NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID PAUL MARTINEZ,

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Mr. Martinez's convictions for violating 18 U.S.C. § 922(g)(9), possession of a firearm after a conviction for a "misdemeanor crime of domestic violence," must be reversed because the panel erred under *Rehaif v. United States*, __ U.S.__, 139 S. Ct. 2191 (2019), by failing to determine whether Mr. Martinez knew the facts that made his conviction a "misdemeanor crime of domestic violence" as that term is defined in 18 U.S.C. § 921(a)(33)?

2. Whether Mr. Martinez's convictions for violating 18 U.S.C. § 922(g)(9) must be reversed because the trial record was devoid of proof that Mr. Martinez knew at the time of the offense that he had a prior conviction for a "misdemeanor crime of domestic violence," as defined by 18 U.S.C. § 921(a)(33), and the government would have been unable to meet its burden even if matters outside the trial record were considered?

3. Whether Mr. Martinez's convictions at trial for violating 18 U.S.C. § 922(g)(9), without proof that he knew that his conviction was a "misdemeanor crime of domestic violence" as that phrase is defined in 18 U.S.C. § 921(a)(33), and as required by *Rehaif v. United States*, __U.S.__, 131 S.Ct. 2191 (2019), constitutes structural error, requiring reversal on plain error review regardless of whether the error affected the outcome of the proceedings?

On January 8, 2021, this Court granted a petition for a writ of certiorari which presents a related issue. *See United States v. Gary*, 20-444, Petition for Writ of Certiorari at i; *United States v. Gary*, 2021 WL 77245 (Mem.) (Jan. 8, 2021).

4. Whether when applying plain-error review based upon an intervening United States Supreme Court decision, a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?

On January 8, 2021, this Court granted a petition for a writ of certiorari which presents this issue. *See Greer v. United States*, 19-8709, Petition for Writ of Certiorari at i; *Greer v. United States*, 2021 WL 77241 (Mem.) (Jan. 8, 2021).

INTERESTED PARTIES

Petitioner is David Paul Martinez, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. There are no parties to the proceeding other than those named in the caption.

DIRECTLY RELATED LOWER-COURT PROCEEDINGS

United States District Court (N.D. Cal.): *United States v. Martinez*, No. 17-CR-00257 LHK (August 14, 2018).

United States Court of Appeals (9th Cir.): *United States v. Martinez*, No. 18-10498 (April 20, 2020) (petition for reh'g denied Sept. 3, 2020).

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PETITION FOR A WRIT OF CERTIORARI

David Paul Martinez 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 opinion of the court of appeals (App. 1a-8a) is not published in the Federal Reporter, but is available at the Federal Appendix at 811 Fed. Appx. 396, and at 2020 WL 1910721. The order of the court of appeals denying panel rehearing (App. 40a) is not reported. The order of the district court (App. 9a-39a) is not published in the Federal Supplement but is available at 2018 WL 3861831.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 20, 2020. A petition for rehearing was denied on September 3, 2020 (App. 40a). By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing, rendering this petition due on January 31, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[Set Forth in Appendix D, 41a-42a]

U.S. Const. amend. V.

U.S. Const. amend. VI.

18 U.S.C. § 922(g)(9).

18 U.S.C. § 921(a)(33).

STATEMENT OF THE CASE

A federal grand jury in the Northern District of California charged Mr. Martinez with two counts of possession of firearms, in violation of 18 U.S.C. § 922(g)(9), following his conviction for a "misdemeanor crime of domestic violence." The district court had jurisdiction under 18 U.S.C. § 3231.

In the district court, Mr. Martinez brought a motion to suppress evidence and statements, which was denied. He was then convicted after a bench trial on stipulated facts, at which – consistent with Ninth Circuit law at that time – there was no proof that he knew he had been convicted of a "misdemeanor crime of domestic violence" under §§ 921(a)(33) and 922(g)(9). App. 43a-46a.

Mr. Martinez appealed the denial of his motion to suppress. During the pendency of his appeal, this Court issued *Rehaif*. Mr. Martinez incorporated a *Rehaif* claim into his pending appeal. The court of appeals reversed in part the denial of his suppression motion, but rejected his argument that his convictions should be reversed on plain error review under *Rehaif*. App. 1a-8a.

1. On January 23, 2017, Mr. Martinez's vehicle was searched during a traffic stop, resulting in discovery of a firearm. Law enforcement obtained a warrant to search Mr. Martinez's home, which resulted in the discovery of additional firearms and other contraband.

2. After Mr. Martinez was charged in federal court, he moved to suppress all fruits of the searches. The district court denied the motion. App. 9a-39a.

3. The parties proceeded to a stipulated facts bench trial on August 29, 2018. As relevant to Mr. Martinez's status as a prohibited person, the parties stipulated that the government was required to prove that "[a]t the time the defendant possessed the firearm, the defendant had been convicted of a misdemeanor crime of domestic violence." App. 45a. With respect to that element, the parties stipulated that "[o]n or about May 22, 2012, Defendant was convicted of a misdemeanor crime of domestic violence, specifically, for battery of the cohabiting mother of Defendant's child in violation of California Penal Code Section 243(e)(1)." App. 46a.

Neither the indictment, nor the statement of the elements set forth in the Joint Stipulations and Waivers for Bench Trial, established that Mr. Martinez had knowledge that he had a prior conviction for a "misdemeanor crime of domestic violence," as defined by 18 U.S.C. § 921(a)(33).

