehaif* guilty plea made without knowledge of the knowledge-of-status mens rea element constitutes structural error, necessarily meeting plain error review and warranting automatic relief. The Fourth Circuit, in *United States v. Gary*, held in the affirmative, explaining "[a]ny conviction resulting from a constitutionally invalid plea 'cannot reliably serve its function as a vehicle for determination of guilt or innocence, . . . and no criminal punishment [based on such a plea] may be regarded as fundamentally fair.'" 954 F.3d 194, 207 (4th Cir. 2020) (alterations in original) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)), *pet'n for reh'g en banc denied*, 963 F.3d 420, *pet'n for cert. docketed*, No. 20-444 (Oct. 5, 2020). Subsequently, the Fifth, Eighth, and Tenth Circuits held to the contrary. *See United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020), *pet'n for cert. docketed*, No. 20-5489 (Aug. 20, 2020); *United States v. Coleman*, 961 F.3d 1024 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1202 (10th Cir. 2020), *pet'n for cert. docketed*, No. 20-6162 (Oct. 23, 2020).

Here, the panel invoked waiver principles to avoid analyzing Espinoza's unconstitutional guilty plea as structural error, instead finding no "evidence from which [it could] conclude that it is reasonably probable he would have gone to trial" had the district court informed Espinoza of all essential elements of the offense prior to his plea. *Espinoza*, 816 F. App'x at 84. As a threshold matter, the panel

improperly found Espinoza's structural error argument waived as, although his opening brief on appeal argued plain error without reference to the structural error doctrine by name, the panel was "not bound by a party's concession as to the meaning of the law" per Ninth Circuit precedent. *United States v. Ogles*, 440 F.3d 1095, 1099 (9th Cir. 2006). This Court holds the same. *Grove City Coll. v. Bell*, 465 U.S. 555, 562 n.10 (1984). "The law, as the saying goes, is what it is." *United States v. Dominguez*, 954 F.3d 1251, 1262 n.7 (9th Cir. 2020). The panel's waiver invocation not only precluded relief for Espinoza, but permitted the panel to avoid grappling with the import of *Rehaif* for cases currently on direct review—cases where the defendant had no meaningful avenue to challenge the defects rendering his plea invalid until *after* he had entered it. *See Rehaif*, 139 S. Ct. 2191, 2201 (Alito, J., dissenting) ("A great many convictions will be subject to challenge," given that *Rehaif* "overturn[ed] the long-established interpretation of . . . 18 U.S.C. § 922(g). . . .").

More importantly, by declining to find structural error, the panel's unpublished disposition contravenes this Court's precedent, adds to the growing split among circuit courts, and results in disparate outcomes for similarly situated defendants.

A. The district court's failure to ensure Espinoza understood the nature of the charge to which he pleaded guilty violated the core principles of due process.

When Espinoza entered his pre-*Rehaif* guilty plea, no one understood 18 U.S.C. §§ 922(g) and 924(a) to require that Espinoza "knew he belonged to the

relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. In his colloquy, Espinoza admitted he had been convicted of a crime punishable by a term of imprisonment of more than one year. However, Espinoza never admitted that he knew at the time of the alleged possession of the firearm that he had been convicted of a felony offense punishable by more than one year in prison. Neither Espinoza, "nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged," and therefore, his plea was "constitutionally invalid." *Bousley v. United States*, 523 U.S. 614, 618-19 (1998).

"A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" *Bousley*, 523 U.S. at 618 (quoting *Brady*, 397 U.S. at 748). This Court has "long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* (citations omitted). A plea that does not evidence that understanding therefore "cannot support a judgment of guilt." *Henderson*, 426 U.S. at 644-45.

Recognizing a conviction entered pursuant to an unintelligent plea violates due process, circuits have split regarding the proper remedy. As the Fourth Circuit reasoned in *Gary*, this Court's precedent compels the conclusion that such error is structural, requiring automatic reversal. *Gary*, 954 F.3d at 202-07. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v.*

Massachusetts, 137 S. Ct. 1899, 1980 (2017) (citations omitted). Where an error "'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself,'" it is structural, "'def[ying] analysis by harmless error standards.'" *Id.* at 1907-08 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)); *see Gary*, 954 F.3d at 206.

