No. _____

IN THE

Supreme Court of the United States

TARCISIO VALENCIA-BARRAGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
Central District of California

JONATHAN D. LIBBY*
Deputy Federal Public Defender
**Counsel of Record*
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2905
Facsimile: (213) 894-0081
Jonathan_Libby@fd.org

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a suspect's flight alone, after submitting to police authority, is sufficient to establish attenuation from an illegal stop and seizure to purge the taint of any Fourth Amendment violation, as the Ninth Circuit holds but which has been expressly rejected by the D.C. Circuit and others.

2. Whether under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), a defendant who pleaded guilty to possessing a firearm and ammunition as a prohibited person—in this case, having been convicted of a misdemeanor crime of domestic violence—in violation of 18 U.S.C. 922(g)(9) and 924(a), is automatically entitled to plain-error relief if the government failed to produce evidence of defendant's knowledge of his prohibited status and/or the district court did not advise him that one element of that offense is knowledge of his prohibited status.

3. Whether an appellate court on plain-error review of a *Rehaif*-based claim is restricted to the district court record or is instead free to consider evidence that was not presented to the factfinder or agreed to by the defendant, a question that has divided the circuits.

PARTIES AND PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

This case arises from the following proceedings in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit: *United States v. Valencia-Barragan*, No. CR 17-660 DSF (C.D. Cal.), and *United States v. Valencia-Barragan*, Ninth Cir. No. 18-50243 (9th Cir. 2020).

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tarcisio Valencia-Barragan, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but can be found at 819 Fed. Appx. 508 (9th Cir. 2020). Pet. App. A1-A5 (copy of slip opinion). The ruling of the district court is unreported, but is available on Westlaw. *United States v. Valencia-Barragan*, No. CR 17-660 DSF, 2018 WL 11235876 (C.D. Cal. Feb. 27, 2018). Pet. App. A6-A11.

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on July 13, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13 and this Court's Order dated March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, in light of the ongoing public health concerns relating to COVID-19. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

18 U.S.C. § 922(g)(9) provides:

(g) It shall be unlawful for any person—

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, 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.

18 U.S.C. § 924(a)(2) provides:

> **Penalties**
>
> (2) 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.

Fed. R. Crim. P. 52 states, in pertinent part:

> **Rule 52. Harmless and Plain Error**
>
> **(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52(b) (2002).

STATEMENT OF THE CASE

On October 17, 2017, an indictment was filed in the Central District of California charging Tarcisio Valencia-Barragan (Valencia) with being a prohibited person in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(9), based on a prior misdemeanor conviction for a crime of domestic violence, namely, battery on a spouse, in violation of California Penal Code § 243(e)(1). Pet. App. A12-A13. Mr. Valencia filed motions to suppress evidence and statements. (ER 64-106).[1] The government opposed. (ER 64-152). Mr. Valencia also filed replies. (ER 153-184).[2]

The district court declined to hold an evidentiary hearing. As the court explained at a hearing on February 26, 2018, "we're not here today for an evidentiary hearing because it seemed to me that the most efficient thing to do would be to assume that the original stop was not legitimate and to move on, and I have seen the videos and heard the audio." (ER 189). The court noted further: "I'm not making any findings. * * * I'm not necessarily accepting your argument, but, as I said, it's just much more efficient to hone in on the fact that he fled and address it

[1] "ER" followed by a number refers to the applicable page in the Appellant's Excerpts of Record filed in the Ninth Circuit.

[2] The dash-cam and body-cam footage of the traffic stop and car search, as well as the audio recording of the post-arrest Miranda warning, were filed in the district court and were transmitted to the Ninth Circuit for its review. Copies of those recordings can also be made available to this Court.

that way." (ER 189). On February 27, 2018, the court denied the motions to suppress in a written order. Pet. App. A6-A11.

On March 19, 2018, Mr. Valencia entered a conditional guilty plea, pursuant to an amended conditional plea agreement, to being a prohibited person in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(9), based on a prior misdemeanor conviction for a crime of domestic violence, in which he expressly reserved the right to appeal the denial of his motions to suppress evidence and statements. (ER 7-20; 24, 50; Pet. App. A16-A29). On July 9, 2018, Mr. Valencia was sentenced to time-served, to be followed by three years of supervised release. (ER 203-207).

The Car Stop, Detention, and Searches.

Mr. Valencia was subjected to multiple Fourth Amendment violations and his motion to suppress should have been granted as a result. Indeed, the police conduct in illegally stopping Mr. Valencia, illegally prolonging the stop, conducting a dog sniff and complete warrantless search of his vehicle after he refused consent, and illegally arresting him without probable cause that he had committed any crime, was especially egregious:

- Police stopped Mr. Valencia without reasonable suspicion purportedly for driving a vehicle with illegally tinted windows;
- Police detained Mr. Valencia and seized his telephone for no reason other than his having said the word "police" to the person he was speaking to;

- Police conducted a dog-sniff of the vehicle over Mr. Valencia's objection, and without any justification, significantly prolonging Mr. Valencia's detention for a traffic ticket;
- Police claimed—perhaps falsely—that the canine alerted to the presence of narcotics in the vehicle;
- Police used the canine to conduct a more thorough internal search of Mr. Valencia's vehicle in which no drugs or other illegal items were found;
- Police decided to place Mr. Valencia under arrest without probable cause that he had committed any crime;
- When police started to handcuff Mr. Valencia to take him into custody for no lawful reason, Mr. Valencia questioned why he was being arrested, declined to be arrested and fled.