On August 29, 2018, the district court found Mr. Martinez guilty of the two § 922(g)(9) offenses based on the stipulated facts. Mr. Martinez reserved his right to appeal the denial of his motion to suppress.

4. After Mr. Martinez filed his Opening Brief in the Ninth Circuit, this Court issued *Rehaif*. On August 13, 2019, Mr. Martinez submitted a proposed substitute Opening Brief presenting the *Rehaif* issue, together with an unopposed motion to file the substitute brief, which the Ninth Circuit granted.

As Mr. Martinez argued, *Rehaif* holds that an element of § 922(g) is the defendant's knowledge of his own prohibited status at the time of his possession of the firearm:

> We hold that the word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

Rehaif, 139 S.Ct. at 2194.

Applying *Rehaif*, Mr. Martinez argued that the trial record contained no evidence that he knew he had a conviction for a "misdemeanor crime of domestic violence," as defined in 18 U.S.C. § 921(a)(33). Dkt. 26 at 60. As a result, reversal of his convictions was required, because he had demonstrated (1) an error (2) that was obvious (3) that affected his substantial rights and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 734, 736 (1993).

In its Answering Brief, the government conceded that the district court committed plain error, but argued that Mr. Martinez could not satisfy the third and fourth prongs of the plain error test. In support, the government argued that "contrary to Martinez's approach," the Ninth Circuit was entitled to consider "facts outside the trial record" to assess Mr. Martinez's knowledge. Gov. Answering Brief,

Dkt. 32 at 59 (citing *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019). The government relied on allegations set forth in Mr. Martinez's Presentence Report ("PSR"), to argue that he "would [not] have forgotten" the events surrounding his conviction. Dkt. 32 at 60-61.

5. On April 20, 2020, the Ninth Circuit reversed in part the district court's suppression order, and remanded for further proceedings with respect to whether Mr. Martinez consented to the vehicle search. App. 1a-8a. The Ninth Circuit affirmed the district court's denial of Mr. Martinez's challenge to the search warrant for the search of his house. *Id.*[1]

With respect to *Rehaif*, the panel held that "[w]hile the decision in *Rehaif* establishes that the district court made an obvious error in failing to address whether Martinez knew of his domestic violence conviction, . . . the third and fourth prongs of the plain error test are not satisfied because Martinez has not shown a 'probability that, but for the error, the outcome of the proceeding would have been different.'" App. 7a (quoting *Benamor*, 937 F.3d at 1188-89).

In support, the panel cited *Rehaif*'s statement that knowledge may be inferred from circumstantial evidence, *Rehaif*, 139 S.Ct. at 2198, and held that "the short period of time between Martinez's conviction and his possession of the firearm is strong evidence that he knew of the conviction at the time of possession." App. 7a. The panel did not address the absence of evidence that Mr. Martinez knew he fell

[1] In this petition, Mr. Martinez does not seek review of the Ninth Circuit's rulings with respect to the suppression motion or search warrant.

within the relevant category of persons with a "misdemeanor domestic violence conviction," as that term is defined in § 921(a)(33).

6. Mr. Martinez filed a petition for panel rehearing, relying in part on the Seventh Circuit's then-recent decision in *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020), to argue that he could "plausibly argue that he did not know" that his "conviction was a 'misdemeanor crime of domestic violence' as that phrase is defined for purposes of § 922(g)(9)." *Id.* at 712. Mr. Martinez also preserved his objection to the court's reliance on any evidence outside the trial record, while noting that the Ninth Circuit had recently rejected this argument in *United States v. Johnson*, 963 F.3d 847 (9th Cir. June 25, 2020), *opinion amended and superseded on denial of reh'g en banc*, 979 F.3d 632 (9th Cir. Oct. 26, 2020). Dkt. 66 at 5 n.3. Mr. Martinez further argued that even if evidence outside the trial record were considered, it would be insufficient to meet the government's burden under *Rehaif*.

The panel ordered the government to respond to the petition.

In its response, the government did not dispute that under *Rehaif*, it was the government's burden at the time of trial to demonstrate that Mr. Martinez was aware that he had a "misdemeanor crime of domestic violence" conviction as defined by § 921(a)(33). As the government summarized:

> [a] "misdemeanor crime of domestic violence" includes, among other things, a state-law offense that "has, as an element, the use or attempted use of physical force" committed by "a person with whom the victim shares a child in common," "a person who is cohabiting with the victim as a spouse, parent, or guardian," or a person similarly situated to a spouse, parent, or guardian." 18 U.S.C. § 921(a)(33)(A)(i)–(ii).

Dkt. 68 at 8.

Nonetheless, the government argued that reversal was not required on plain error review because the Ninth Circuit "looks to the full record on appeal—not just the 'record adduced at trial'—for 'additional evidence the government would introduce to prove'" *Rehaif*'s knowledge-of-status element." Dkt. 68 at 6 (quoting *Johnson*, 963 F.3d at 852-53). On that basis, the government argued that certain allegations set forth in the PSR would suffice to meet the government's burden to prove knowledge of the elements set forth in § 921(a)(33):

> Martinez was charged and convicted of "Battery on Spouse," and was represented by counsel. PSR ¶ 39. It is not plausible that Martinez could have been unaware of the domestic-violence element of that offense. And the facts of the conviction extinguish any lingering doubt as to the qualifying nature of his conviction: Martinez "used his forearm to push" his cohabitating girlfriend while he was holding their daughter. *Id.*

Dkt. 68 at 9.