This Court too has applied the structural error rule to an involuntary plea, even if not identifying the doctrine by name. *See Henderson*, 426 U.S. at 647. In *Henderson*, the defendant pleaded guilty to "second-degree murder without being informed that intent to cause the death of his victim was an element of the offense." 426 U.S. at 638. "Defense counsel did not purport to stipulate to that [requisite intent]; they did not explain to [the defendant] that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent." *Id.* at 646. Given these circumstances, this Court could not "conclude that his plea to the unexplained charge of second-degree murder was voluntary," and granted automatic relief. *Id.*

That the nature of the error in *Henderson* precluded any harmlessness analysis makes sense: the Constitution's insistence on a voluntary and intelligent plea guards against more than erroneous conviction. It protects an accused's "right to make an *informed* choice on whether to plead guilty or to exercise his right to go to trial," *i.e.*, "his right to determine the best way to protect his liberty." *Gary*, 954 F.3d at 205-06 (emphasis in original). Whether the prosecutor in *Henderson* "had overwhelming evidence of guilt available," as this Court assumed, could not save

the defendant's involuntary plea. *Henderson*, 426 U.S. at 644-45. Indeed, not even the defendant's own admission he killed the victim could "serve as a substitute for either a finding after trial, or a voluntary admission, that [he] had the requisite intent." *Id.* at 646.

The deprivation of this "autonomy interest" yields "consequences that 'are necessarily unquantifiable and indeterminate,' . . . rendering the impact of the district court's error simply too difficult to measure." *Gary*, 954 F.3d at 206 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 150 (2006)). Relatedly, "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea." *Gary*, 954 F.3d at 206. Whether a defendant chooses to forego his right to trial and instead plead guilty the choice is his "alone to make—after he has been fully informed by the nature of the charges against him and the consequences of his plea." *Id.* at 208. "The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (discussing the Sixth Amendment right to self-representation).

While this Court has explained that relief for a technical violation of Federal Rule of Criminal Procedure 11 requires the defendant show a reasonable probability that but for that error he would not have pleaded guilty, *United States v. Dominguez Benitez*, 542 U.S. 74, 80-84 (2004), this Court was careful to note a "point of contrast with the constitutional question whether a defendant's guilty plea was knowing and voluntary," *id.* at 84 n.10. Where the claim is the denial of constitutional due process, the conviction cannot "be saved even by overwhelming

evidence that the defendant would have pleaded guilty regardless." *Id.* That is the case here.

This Court has suggested unpreserved structural errors may be subject to plain error review, *Johnson v. United States*, 520 U.S. 461, 466 (1997), but has declined to answer the question whether structural error necessarily affects the defendant's substantial rights under the third prong of the plain error test, *United States v. Marcus*, 560 U.S. 258, 263 (2010) (citing *Puckett v. United States*, 556 U.S. 129, 140 (2009); *United States v. Olano*, 507 U.S. 725, 735 (1993); *Johnson v. United States*, 520 U.S. 461, 469 (1997); *Cotton*, 535 U.S. at 632). Circuit courts to have addressed the issue, however, seem to agree structural error meets the third prong without a further showing of prejudice. *See Gary*, 954 F.3d at 203; *United States v. McAllister*, 693 F.3d 572, 582 n.5 (6th Cir. 2012); *United States v. Maez*, 960 F.3d 949, 957 (7th Cir. 2020); *United States v. Becerra*, 939 F.3d 995, 1005 (9th Cir. 2019).

Here, the panel faulted Espinoza for "not point[ing] to any evidence from which [it] could conclude that it is reasonably probable he would have gone to trial instead of pleading guilty if he had been aware that the Government would need to prove that he knew his prior convictions were for crimes punishable by more than one year in prison." *Espinoza*, 816 F. App'x at 84. But the panel engaged in the wrong analysis. By depriving Espinoza of the fundamental right to make an informed decision whether to plead guilty, the district court's error affected the very framework within which the prosecution proceeded. *Gary*, 954 F.3d at 204-07.