The district court denied the motions to suppress because it believed that Mr. Valencia's flight negated the multiple Fourth Amendment violations by the police; the court was wrong. All evidence should have been suppressed.

On August 28, 2017, at approximately 3:53 p.m., California Highway Patrol ("CHP") Officer Julie Jensen reported that she observed a white Acura TL with tinted front windows, purportedly in violation of California Vehicle Code § 26708(a). Pet. App. A6; ER 78, 135. At the time Officer Jensen viewed the Acura, she was parked along the right shoulder of the southbound U.S. Highway 101. (ER 78).

After observing the Acura, Officer Jensen positioned her marked patrol vehicle behind the vehicle and initiated an enforcement stop. (ER 78).

Officer Jensen explained the reason for the stop and asked for the driver for his license, proof of insurance, and registration. (ER 78). The driver handed Officer Jensen each item as requested. (ER 78). Officer Jensen then asked the driver, now identified as Mr. Valencia, to exit the car, but Mr. Valencia asked if she spoke Spanish. (ER 78). Officer Jensen replied that she could but "just a little." (ER 78). Mr. Valencia then stated, "Ticket or no?" Officer Jensen replied that it was going to be a "fix it" ticket. Officer Jensen then asked Mr. Valencia to exit the car and he complied. (ER 78). A "fix-it" traffic ticket was eventually issued at 4:02 p.m. (ER 86).

After Mr. Valencia exited the car, Officer Jensen directed Mr. Valencia to follow her and Mr. Valencia obeyed. (ER 79). Mr. Valencia made a phone call and Officer Jensen ordered Mr. Valencia not to make calls and seized his phone. (ER 79). Officer Jensen asked if Mr. Valencia had any weapons on him, but Mr. Valencia said he did not understand. (ER 79). Officer Jensen proceeded to ask Mr. Valencia questions regarding his address and the owner of the vehicle, but Mr. Valencia again indicated that he spoke little English. (ER 79). Officer Powers then arrived and assisted with translation. (ER 79). Mr. Valencia was asked if he had anything illegal in the car like heroin, methamphetamine, cocaine, or marijuana, to which Mr. Valencia replied no. (ER 80). Mr. Valencia was then provided with a

consent form in Spanish and asked for his permission to search the car. (ER 80). Mr. Valencia read the form and denied consent. (ER 80).

Officer Jensen then retrieved her police service dog to conduct a dog sniff of the exterior of the vehicle. (ER 80). Officer Jensen claimed that the dog attempted to jump inside the vehicle, and that this was an alert to the existence of narcotics. (ER 80). Officer Jensen again asked Mr. Valencia if there were narcotics in the car, to which he said there were not. (ER 80). Officer Jensen then opened the right front door and directed the police service dog inside the vehicle. (ER 80). Officer Jensen reported that the dog altered to the presence of narcotics in the "right quarter panel of the trunk". (ER 81).

After performing a dog search of the vehicle's interior, Officer Jensen conducted a search for weapons on Mr. Valencia. (ER 81). Mr. Valencia said he had money and a car key in his right front pocket, and another cell phone in his left pocket. (ER 81). No weapons were found on Mr. Valencia's person. Officer Jensen then proceeded with a hand search of the Acura. (ER 82). As Officer Jensen search the back seat area, she observed what appeared to be a black trash bag. (ER 81). Officer Jensen opened the package and observed U.S. currency. (ER 81).

Officer Jensen then walked back to Mr. Valencia, asked him to stand up, and directed Officer Powers to arrest Mr. Valencia by putting him in handcuffs. (ER 81). Valencia said, "For what?" and at approximately 4:38 p.m., Mr. Valencia ran off. (ER 81).

Shortly thereafter, Mr. Valencia was captured and handcuffed without incident. (ER 82). A vehicle search of Acura continued at the Santa Maria CHP office and officers purportedly located a firearm in the vehicle's sun roof cover. (ER 82). Officers did not recover any other contraband during the search.

Not revealed until the government filed its opposition to the motion to suppress evidence, was the real reason for the repeated Fourth Amendment violations: the stop actually was the result of an unverified anonymous tip the CHP area office in Santa Maria had received claiming that the car Mr. Valencia was driving, and another, had at least $500,000 worth of drugs, guns, and money inside. (ER 122, 135). So when Officer Jensen saw the car, she decided to conduct a stop based on the fact that car's windows "appeared to be tinted." (ER 135).

The district court denied the motions to suppress evidence and statements, concluding that while Mr. Valencia had standing to challenge the legality of his stop, search, questioning, seizure and arrest (Pet. App. A9-A10), "even assuming the illegality of the traffic stop, Defendant's subsequent flight was an intervening event that purged the taint of the unlawful search." Pet. App. A10 (citing *Garcia v. United States*, 516 F.2d 318 (9th Cir. 1975)). The court believed that "Defendant's independent and voluntary action of fleeing from the traffic stop is sufficient to purge any taint arising from an allegedly illegal stop." Pet. App. A10-A11 (citing *Garcia*, 516 F.2d at 320 ("In this case, the illegal stop was no more than part of a series of facts leading up to the subsequent flight."); *United States v. McClendon*, 713 F.3d 1211, 1218 (9th Cir. 2013) (defendant's act of walking away from the police

was an "intervening event that purged any taint from the prior [illegal] search")). Mr. Valencia appealed.