7. The panel denied the petition for panel rehearing without analysis. App. 40a.

REASONS FOR GRANTING THE WRIT

Following this Court's decision in *Rehaif v. United States*, __ U.S. __, 139 S.Ct. 2191 (2019), the Circuits have taken disparate approaches to applying *Rehaif* in the context of convictions under 18 U.S.C. § 922(g)(9). The panel in this case, for example, concluded that reversal was not required on plain error review under *Rehaif* because there was "strong evidence" that Mr. Martinez "knew of the conviction." App. 7a. The Seventh and Eleventh Circuits, by contrast, have concluded on plain error review that a defendant prosecuted under § 922(g)(9) must

have knowledge that his conviction met all or part the definition of "misdemeanor crime of domestic violence" set forth in § 921(a)(33). *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020); *United States v. Johnson*, 981 F.3d 1171 (11th Cir. 2020).

For two reasons, this case is a good vehicle for the Court to address the Ninth Circuit's legally erroneous approach to § 922(g)(9) convictions under *Rehaif*. First, in response to Mr. Martinez's petition for panel rehearing, the government did not dispute that it was required to prove Mr. Martinez's knowledge that his conviction met the definition set forth in § 921(a)(33), yet the panel did not grant rehearing to correct the error. Second, absent the legal error, the panel would have been required to reverse Mr. Martinez's convictions for plain error. Although the government attempted to rely on matters outside the trial record to prove Mr. Martinez's knowledge, the government's showing remained insufficient.

The Court should also grant certiorari to address whether omission of *Rehaif*'s mens rea element at trial constitutes structural error in the context of convictions under § 922(g)(9), without regard for whether the outcome would have been different absent the error. The Court has granted certiorari to consider a related question in *United States v. Gary*, No. 20-444, in which the question presented is:

> Whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(a), is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.

Gary, No. 20-444.

Finally, following *Rehaif*, the Circuits have split regarding whether an appellate court considering *Rehaif* error may consider matters outside the trial record to decide whether the error affected the defendant's substantial rights, and seriously affected the fairness, integrity, or public reputation of judicial proceedings. This Court has never held that an appellate court may consider evidence outside the trial record on plain error review in light of intervening authority, and has granted certiorari in *Greer v. United States*, No. 19-8709, to resolve this question.

Mr. Martinez requests that the Court grant certiorari with respect to the panel's erroneous analysis of § 922(g)(9), as set forth in the first two questions presented, and with respect to whether *Rehaif* error constitutes structural error in the context of convictions under § 922(g)(9), as set forth in the third question presented. Alternatively, Mr. Martinez requests that this Court hold the third and fourth questions presented pending resolution of *Gary* and *Greer*, and then dispose of those questions in a manner consistent with those decisions.

I. A Defendant's Mere Knowledge That He Has a Prior Misdemeanor Conviction Is Insufficient to Demonstrate the Knowledge Required by *Rehaif*

A. Introduction

Title 18 U.S.C. § 924(a)(2) states that "[w]hoever knowingly violates" 18 U.S.C. § 922(g) shall be subject to up to ten years' imprisonment. 18 U.S.C. § 924(a)(2). In turn, § 922(g) provides that, subject to some exceptions, it "shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm or

ammunition." § 922(g)(9). For purposes of § 922(g)(9), the term "misdemeanor crime of domestic violence" is defined at 18 U.S.C. § 921(a)(33)(A)-(B) (providing multi-part definition of "misdemeanor crime of domestic violence" for purposes of § 922(g)).

On June 21, 2019, this Court held in *Rehaif* that the word "knowingly" in § 924(a)(2) "applies both to the defendant's conduct and to the defendant's status" under § 922(g). 139 S. Ct. at 2194. This Court looked to the presumption in favor of scienter, the statutory text, congressional intent, and basic principles of criminal law. *Id.* at 2195-97. This Court held that as a matter of statutory construction, in order to obtain a conviction 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 when he possessed it." *Id.*

Thus, under *Rehaif*, at the time of trial, the government was required to prove that Mr. Martinez knew he belonged "to the relevant category of persons barred from possessing a firearm" at the time of the alleged possession. *Rehaif*, 139 S. Ct. at 2200. As relevant here, the government was required to prove that Mr. Martinez knew at the time of possession that he had a "misdemeanor crime of domestic violence," as that term is defined by 18 U.S.C. § 921(a)(33). The government did not do so. Thus, his § 922(g)(9) convictions were not supported by sufficient evidence on every element of the crime, and violated his constitutional right to due process. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

The Ninth Circuit erred in failing to reverse Mr. Martinez's convictions for plain error under *Rehaif*. This Court's test for reversal of a conviction based on plain error requires: (1) an error (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993); Fed. R. Crim. P. 52(b) ("Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). The fourth prong's tenets, listed disjunctively, require a defendant to satisfy only one, which may be satisfied "independent of the defendant's innocence." *Olano*, 507 U.S. at 736-37.

In light of *Rehaif*, there is no dispute that the district court in this case committed error that was plain at Mr. Martinez's bench trial, thereby satisfying the first two *Olano* prongs, because he was convicted without proof on the knowledge-of-status element. Under *Olano*, the remaining questions are whether the error affected his substantial rights, and whether it seriously affected the fairness, integrity or public reputation of judicial proceedings.