Indeed, without knowledge of the government's mens rea burden, Espinoza (and other similarly situated defendants) would have had no reason to challenge or develop record evidence relevant to prejudice. "A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense. . . ." *Descamps v. United States*, 570 U.S. 254, 270 (2013). In this context, the district court's acceptance of Espinoza's invalid guilty plea necessarily affected his substantial rights, and warrants automatic reversal.

Because "the structural integrity of the judicial process is not only at stake but undermined when we permit convictions based on constitutionally invalid guilty pleas to stand," the very "fairness, integrity or public reputation of [the] judicial proceedings" is seriously impaired. *Gary*, 954 F.3d at 208. This Court should grant certiorari to resolve the split on this issue.

IV. Espinoza's petition for certiorari raises questions of exceptional importance and his case presents an appropriate vehicle for review.

Given the substantial number of prosecutions under 18 U.S.C. § 922(g), combined with the fact that the overwhelming majority of federal criminal convictions result from defendants' guilty pleas, the questions presented herein are of exceptional importance to federal courts. Moreover, given the widening circuit splits on these issues, similarly situated defendants receive disparate treatment—with some obtaining relief for unconstitutional convictions and others denied.

Federal prosecutions for unlawful firearm possession under 18 U.S.C. § 922(g) currently account for approximately ten percent of all federal criminal

cases. *Quick Facts, Felon in Possession of a Firearm*, U.S. Sentencing Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf (last accessed Nov. 30, 2020) (providing data for fiscal year 2019). In fiscal year 2019, 7,647 cases involved convictions under § 922(g), representing a steady and significant increase in unlawful firearm convictions over the previous four years. *Id.* (reporting 4,984 unlawful possession cases in fiscal year 2015 and progression through fiscal year 2019).

Moreover, "the vast majority of federal criminal cases are resolved through guilty pleas." *Gary*, 954 F.3d at 207. In 2019, guilty pleas accounted for over ninety-seven percent of total convictions in the federal criminal justice system, compared to just over two percent of convictions obtained following trial. *See 2019 Annual Report and Sourcebook of Federal Sentencing Statistics*, U.S. Sentencing Comm'n, Table 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf (last accessed Nov. 30, 2020). As this Court has recognized, "ours is for the most part a system of pleas, not a system of trials," *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citation and internal quotation marks omitted), and guilty pleas therefore "are indispensable in the operation of the modern criminal justice system." *Dominguez Benitez*, 542 U.S. at 83 (citation omitted).

With respect to whether an invalid guilty plea constitutes structural error, the government has recently agreed this issue is one "of significant practical importance," and urged this Court's review. Petition for a Writ of Certiorari, *United*

States v. Gary, No. 20-444, at 21 (Oct. 5, 2020). As with an invalid plea, the related issues flowing from the defective indictment—the lack of jurisdiction and deprivation of Fifth and Sixth Amendment rights—are virtually certain to continue to arise as lower courts continue to grapple with *Rehaif*'s mandate.

Espinoza's petition, raising these three inter-related, purely legal questions, presents an appropriate vehicle for this Court's review. And Espinoza, having only a single prior felony conviction for which he originally received a suspended custodial sentence and does not appear to have served more than one year of imprisonment at one time, *see* Presentence Investigation Report (PSR) at ¶ 43, represents the precise petitioner this Court took care to acknowledge in *Rehaif* may lack the requisite mens rea. 139 S. Ct. at 2197-98 ("Nor do we believe that Congress would have expected defendants under § 922(g) and § 924(a)(2) to know their own statuses. If the provisions before us were construed to require no knowledge of status, they might well apply to . . . a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is 'punishable by imprisonment for a term exceeding one year.'" (quoting § 922(g)(1)) (emphasis omitted)). The defective indictment, which failed to allege a federal crime, stripped the courts of jurisdiction, deprived Espinoza of his Fifth Amendment right to indictment by grand jury and Sixth Amendment right to notice, and ultimately resulted in an unconstitutional conviction obtained by an involuntary plea.

Espinoza's conviction, and countless others like it across the nation, cannot stand. This Court's guidance is essential to instruct the circuit courts of appeal on the correct application of the law.

Conclusion

Espinoza respectfully requests this Court grant the petition for certiorari.

Respectfully submitted,

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