Appeal to the Ninth Circuit.

On appeal, Mr. Valencia again challenged the constitutionality of the stop and search of his vehicle, and argued that the district court was wrong in concluding that Valencia's subsequent flight from law enforcement constituted an intervening act that purged the taint from any prior illegality. The Ninth Circuit affirmed, holding it "need not address Valencia's arguments regarding the constitutionality of the vehicle stop because the district court correctly denied his motion to suppress on the ground that his flight from the officers attenuated any prior illegality." Pet. App. A2. The Ninth Circuit explained that "[t]he district court was correct in finding that *Garcia* and related authority were applicable to the facts of this case, where the video footage makes clear that the officers were attempting to physically restrain Valencia using handcuffs at the time he fled." Pet. App. A2-A3 (citing *United States v. Garcia*, 516 F.2d 318, 319 (9th Cir. 1975); *United States v. McClendon*, 713 F.3d 1211, 1218 (9th Cir. 2013)).

Mr. Valencia also argued that his conviction for violating 18 U.S.C. § 922(g)(9) should be reversed, and the matter remanded for new proceedings, because the government did not allege in the indictment, or present any evidence, that Mr. Valencia knew that he was a prohibited person or that he had previously been convicted of a "misdemeanor crime of domestic violence," as required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The Ninth Circuit, applying plain error

review, rejected this argument. The court first concluded that "the record does not establish a reasonable probability that he would have persisted in a not guilty plea were it not for the alleged error." Pet. App. A5. Second, it held that "Valencia cannot establish plain error in light of the fact that he was convicted of the relevant misdemeanor domestic violence offense in 2013, approximately five (5) years before possessing the firearm at issue in this case, and he completed a treatment program for domestic violence offenders following his conviction." Pet. App. A5. In order to reach its conclusions, the Ninth Circuit granted the government's motion to take judicial notice of certain documents related to Mr. Valencia's prior state misdemeanor battery conviction that were not part of the district court record. Pet. App. A5 n3.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO ADDRESS A SPLIT IN THE CIRCUITS ON APPLICATION OF THE ATTENUATION DOCTRINE.

The circuits are divided on application of the attenuation doctrine to situations where a suspect has submitted to police authority and only then attempts flight from police and abandons property. Consistent with long-standing Ninth Circuit precedent, the government argued here—and the Ninth Circuit panel agreed—that "flight, alone, is enough to attenuate the later search of [a] car from [an] initial [unlawful] stop." Ninth Cir. Gov't Answ. Br. 29. But the Ninth Circuit's decision is at odds with the District of Columbia Circuit and the cases it relies on which hold that when a suspect submits to police authority, even temporarily, the flight is not attenuated from the Fourth Amendment violations. Thus, Mr. Valencia's refusal to succumb to his unlawful arrest did not vitiate the unlawful stop, or officer's multiple egregious Fourth Amendment violations that occurred here. This Court should grant the petition to resolve the conflict among the circuits on this issues.

In denying the motion to suppress, the district court concluded that in light of *United States v. Garcia*, 516 F.2d 318 (9th Cir. 1975), and *United States v. McClendon*, 713 F.3d 1211 (9th Cir. 2013), Mr. Valencia's flight was an "intervening event not intended by the officers," and thus the multiple Fourth Amendment violations were all excused. Pet. App. A10-A11.

In *Garcia*, relied on by the district court, the defendant failed to slow down at a border checkpoint, and because of this failure to slow, the officer directed

defendant to a secondary inspection area. 516 F.2d at 319. Defendant drove to the secondary area, parked momentarily, and then sped off, leading officers on a chase. *Id.* In analyzing the situation, this Court explained that "assuming the illegality of the stop, the question is whether the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (quotation marks and citations omitted). Thus, because the defendant in *Garcia* fled after he was ordered to stop, this Court held that the officers did not exploit the illegal stop in any way. *Id.*

Here, by significant contrast, Mr. Valencia did not flee after being ordered to stop. He stopped. And he fully cooperated. And Mr. Valencia did not flee after police continued to question him after the traffic citation had been issued about topics unrelated to the stop. And Mr. Valencia did not flee after the police unlawfully extended the stop and detention to conduct a dog sniff of the outside of his vehicle. And he did not flee after police claimed the dog alerted to the presence of drugs—even though none were present—and fully cooperated with police when they ordered him to open the car's trunk and Officer Jensen and her dog conducted a more extensive internal search of the car. It was only after the police added yet another Fourth Amendment violation to its ever-growing pile—an unlawful arrest without probable cause (and the concomitant seizure and impoundment of his car)––that Mr. Valencia stopped submitting to the police show of authority, as he had for nearly 40 minutes, and fled from the police's illegal actions.

As a result, here police not only exploited the illegal stop and search to its benefit, it did so again, and again, and again, and again.

The district court's reliance on *United States v. McClendon*, 713 F.3d 1211 (9th Cir. 2013), likewise did not support the conclusion that the flight here sufficiently attenuated the causal connection between the stop and the acquisition of evidence. *McClendon* merely relies upon the factual scenario presented in *Garcia,* and like in *Garcia*, the defendant in *McClendon* fled before submitting to the authority of the police. *McClendon*, 713 F.3d at 1216-17. Further, there is no evidence that the officers in *McClendon* acted egregiously against the defendant, who was a suspect in an attempted burglary and was identified by a possible accomplice. *See McClendon*, 713 F.3d at 1213-14, 1218. By contrast, Mr. Valencia was stopped for a mere vehicle code infraction and was detained illegally and repeatedly subjected to an ever-growing list of Fourth Amendment violations for nearly 40 minutes before his flight.