Applying *Rehaif*, the Ninth Circuit legally erred in concluding that Mr. Martinez had not satisfied the third and fourth prongs of the *Olano* test. The panel erroneously relied on its conclusion that Mr. Martinez "knew of the conviction at the time of possession," without considering his knowledge of the facts that made his conviction fall within the relevant status category, as defined by 18 U.S.C. § 921(a)(33). App. 7a. In so holding, the panel's analysis conflicts with this Court's precedent, and with decisions of the Seventh and Eleventh Circuits, both of which

were issued after the panel's decision in this case. *See United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020); *United States v. Johnson*, 981 F.3d 1171 (11th Cir. 2020).

Additionally, the trial record was devoid of evidence that Mr. Martinez knew at the time of the offense that he had a prior conviction for a "misdemeanor crime of domestic violence," as defined by 18 U.S.C. § 921(a)(33). Even if matters outside the trial record were considered, the government could not have met its burden.

The Court should grant certiorari.

B. The Ninth Circuit Committed Legal Error With Respect to Mr. Martinez's Mens Rea, and Should Have Reversed His Convictions for Insufficient Evidence Under the Correct Analysis

Mr. Martinez has a prior misdemeanor conviction under Cal. Penal Code § 243(e), for battery against a cohabitant. As Mr. Martinez argued in the Ninth Circuit, the term "misdemeanor crime of domestic violence" is a term of art under § 922(g)(9), and is specifically defined in 18 U.S.C. § 921(a)(33). Appellant's Opening Brief, Dkt. 26, at 60; Appellant's Reply, Dkt. 47, at 29.

Applying this Court's precedent, the government is required to prove Mr. Martinez's knowledge "of the characteristics of his [conviction] that made it a ['misdemeanor crime of domestic violence'] under [18 U.S.C. §§ 921(a)(33) and 922(g)]." *See Staples v. United States*, 511 U.S. 600, 604 (1994) (defendant required to "kn[o]w of the characteristics of his weapon that made it a 'firearm' under the Act"); *see also Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001, 2009 (2015) ("our cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense'") (quoting *Staples*, 511 U.S. at 608

n.3); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) ("presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct").

Rehaif's analysis supports this construction of §§ 921(a)(33) and 922(g)(9). *Rehaif*, 139 S.Ct. at 2198. Under *Rehaif*, the government is required to prove the defendant's knowledge that "he belonged to the relevant category of persons barred from possessing a firearm," and the relevant category in this case is defined by §§ 921(a)(33) and 922(g)(9). *Rehaif*, 139 S.Ct. at 2200.

As the *Rehaif* Court explained, the requisite mental state for § 922(g) would be negated where the defendant "'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct.'" *Id.* at 2198 (citation omitted). Applying that rationale to the case before it, which involved § 922(g)(5)(A), this Court found:

> A defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require.

Id. Applying that analysis here, a defendant who does not know that he "has been convicted in any court of a misdemeanor crime of domestic violence" within the meaning of §§ 921(a)(33) and 922(g)(9) also lacks "the guilty state of mind that the statute's language and purposes require." *Id.*

Knowledge of prohibited status thus separates criminal conduct from innocent conduct under *Rehaif. Id.* at 2197. "Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His

behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.*

Thus, as framed by the Seventh Circuit, the government must prove that Mr. Martinez "kn[e]w he belonged to the relevant category of persons disqualified from firearm possession," as defined by § 921(a)(33). *Triggs*, 963 F.3d at 712, 716. Moreover, "[i]n contrast to some of the other categories of prohibited persons listed in § 922(g)—notably, felons—the statutory definition of 'misdemeanor crime of domestic violence' is quite complicated." *Id.* at 712.

To assess the impact of *Rehaif* error in *Triggs*, the Seventh Circuit considered judicially noticeable documents from the underlying conviction. *Triggs*, 963 F.3d at 916 (applying plain-error standard and considering, inter alia, criminal complaint, plea questionnaire, and transcript of plea hearing). The government did not take that approach in Mr. Martinez's case, however. With respect to the initial question of *Rehaif* error, the government did not dispute that under *Rehaif*, it was required to demonstrate Mr. Martinez's knowledge that he had a "misdemeanor crime of domestic violence" as defined by § 921(a)(33). Gov. Opp. to Panel Reh'g, Dkt. 68 at 8. However, the trial record in this case did not contain judicially noticeable documents that were sufficient to meet the government's burden. Thus, the government contended that it could demonstrate Mr. Martinez's knowledge through reliance on matters outside the trial record. Gov't Answering Brief, Dkt. 68 at 7 (government relying on allegations in PSR to argue that "[t]he full record here

prevents Martinez from showing" any probability that the outcome would have been different).

Even if consideration of the PSR is legally permissible on plain error review, which Mr. Martinez separately disputes, the PSR here failed to establish Mr. Martinez's knowledge of each of the required components of § 921(a)(33). First, under § 921(a)(33)(A)(ii), the crime of conviction must have, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *Compare Triggs*, 963 F.3d at 716 ("The judge did not advise him of the elements of either offense to which he was pleading no contest.").

Second, the crime of conviction must have been "committed by . . . a person with whom the victim shares a child in common, [or] by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian . . . ." § 921(a)(33)(A)(ii).

With respect to these two requirements, Paragraph 39 of the PSR asserts that Mr. Martinez pushed the mother of his child with his forearm. While this allegation addresses the relationship element of § 921(a)(33)(A)(ii), it does not address whether Mr. Martinez knew that his conviction had, as an element, the use or attempted use of "physical force," as that term is defined for purposes of § 921(a)(33).[2]

[2] At the time of Mr. Martinez's misdemeanor conviction in 2012, the Ninth Circuit had held that offensive touching was insufficient to qualify as "physical force" under § 921(a)(33)(A). *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003). Two years after Mr. Martinez's conviction, this Court abrogated *Belless* in *United States v. Castleman*, holding that § 921(a)(33)(A)'s requirement of "physical force" in the

Third, under § 921(a)(33)(B)(i), the defendant must have been represented by counsel. Mr. Martinez does not dispute that Paragraph 39 of the PSR asserts that he was represented by counsel.

Fourth, under § 921(a)(33)(B)(ii), in cases where the defendant was entitled to a jury trial, the case must either have been tried by a jury, or the defendant must have knowingly and intelligently waived the right to jury trial. § 921(a)(33)(B). The PSR does not address whether Mr. Martinez was entitled to a jury trial, or if he was, whether he knowingly waived his right to a jury trial.

Thus, as *Triggs* explained in analyzing this issue on plain error review,

> Given the comparative complexity of this definition, the guilty-plea calculus changes. *Rehaif* improves Triggs's trial prospects, giving him at least a plausible argument that he was unaware that his 2008 battery conviction is a crime of this nature.

Triggs, 963 F.3d at 716.

A partially divided panel of the Eleventh Circuit has taken a slightly different approach than the Seventh Circuit to the government's burden under § 921(a)(33). *Johnson*, 981 F.3d at 1182 (holding that "subsection (a)(33)(A) contains the elements of this offense, while subsection (a)(33)(B) contains affirmative defenses"). The Eleventh Circuit crafted its own post-*Rehaif* mens rea test for § 922(g)(9), holding that "a person knows he is a domestic-violence misdemeanant, for *Rehaif* purposes, if he knows all of the following: (1) that he was convicted of a

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definition of "misdemeanor crime of domestic violence" incorporates the common-law meaning of "force"—"namely, offensive touching." *United States v. Castleman*, 572 U.S. 157, 162 (2014).

misdemeanor crime, (2) that to be convicted of that crime, he must have engaged in at least 'the slightest offensive touching,' *United States v. Castleman*, 572 U.S. 157, 163 [ ] (2014) (internal citations omitted), and (3) that the victim of his misdemeanor crime was, as relevant here, his wife." *Id.* at 1175.

Judge Martin concurred in part and dissented in part. Judge Martin expressed reservations regarding the majority's characterization of § 921(a)(33)(B) as setting forth affirmative defenses, and argued that the majority's approach disregarded *Rehaif*'s holding that a "mistake of law" may negate the mens rea element of § 922(g)(9). *Id.* at 1194 & n.1, 1197 (Martin, J., dissenting). Judge Martin further stated that she "would follow the Seventh Circuit's approach in *Triggs*." *Id.* at 1199.

The Ninth Circuit in this case, without considering this *Rehaif* requirement or the elements of § 921(a)(33) as applied to his underlying conviction, solely determined that there was "strong evidence" that Mr. Martinez "knew of the conviction," because it had occurred less than five years earlier. App. 7a. But Mr. Martinez's mere knowledge that he had been convicted of a crime in state court does not show that he had knowledge that he belonged to the "relevant category of persons" under §§ 921(a)(33) and 922(g)(9). *Rehaif*, 139 S.Ct. at 2200; *id.* at 2195 (presumption of scienter applies to "each of the statutory elements that criminalize otherwise innocent conduct") (citation and quotation marks omitted).

Indeed, in the context of § 922(g)(5)(B), a partially divided panel of the Ninth Circuit recently undertook an approach that is more faithful to *Rehaif*. *United*

States v. Gear, __ F.3d __, 2021 WL 163090 (9th Cir. Jan. 19, 2021). Section 922(g)(5)(B) prohibits firearm possession by any person who is an alien, and has been admitted to the United States under a nonimmigrant visa. *Id.* at *3. The Ninth Circuit in *Gear* concluded that under *Rehaif*, the government was required to prove that the defendant "*knew* he was admitted into the country "under a nonimmigrant visa."' *Id.* (emphasis in original).

The Ninth Circuit observed that Gear's statute of conviction "incorporates the definition of 'nonimmigrant visa' from another statute." *Id.* (citing 8 U.S.C. § 1101(a)(26)). Accordingly, the Ninth Circuit held that "[s]uch knowledge can be established by demonstrating Gear knew that his visa was classified as a 'nonimmigrant visa,' or by showing that he knew the 'offending characteristics' of his visa—i.e., the facts that make his visa a nonimmigrant one." *Id.* (citing *Staples*, 511 U.S. at 620, and *McFadden v. United States*, 576 U.S. 186, 196 (2015)). *Id.* The Ninth Circuit stressed that mere knowledge of the visa's "label" (in that case, an "H1-B visa") is not enough. *Id.* at *4. Instead, the government must prove knowledge of the facts that made the visa a "nonimmigrant visa." *Id.* Otherwise, a defendant could be convicted even though he "lacks the requisite guilty mind" that *Rehaif* requires. *Id.* at *5.[3]

[3] Judge Bumatay concurred in part and dissented in part. *Gear*, 2021 WL 163090, *7. While the majority looked to facts outside the trial record to conclude that reversal on plain error was not required, Judge Bumatay would have found that the defendant met all four prongs of the plain-error test. *Id.* ("Rather than conjecture about his guilt from the bench, we should return the question to where it is constitutionally reserved: the jury box.").