In expressly distinguishing both *Garcia* and *McClendon*, the District of Columbia Circuit recently explained that a seizure occurs when a person submits to a show of authority—as Mr. Valencia did here—and a flight that later follows that submission to police authority does not demonstrate attenuation between the original illegal seizure and the resultant discovery of evidence, even where the evidence, such as drugs and guns, were tossed during the flight from police. *United States v. Brodie*, 742 F.3d 1058, 1061-64 (D.C. Cir. 2014). The D.C. Circuit explained that unlike in *Garcia*, in which compliance with a police order was

feigned, the defendant in *Brodie* had submitted to police authority—by putting his hands on the car as ordered—even if the compliance was momentary. *Brodie*, 742 F.3d at 1061. And unlike in *McClendon*, in which this Court "found ample evidence that the fruitful search would have occurred even in the absence of the antecedent illegal search," the defendant in *Brodie*—like Mr. Valencia—cooperated with the police and initially made "no effort to flee or to shed his concealed weapon." *Brodie*, 742 F.3d at 1063 (citing *McClendon*, 713 F.3d at 1217-18).

Accordingly, given his continuous submission to police authority for nearly 40 minutes, Mr. Valencia's flight did not then negate the egregious police conduct and repeated Fourth Amendment violations that preceded it. "Later acts of noncompliance do not negate a defendant's initial submission, so long as it was authentic." *Id.* (citing *United States v. Brown*, 401 F.3d 588, 595 (4th Cir. 2005); *United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006)).

This Court recognizes the "purpose and flagrancy of the official misconduct" as a significant factor in determining whether a causal connection has become "too attenuated" by intervening events. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). Other factors of special relevance include the amount of time between the illegality and the discovery of the evidence, and the presence of intervening circumstances. *Id.* Here, given the close temporal proximity of the unlawful stop, continued unlawful detention, and unlawful arrest, to the searches of Mr. Valencia's vehicle, this factor supports Mr. Valencia. And in light of the multiple repeated and ongoing Fourth Amendment violations throughout the police encounter with Mr. Valencia—

including the unlawful stop, unlawful prolongation of the stop for unrelated questioning and a dog sniff, unlawful search of the car, and the announced unlawful arrest—the flagrancy of the police misconduct should be obvious. But the final factor also supports Mr. Valencia and shows a lack of attenuation between his flight and the police misconduct: neither the flight nor Valencia leaving his car at the site of the stop were intervening events that purged the taint of the illegal police conduct, but were instead the direct result of the illegal police conduct. *See Brodie*, 742 F.3d at 1063 ("The government contends that Brodie's flight and abandonment of evidence were intervening circumstances that purged the taint. As those events flowed directly from the seizure, however, it is hard to spot any attenuation.") (citing *United States v. Wilson*, 953 F.2d 116, 127 (4th Cir. 1991) (rejecting government's abandonment argument where defendant had thrown away a coat with drugs during the course of flight following an illegal seizure by police because the purported abandonment occurred "*after* he had been illegally seized" and the flight "was clearly the direct result of the illegal seizure")).

Accordingly, Mr. Valencia's flight following his illegal seizure and arrest did not purge the taint of the multiple Fourth Amendment violations by the police and everything that followed the unlawful stop and other illegal police actions should have been suppressed.[3]

[3] Moreover, because Mr. Valencia had already being arrested—for what we do not know—his car necessarily would be impounded and searched either as a search incident to arrest or as an inventory search. Indeed, police conducted a warrantless search of Valencia's vehicle as soon as it was moved to the CHP area office. (ER 141). Thus, Mr. Valencia's flight had no impact on anything. It did not

The government conceded below that the D.C. Circuit explicitly held that flight, alone, is not sufficient to establish attenuation. Gov't Ninth Cir. Answ. Br. 32. And while, as the government noted, *Brodie* holds that flight that poses a risk to public safety may be enough, Mr. Valencia's flight did not pose a risk to public safety.[4] Indeed, as *Brodie* recognized, the type of risk to public safety it was talking about was "typically a vehicular flight leading to a high-speed car chase." *Id.* at 1063 (citing *United States v. Boone*, 62 F.3d 323, 324 (10th Cir. 1995)). It explained that flight on foot would not be enough to qualify. *Id.* Indeed, like the defendant in *Brodie*, Mr. Valencia's flight was on foot and the flight itself did not pose a threat to anyone. *Id.*

What *Brodie* makes clear is that while "[t]here are indeed a number of cases where courts have found attenuation in a defendant's response to illegal police

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change or delay what police had planned all along: to seize the car and conduct a more thorough search to find what it wanted and expected to find, the $500,000 worth of drugs, money and guns the anonymous tipster falsely claimed were inside the vehicle.