Applying that approach here, § 922(g)(9) incorporates the definition of "misdemeanor crime of domestic violence" from another statute. As in *Gear*, it is not sufficient for the government to prove that a defendant charged under § 922(g)(9) knows that his conviction was labeled under state law as "battery on spouse." Instead, the government must also prove his knowledge of the facts that make the conviction a "misdemeanor crime of domestic violence" under § 921(a)(33).

Mr. Martinez should be permitted to defend against this mens rea element at trial. In the record on appeal, there is insufficient evidence to provide either direct or circumstantial evidence of Mr. Martinez's knowledge of all relevant facts and circumstances under §§ 921(a)(33) and 922(g)(9). Reversal is therefore required because "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson*, 443 U.S. at 316.

Accordingly, this Court should grant certiorari and require the government to prove to a jury that Mr. Martinez knew the facts that made his conviction a "misdemeanor crime of domestic violence" as defined by § 921(a)(33).

C. This Case Presents a Good Vehicle for Resolving the Circuits' Disparate Approaches to §§ 921(a)(33) and 922(g)(9)

Mr. Martinez's case is an appropriate vehicle for review of the Circuits' disparate approaches to §§ 921(a)(33) and 922(g)(9).

First, the government has not disputed that under *Rehaif*, a defendant convicted under § 922(g)(9), must have known that his conviction met the definition

set forth in § 921(a)(33). The Ninth Circuit's decision in this case, however, makes clear that the court of appeals did not consider this definition, but instead concluded only that Mr. Martinez "knew of the conviction at the time of possession." App. 7a.

Second, the government has attempted to meet its burden through reliance on the PSR. Even if such a practice is legally permissibly, which Mr. Martinez separately disputes, the PSR in this case would be insufficient to demonstrate Mr. Martinez's knowledge of each of the facts required by § 921(a)(33), as discussed above.

Accordingly, the Court should grant Mr. Martinez's petition.

II. This Court Should Grant Certiorari and Reverse Mr. Martinez's Convictions Because *Rehaif* Error with Respect to §§ 921(a)(33) and 922(g)(9) Is Structural Error, and Satisfies Prongs Three and Four of the *Olano* Test

The Due Process Clause of the Fifth Amendment "constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Jackson*, 443 U.S. at 313-14; *see also In re Winship*, 397 U.S. 358, 364 (1970) (Due Process Clause requires that every fact necessary to constitute the charged crime must be proved beyond a reasonable doubt). "It is axiomatic that a conviction upon a charge not made or a charge not tried constitutes a denial of due process." *Jackson*, 443 U.S. at 314.

Moreover, "[t]he *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive due process standard must also require that the factfinder will rationally apply that standard to the facts in

evidence." *Jackson*, 443 U.S. at 316-17.[4] As the *Jackson* Court noted, that standard must be applied to "the record evidence." *Id.* at 318.

Fundamental to due process is the defendant's right to "establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Jackson*, 443 U.S. at 314 ("a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend"). The Sixth Amendment strengthens these rights, guaranteeing all defendants a "public trial, by an impartial jury," "informed of the nature and cause of the accusation," "confronted with the witnesses against him," with "compulsory process for obtaining witnesses in his favor," and "the Assistance of Counsel for his defence." U.S. Const. amend. VI.

This Court has described structural errors as "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," because "[t]he entire conduct of the trial from beginning to end" is affected by the error. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *see also Neder v. United States*, 527 U.S. 1, 8–9 (1999) (structural error "infect[s] entire trial process" and deprives defendants of "basic protections" without which "criminal trial cannot reliability serve function as vehicle for determination of guilt or innocence") (citation and quotation marks omitted); *Rose v. Clark*, 478 U.S. 570, 577–78 (1986) (same).

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[4] *Jackson* makes clear that this standard applies equally to jury trials as well as bench trials. *Jackson*, 443 U.S. at 317 n.8 (noting that trier of fact in *Jackson* was a judge and not a jury, which was "of no constitutional significance," where the judge deemed himself "properly instructed").

Accordingly, this Court observed in *Olano* that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome." *Olano*, 507 U.S. at 735. Importantly, "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Weaver v. Massachusetts*, __ U.S. __, 137 S.Ct. 1899, 1908 (2017).

Structural errors are thus distinct from "trial errors," which "occur[] during the presentation of the case to the jury, and which may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08.

This Court in *Rose* and *Neder* found that erroneous mens rea instructions did not constitute structural error. However, in each case, the Court's rationale demonstrates precisely why omission of the mens rea element in a § 922(g)(9) prosecution *is* structural error. In *Rose*, for example, the jury received an erroneous malice instruction, but the Court emphasized that the respondent nonetheless "received a full opportunity to put on evidence and make argument to support his claim of innocence." 478 U.S. at 579. As a result, the erroneous malice instruction did not constitute structural error in part because it "did not affect the composition of the record," and because the evaluation of prejudice did not "require any difficult inquiries regarding matters that might have been, but were not, placed in evidence." *Id.* n.7.