[4] The government vastly overstated the so-called dangerousness of Mr. Valencia's flight. The only evidence introduced in the district court—other than the video evidence—was Officer Jensen's declaration in which she stated that Mr. Valencia "r[an] across several lanes of traffic, scal[ed] a fence, and head[ed] into a nearby industrial area." (ER 140). While the government tried to suggest this flight "was erratic and extremely dangerous" (Gov't Ninth Cir. Answ. Br. 30), in fact, a review of the body-cam video provided to the Court shows it was nothing more than running across a virtually empty street in which absolutely no traffic was affected. Mr. Valencia's flight was neither erratic nor dangerous—let alone "extremely" dangerous. Unlike the cases relied on by the government, Valencia did not flail his arms or assault, or even attempt to assault, a police officer while trying to flee. He merely chose to leave the scene of the illegal stop and illegal search of his vehicle when police intended to illegally detain him.

conduct . . . , in those decisions the court found that the defendant had committed a new crime, or had at least fled in a manner posing serious risks to the public safety." *Id.* (citation omitted). Taking off on foot in response to an illegal seizure by police does not show attenuation between the illegal seizure and the later discovery of evidence. *Id.* at 1063-64. Such is the case here.

Moreover, the police misconduct here was flagrant. This was not merely some innocent mistake of law by police to justify a stop. Police conducted a stop with the intention to discover the purported "over a half-million dollars worth of drugs, guns, and money" the anonymous tip claimed Valencia was transporting. (ER 135). Like a dog with a bone—or in our case, a drug-sniffing dog the police insisted kept alerting to the presence of the claimed narcotics—Officer Jensen would not abide by the requirements of the Fourth Amendment in order to find the drugs she was convinced were present but were not actually there. She came up with a basis for a traffic stop which was not actually legal. She prolonged the stop without justification in violation of the law. She conducted a dog sniff in which she claimed the dog alerted, but given that no drugs were actually in the car, suggests the alert may have been manipulated. Even after finding nothing illegal in the car, she decided to arrest Mr. Valencia and take him into custody. Officer Jensen's misconduct—the repeated Fourth Amendment violations, from the initial stop through the attempt to forcefully detain Mr. Valenia over a period of nearly forty minutes—together demonstrate flagrant misconduct on the officer's part.

In sum, attenuation is lacking and the district court erred in denying Mr. Valencia's suppression motion. The petition should be granted to resolve the conflict among the circuits on the attenuation doctrine where a suspect has submitted to police authority—in this case, for nearly forty minutes.

II. REVIEW IS ALSO NECESSARY BECAUSE THE CIRCUITS ARE DIVIDED ON HOW TO APPLY PLAIN ERROR TO ARGUMENTS UNDER *REHAIF V. UNITED STATES*, 139 S. CT. 2191 (2019).

The circuits are divided on whether a conviction should be reversed in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), where the government presented no evidence that the defendant had knowledge of his status as a prohibited person. The circuits are also divided on a related subsidiary question, relevant here: "whether an appellate court on plain-error review is restricted to the trial record or is instead free to consider evidence that was not presented to the [factfinder or agreed to by the defendant]." *United States v. Nasir*, No. 18-2888, 2020 WL 7041357, at *11 (3d Cir. Dec. 1, 2020) (en banc).

1. Here, the Ninth Circuit granted the government's motion to take judicial notice of certain conviction-related documents for purposes of Valencia's *Rehaif*-based claim that were outside the record, and relied on those documents to reject Mr. Valencia's *Rehaif*-based argument and affirm his conviction. Pet. App. A5 n.3. By contrast, the en banc Third Circuit recently concluded that "even on plain-error review, basic constitutional principles require us to consider only what the government offered in evidence at the trial, not evidence it now wishes it had offered." *Nasir*, 2020 WL 7041357, at *11. As the Third Circuit put it, this was "the

difficult and dividing issue in this case, one that has elicited a variety of responses from other courts of appeals dealing with the aftermath of *Rehaif* [—t]he assertion that [defendant] knew he was a [prohibited person] is founded entirely on information that his jury never saw or heard." *Id.*, at *11.

As that court explained, "[w]ith one exception,[5] other courts of appeals that have considered whether the government's failure to prove the knowledge-of-status element in a 922(g) prosecution is plain error have decided that it is not. They have reached that result based on their preliminary conclusion that they are permitted to look outside the trial record to find evidence to plug the gap left by the prosecution at trial." *Nasir*, 2020 WL 7041357, at *13.

"The justifications offered for that view are not all of a piece." *Id.* (citing *United States v. Huntsberry*, 956 F.3d 270, 284 (5th Cir. 2020) ("We note that our

[5] *See United States v. Medley*, 972 F.3d 399 (4th Cir. 2020), *pet. for rhg. en banc granted* (Nov. 20, 2020), in which the Fourth Circuit vacated a defendant's jury trial conviction on plain-error review after *Rehaif* because the indictment did not allege knowledge-of-status, the government had presented no evidence of knowledge-of-status at trial, and the jury was not instructed to find knowledge-of-status. The Third Circuit explained in *Nasir* that the Fourth Circuit "did not address the issue we confront here, namely whether we are restricted to the trial record on plain-error review of a jury conviction," but that "the majority in that case appeared to take it as given that it was limited to the trial record." *Nasir*, 2020 WL 7041357, at *13 n.19 (citing *Medley*, 972 F.3d at 417 (noting that the government "provided substantial post-trial evidence supporting [the defendant's] knowledge of his prohibited status" but "declin[ing] the Government's invitation to engage in the level of judicial factfinding that would be required to affirm," given the trial record), while the dissent appears to have assumed that it was not so limited, *id.* at 419-20 (Quattlebaum, J., dissenting) (asserting that the conviction should be sustained because the defendant had previously served more than twelve years in prison for second-degree murder, information that was not presented to the jury)).