In *Neder*, the judge – rather than the jury – decided the question of materiality in a fraud trial, which was permissible under then-extant precedent, but was error under *United States v. Gaudin*, 515 U.S. 506 (1995). *Neder*, 527 U.S. at 8. This Court found that the error was not structural in part because the defendant still had the opportunity to defend against materiality at trial, and because the defendant failed to demonstrate that he would have conducted any aspect of his trial differently. *Id.* at 15.

Here, unlike the errors in *Neder* and *Rose*, the error *did* affect the composition of the record, and Mr. Martinez *can* demonstrate that he would have conducted aspects of his trial differently. Because the mens rea element was not recognized at the time of trial, Mr. Martinez did not have the opportunity to investigate or defend against the omitted element at trial, and as previously argued, he had multiple grounds on which he could have challenged the government's proof.

Recall that under *Rehaif*, the government was required to prove Mr. Martinez's knowledge that (1) his California conviction had, as an element, the use or attempted use of "physical force" (2) against a specified individual, (3) that he was represented by counsel, and (4) if applicable, that he knowingly waived his right to jury trial. § 921(a)(33); *Rehaif*, 139 S.Ct. at 2195; *Triggs*, 963 F.3d at 716.

Had the parties and the court been aware of these mens rea requirements, the entire conduct of the trial from beginning to end would have been different. First, the parties would likely have conducted pretrial litigation regarding the relevance and admissibility of court records regarding the California conviction, on

which the government would likely have attempted to rely to meet its burden. Second, Mr. Martinez would likely have conducted pretrial investigation to identify the existence of any favorable witnesses or documents with respect to his knowledge of relevant facts. Third, Mr. Martinez would likely have weighed whether to proceed to trial based in part on the strength of the evidence with respect to his mens rea. Fourth, Mr. Martinez would likely have weighed whether to testify in his own defense based in part on the existence of this mens rea element, and based on the parties' evidence to prove or disprove it.[5]

Thus, the impact of this error on Mr. Martinez's trial necessarily "def[ies] analysis by 'harmless-error' standards," because "[t]he entire conduct of the trial from beginning to end" was affected by the error. *Fulminante*, 499 U.S. at 309-10. The omission of this mens rea element from the trial process cannot be characterized as mere "trial error," because the impact of this error cannot be "qualitatively assessed *in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08 (emphasis added). Because the element was wholly absent, there was no "other evidence" presented at trial on this issue, and there is no "context" within which the impact of this error may be "qualitatively assessed." *Id.*; *see also Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (finding that

[5] Given that the government has never been put to its burden on these mens rea requirements, Mr. Martinez should not be required to preview any specific evidentiary challenges, factual or legal arguments, or evidence he may present upon retrial.

misdescription of burden of proof constitutes structural error because "[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done," and "'wrong entity judge[s] the defendant guilty'") (quoting *Rose*, 478 U.S. at 578).

Thus, construing the *Rehaif* error in this case as structural error is appropriate because it is a "fundamental flaw[]" that "undermines the structural integrity of [a] criminal tribunal." *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986). Indeed, "[t]he purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. The defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver*, 137 S. Ct. at 1907–08 (quoting *Fulminante*, 499 U.S. at 310).

This Court has identified a "limited class" of errors as structural. *Johnson v. United States*, 520 U.S. 461, 468–69 (1997). Depriving the defendant of the opportunity to investigate and defend against a mens rea element at trial constitutes structural error within this Court's precedent. *See, e.g., McCoy v. Louisiana*, __U.S.__, 138 S. Ct. 1500, 1511 (2018) (attorney admission of defendant's guilt over defendant's objection); *Sullivan*, 508 U.S. at 280-81 (erroneous reasonable-doubt instruction); *Vasquez*, 474 U.S. at 254 (racial discrimination in selection of grand jury); *Gideon v. Wainwright*, 372 U.S. 335, 339-44 (1963) (total

deprivation of counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (lack of an impartial trial judge).

In the context of a guilty plea to a violation of § 922(g)(1), the Fourth Circuit has concluded that *Rehaif* error is structural error, and thereby satisfies both the third and fourth prongs of the *Olano* test.[6] *United States v. Gary*, 954 F.3d 194, 208 (4th Cir. 2020), *pet'n for cert. granted*, 2021 WL 77245 (Jan. 8, 2021).

In conflict with the Fourth Circuit, the Fifth, Eighth, and Tenth Circuits have concluded that *Rehaif* error in a guilty plea to § 922(g)(1) is not structural. *United States v. Hicks*, 958 F.3d 399 (5th Cir. 2020), *pet. for cert pending*, No. 20-5959 (filed Oct. 2, 2020); *United States v. Coleman*, 961 F.3d 1024, 1029-30 (8th Cir. 2020), *pet. for cert. pending*, No. 20-6714 (filed Dec. 18, 2020); *United States v. Trujillo*, 960 F.3d 1196, 1205-06 (10th Cir. 2020), *pet. for cert. pending*, No. 20-6162 (filed Oct. 23, 2020); *see also United States v. Maez,* 960 F.3d 949, 957-58 (7th Cir. 2020), *pet. for cert. pending,* No. 20-6226 (filed Oct. 28, 2020) (omission of knowledge-of-status element from § 922(g)(1) indictment not structural error); *Triggs*, 963 F.3d at 714 (applying *Maez* to conditional guilty plea to § 922(g)(9)).