sister courts have taken different paths on this issue."). As the Fifth Circuit explained, some courts, such as the Eighth and Ninth Circuits, have considered "facts about the defendant's prior convictions and sentences without discussing whether those facts were in the trial record or before the district court." *Id.* (citing *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir 2019); *United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019)). "Others have relied on evidence introduced at sentencing—even where that evidence was never admitted at trial—on the basis that (1) the defendant failed to object to the evidence and (2) caselaw from the guilty-plea context permits courts reviewing for plain error to consult the 'entire' record." *Id.* (citing *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019) (citing *United States v. Vonn*, 535 U.S. 55, 59 (2002))). *See also United States v. Miller*, 954 F.3d 551, 559-560 (2d Cir. 2020) ("We will not penalize the government for its failure to introduce evidence that it had but that, prior to *Rehaif*, it would have been precluded from introducing. Therefore, in the limited context of our fourth-prong analysis, we will consider reliable evidence in the record on appeal that was not a part of the trial record: [defendant]'s presentence investigation report.") (citing *Neder v. United States*, 527 U.S. 1, 19 (1999)). Although noting that "[t]hese approaches may be in tension with its precedent that "we review for plain error based on the record before the district court," the Fifth Circuit nevertheless

concluded that it could take judicial notice of defendant's prior felony conviction. *Huntsberry*, 956 F.3d at 284-85.[6]

The *Nasir* court's breakdown of the various lines of thinking on this point helps to explain why this Court must grant review to resolve the split among the circuits:

> Under one line of thinking, the Supreme Court's decision in *United States v. Vonn*, 535 U.S. 55, 122 S. Ct. 1043, 152 L.Ed.2d 90 (2002), authorizes consideration of the entire record, not just the trial record, at step three of plain-error review of a jury verdict, even though *Vonn* was decided in the context of a guilty plea. *United States v. Ward*, 957 F.3d 691, 695 & n.1 (6th Cir. 2020); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019). A second rationale holds that a reviewing court is limited to the trial record on the first three steps of plain-error review but may look to the entire record at the fourth step, which involves the exercise of discretion in considering potential harm to the reputation of the judiciary. *United States v. Owens*, 966 F.3d 700, 706-07 (8th Cir. 2020); *United States v. Maez*, 960 F.3d 949, 961 (7th Cir. 2020); *United States v. Miller*, 954 F.3d 551, 560 (2d Cir. 2020). We respectfully disagree with both of those perspectives, neither of which can comfortably co-exist with our own precedent, nor, to our thinking, with due process, the Sixth Amendment, or relevant Supreme Court authority.

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[6] The First Circuit similarly indicated that judicial notice might be a proper path to resolution, but in the end, it did not take that path. *United States v. Lara*, 970 F.3d 68, 88 (1st Cir. 2020) (noting that "the government had available to it evidence of [the defendant's] four recent and serious convictions from Maine," and although it did not present that evidence at trial, "we regularly take judicial notice of . . . state court records given their presumed reliability"). The Fifth Circuit subsequently decided that it is permitted to look outside the trial record at the fourth step of plain-error review. *See United States v. Staggers*, 961 F.3d 745, 756 (5th Cir. 2020); *see also United States v. Burden*, 964 F.3d 339, 348 n.8 (5th Cir. 2020).

Nasir, 2020 WL 7041357, at *14.

The Third Circuit has the better view. "[G]oing back at least as far as Blackstone, it has been a given that the jury—not appellate judges after the fact—must find 'the truth of every accusation' for a conviction to be sustained." *Nasir*, 2020 WL 7041357, at *11 (quoting 4 William Blackstone, *Commentaries on the Laws of England*, *343-44). "[T]o secure a conviction that is consistent with its constitutional obligations, the government must present evidence to the [factfinder] to prove beyond a reasonable doubt every single element of the crime." *Id.* Indeed,

> Notably, no one questions that if we were reviewing a sufficiency-of-the-evidence objection that had been preserved at trial, our review would be confined to the trial record. Only evidence and argument that had actually been proffered would matter. That foundational point, rooted as it is in the Due Process Clause of the Fifth Amendment, serves as a bright-line rule, buttressed by the Sixth Amendment's guarantee of trial by jury. The question before us thus becomes whether the plain-error standard of review permits us to disregard the demands of the Due Process Clause and the Sixth Amendment and to affirm a conviction when no evidence was presented to the jury on one of the elements of the charged offense. We think the answer to that question has to be no.

Id., 2020 WL 7041357, at *12.

"To rule otherwise would give us free rein to speculate whether the government *could have proven* each element of the offense beyond a reasonable doubt at a *hypothetical* trial that established a different trial record." *Id.* (emphases in original). "But no precedent of the Supreme Court or our own has ever sanctioned such an approach. To the contrary, given the dictates of the Due Process Clause, as described in [*In re Winship*, 397 U.S. 358, 364 (1970)], our inquiry must

necessarily focus on whether the government *did prove*—or at least introduced sufficient evidence to prove—each element of the offense beyond a reasonable doubt." *Id.* (emphasis in original).[7]

Notably, the Third Circuit relied in part on the fact that this Court has limited itself to the trial record in analogous cases. *Nasir*, 2020 WL 7041357, at *12 (discussing that in *Johnson v. United States*, 520 U.S. 461 (1997), the "exact procedural posture we are in now was present"). In *Johnson*, the argument for reversal on plain error failed based on the trial record: "*Johnson* thus highlights the importance of the government carrying its constitutional burden." *Id.,* 2020 WL 7041357, at *13.

The Eleventh Circuit's view, and those circuits which follow it, is wrong because "due process and Sixth Amendment considerations compel us to focus our inquiry on the information presented to the trier of fact." *Nasir*, 2020 WL 7041357, at *14-*15. Those courts' reliance on *Vonn* is "inapposite where, as here, we are concerned not with the facts possessed by the defendant and their effect on the voluntariness of his plea but with the information presented to the fact-finder to prove an element of the charged offense." *Id.* at *15. And that's the same whether it's a jury finding or a guilty plea.

[7] The court indicated the analysis is no different if this were as guilty plea—as here—or at a jury trial; the court may not go outside the record to establish an essential element for conviction. *Nasir*, 2020 WL 7041357, at *15 & n.21.

And as for those circuits that hold it may consider facts outside the record when considering the fourth prong of the plain-error analysis, such as in the Second and Seventh Circuits, that approach is wrong because "it treats judicial discretion as powerful enough to override the defendant's right to put the government to its proof when it has charged him with a crime"; as the Third Circuit explained, "[w]e do not think judicial discretion trumps that constitutional right." *Nasir*, 2020 WL 7041357, at *17.[8] Thus, it was error for the Ninth Circuit to take judicial notice of facts outside the record in Mr. Valencia's case in order find the *Rehaif* error did not constitute plain error. This Court should grant review to resolve the conflict in the circuits on this issue.

2. This Court should also grant review as to the broader question of whether failure to prove knowledge of being a prohibited person constitutes plain error. Here, Mr. Valencia's conviction following a guilty plea was based on his prior conviction for a "misdemeanor crime of domestic violence," which is a required element of 18 U.S.C. § 922(g)(9). A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." *Bousley v. United States,* 523 U.S. 614, 618 (1998) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). The Supreme

[8] The en banc Third Circuit also explained that "those decisions and the ones that follow them are independently troubling to the extent they imply that relief on plain-error review is available only to the innocent." *Nasir*, 2020 WL 7041357, at *17 (explaining that that is a proposition this Court "put to rest" in *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018), when the Court observed that "*Olano* rejected a narrower rule that would have called for relief only . . . where a defendant is actually innocent").

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.* (citing *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).[9]

In *Rehaif*, 139 S. Ct. at 2194, the Court held that in order to convict a defendant under § 922(g), the government must prove that the "defendant knew he possessed a firearm and also that he knew he had the relevant status," such as being a felon or alien, "when he possessed it." *Rehaif* makes clear that this mens rea requirement applies to all nine categories of individuals set forth in § 922(g), including individuals who have been previously convicted of a "misdemeanor crime of domestic violence." *Id.* at 2195-96. *Rehaif* thus makes plain that for a conviction under 18 U.S.C. § 922(g)(9), the government was required to prove that when Mr. Valencia possessed the firearm and ammunition that knew he was a prohibited person based on his status as having been convicted of a "misdemeanor crime of domestic violence."

[9] Federal Rule of Criminal Procedure 11 ensures that a guilty plea is knowing and voluntary by requiring the district court to follow certain procedures before accepting such a plea. Rule 11(b)(1)(C) requires the district court to inform the defendant of, and determine the defendant understands, the nature of each charge to which the defendant is pleading.

Here, because there is nothing in the record to support a finding that Mr. Valencia knew he was prohibited from possessing a firearm and ammunition based on his status, or even that he knew had had a prior conviction that qualified as a "misdemeanor crime of domestic violence" that made him a prohibited person under § 922(g), Mr. Valencia's conviction should have been reversed.

Simply put, there was insufficient evidence in the record that Mr. Valencia had the necessary knowledge that he had the status of a prohibited person for purposes of § 922(g) or that he had a conviction for a "misdemeanor crime of domestic violence" as that term is defined in 18 U.S.C. § 921(a)(33) (defining "misdemeanor crime of domestic violence"). *Cf. United States v. LeVeque*, 283 F.3d 1098, 1106 (9th Cir. 2002) (reversing Lacey Act conviction for insufficient evidence because there was no evidence "that the defendant actually kn[e]w," at time of offense, that taking violated state law). The indictment did not allege Mr. Valencia's knowledge of his prior conviction at the time he possessed the firearm and ammunition or his status as a prohibited person. Pet. App. A12-A13.

There was nothing in the factual basis detailed in Mr. Valencia's plea agreement indicating or even suggesting that he knew of his prohibited status. Pet. App. A20-A21. At the change of plea hearing, there was no mention of the now-required knowledge element when the government detailed the elements of the crime. (ER 32). And when detailing the facts it could prove at trial, which Mr. Valencia did admit to, there again was no mention of the knowledge requirement for being a prohibited person. (ER 48-49). Thus, there was neither direct nor

circumstantial evidence of Mr. Valencia's knowledge of his relevant status at the relevant time. *See Rehaif*, 139 S. Ct. at 2198 (citing *Staples v. United States*, 511 U.S. 600, 615 n.11 (1994) ("knowledge can be inferred from circumstantial evidence")). "[A] reasonable suspicion or probability of guilt is not enough. Guilt, according to the basic principles of our jurisprudence, must be established beyond a reasonable doubt." *United States v. Espinoza-Valdez*, 889 F.3d 654, 659 (9th Cir. 2018). Here, it was not.

Nor is there anything in the record from which it could be inferred that Mr. Valencia knew of his prohibited status at the time of his possession. Notably, courts have struggled with the definition of "misdemeanor crime of domestic violence." *See Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016) (holding that a "misdemeanor crime of domestic violence" can include reckless assaults of a domestic partner); *United States v. Castleman*, 134 S. Ct. 1405 (2014) (concluding that a misdemeanor conviction for touching a domestic partner against her will qualifies as a "misdemeanor crime of domestic violence"). Indeed, when dissenting from the majority in *Rehaif*, Justice Alito cited the complexity of this particular category of prohibited persons. *Rehaif*, 139 S. Ct. at 2208 (Alito, J., dissenting) ("If the Justices of this Court, after briefing, argument, and careful study, disagree about the meaning of a 'crime of domestic violence,' would the majority nevertheless require the Government to prove at trial that the defendant himself actually knew that his abuse conviction qualified?"). It therefore stands to reason that Mr. Valencia did not know he had been convicted of a "misdemeanor crime of domestic violence"

pursuant to § 922(g)(9). s*ee* 18 U.S.C. § 921(a)(33)(B)(ii), or that he was prohibited from possessing firearms or ammunition.

Moreover, although *Rehaif* was decided after trial, the error is plain because *Rehaif* is the law in effect at the time of appellate review. In *Henderson v. United States*, 568 U.S. 266, 279 (2013), this Court held that, regardless of "whether a legal question was settled or unsettled at the time of trial," an error is "plain" so long as the error was plain at the time of appellate review. The Court based its decision on "[t]he general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." *Id.* at 271 (citation and quotation marks omitted). *Rehaif* is the law in effect at the time of appellate review of this case. Because the government did not meet its obligation under *Rehaif* to prove Mr. Valencia's knowledge of his prohibited status, this Court must find plain error.

And under the third and fourth prongs of plain-error review, plain error was met because the error affected Mr. Valencia's substantial rights and affected the fairness, integrity and public reputation of judicial proceedings. The fairness, integrity, and public reputation of the proceedings are implicated when there is a structural error such as when a defendant is convicted without ever being properly indicted with each element of the crime. The *Rehaif* error permeates every aspect of the federal criminal case. A defective indictment affects the entire framework in which a prosecution proceeds or does not proceed. A grand jury cannot return an indictment without first making a finding of probable cause with respect to each element. In *United States v. Gary*, 954 F3d 194, 203-07 (4th Cir 2020), *pet. for cert.*

pending (No. 20-444), the Fourth Circuit held that in guilty plea context, third and fourth prongs of plain-error review are met because failure to properly inform a defendant of the knowledge requirement for status was structural error. The same applies here.

A conviction based on an indictment that does not state an offense will always be "fundamental[ly] unfair[]." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). Failing to indict with the required mens rea element deprives the defendant of the opportunity to contest or to concede that element. The mens rea element never charged or proven in this case "separat[es] wrongful from innocent acts." *Rehaif*, 139 S. Ct. at 2196. It would be unfair for a reviewing court to affirm a guilty plea conviction based upon an element never indicted, considered by the parties or the trial court, or admitted by the defendant. The judicial proceedings below failed to comply with due process, endangering the fairness, integrity, and public reputation of criminal plea proceedings.

Notably, even though the Ninth Circuit upheld Valencia's conviction based on judicially-noticed documents regarding his prior misdemeanor battery conviction, the evidence in those documents were not so clear as to establish Mr. Valencia knew of his prohibited status—and certainly not given all other factors not addressed by the Ninth Circuit. The government argued below that the conduct underlying Valencia's battery conviction, elements of the California statute, and the sentence imposed, together showed that Valencia could not dispute knowing he had a prior

misdemeanor domestic violence conviction. (Gov't Ninth Cir. Answ. Br. 70-71). But that's simply not true.

There is very good reason why Mr. Valencia would not know he fell into the category of prohibited persons: at time of Valencia's state conviction in 2013, the law in the Ninth Circuit was that his battery conviction did *not* qualify as a crime of domestic violence for purposes of § 922(g). "The phrase 'physical force' in the federal definition at 18 U.S.C. § 921(a)(33)(A)(ii) means the violent use of force against the body of another individual." *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003). The Ninth Circuit held there that "conduct that is minimally forcible" is not enough, and that "the Wyoming law against rude touchings does not meet the requirements for . . . 'the use or attempted use of physical force . . . .'" It was not until *United States v. Castleman*, 572 U.S. 157, 162 (2014)—decided in March 2014, a year after Valencia's battery plea—that this Court held that § 922(g)(9)'s "physical force" requirement is satisfied by the degree of force that supports a common-law battery conviction—namely, offensive touching—and expressly abrogated *Belless*.

Mr. Valencia's state battery conviction, relied on by the government here, was based on "offensive touching only." Pet. App. A43. Thus, when he was convicted of misdemeanor domestic battery, the conviction did not qualify as a misdemeanor crime of domestic violence for purposes of § 922(g), and he would have had no reason to know of a change in his status that would have rendered him a prohibited person some five years later when he was found in possession of a firearm and ammunition in this case. Thus, even with the judicially-noticed

documents that should not have been considered anyway, it is not at all clear that the government had sufficient proof of knowledge. Accordingly, Mr. Valencia's conviction should not stand, and this Court should grant the petition to resolve the divide in the circuits on application of plain error review to these cases.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

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JONATHAN D. LIBBY
Deputy Federal Public Defender
Counsel of Record
Attorneys for Petitioner