As the *Gary* court emphasized, "justice is not *only* a result. In criminal proceedings where life and liberty are at stake, it is certainly our *intent* that

[6] The *Gary* court recognized that this Court has reserved the question of whether structural errors automatically satisfy the third prong of *Olano*. *See Gary*, 954 F.3d at 205 (citing *Puckett v. United States*, 556 U.S. 129, 140-41 (2009)). *Gary* relied on Fourth Circuit precedent holding that a "structural" error necessarily "affects substantial rights" for purposes of *Olano*'s third prong. *Id.*

'justice' be achieved in the result, but it is our *mandate* that 'justice' be achieved in the process afforded the accused." 954 F.3d at 208 (emphases in original).

As the *Gary* court found, the defendant's guilty plea was not knowing or intelligent "because he did not understand the essential elements of the offense to which he pled guilty." *Id.* at 198. In so holding, the *Gary* court rejected the premise that a defendant raising *Rehaif* error on appeal must show a reasonable probability that the outcome would be different on retrial. *Gary*, 954 F.3d at 200.

This Court has identified at least three broad categories of errors that are structural. *Weaver*, 137 S.Ct. at 1908. These categories include: (1) errors that occur in relation to a right that is not designed to protect the defendant from erroneous conviction, such as the defendant's right to conduct his own defense; (2) errors with effects that "are simply too hard to measure"; and (3) errors that always result in fundamental unfairness. *Id.* at 1908.

A conviction that occurs in violation of *Rehaif* falls within each of these categories. First, the error "violate[s the defendant's] right to make a fundamental choice regarding his own defense." *Gary*, 954 F.3d at 205; *see Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979) (Constitution contemplates "a norm in which the accused" alone is the "master of his own defense"); *Martinez v. Ct. of Appeal*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) (criminal defendant must be "fully informed" in order to evaluate "his own best interests"). "Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error." *Weaver*, 137 S.Ct. at 1908.

Second, because the defendant was deprived of notice and an opportunity to defend himself against the mens rea element at trial, "the precise effect of the violation cannot be ascertained." *Weaver*, 137 S.Ct. at 1908 (internal quotation marks omitted); *Gary*, 954 F.3d at 206 (conviction that occurs in violation of *Rehaif* has consequences that are necessarily unquantifiable and indeterminate).

Third, fundamental unfairness results when a defendant is convicted of a crime following proceedings at which he was deprived of the opportunity to defend against the mens rea element, thereby "affect[ing] the composition of the record." *Rose*, 478 U.S. at 579 n.7.

Finally, *Rehaif* error satisfies the fourth prong of the *Olano* framework because the fairness, credibility, and public reputation of judicial proceedings are seriously undermined when a defendant is not aware of a mens rea element of an offense. *Gary*, 954 F.3d at 208 (defendants must be "fully informed" of the charge "[e]ven where evidence in the record might tend to prove a defendant's guilt").

Although this Court has granted the government's petition for writ of certiorari in *Gary*, one of the key grounds offered by the government as a basis for this Court's review does not apply here, because, unlike Mr. Martinez, the defendant in *Gary* had been convicted of possession of firearm by a felon. *See* Petition for Writ of Certiorari, 20-444, at 10-11, 20-21. At several points in its petition, the government argued that structural error analysis should be inapplicable in light of the ease with which the government could prove the defendant's knowledge of his felony conviction. *Id.* at 10-11, 20-21; *see also id.* at 10

(citing *Rehaif*, 139 S. Ct. at 2209 (Alito, J., dissenting) ("Juries will rarely doubt that a defendant convicted of a felony has forgotten that experience.")).

Here, by contrast, as previously outlined, Mr. Martinez was convicted under § 922(g)(9), and as the Seventh Circuit noted in *Triggs*, "[t]he Supreme Court's clarification of the elements of this crime means that the government must prove a new and—in the case of § 922(g)(9)—burdensome knowledge element. *Rehaif* opens a potentially viable avenue of defense." *Triggs*, 963 F.3d at 716. Where, as here, the defendant had no basis at the time of trial to defend against an omitted element, and no grounds to object to insufficient evidence on the omitted element, the balance weighs towards promptly redressing the obvious injustice without further analysis of prejudice.

The Court should grant certiorari and conclude that the omission of this potentially viable avenue of defense under §§ 921(a)(33) and 922(g)(9) was structural error, which necessarily affected Mr. Martinez's substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings.

III. This Court Should Grant Certiorari and Reverse Mr. Martinez's Convictions With Instructions to Preclude the Court of Appeals from Considering Matters Outside the Trial Record on Plain Error Review

A. Introduction

Since *Rehaif*, appellate courts have taken conflicting approaches to the scope of their authority to look beyond the trial record when assessing § 922(g)'s knowledge-of-status element. In cases such as this one, where an essential element was omitted at trial, this Court has never allowed appellate courts to search outside

the trial record in assessing whether plain error's third and fourth prongs have been satisfied. Moreover, such a practice would undoubtedly permeate review of trial errors beyond *Rehaif* knowledge-of-status omissions.

Nor does the Constitution permit an appellate court to sit as the initial factfinder in a federal criminal prosecution, searching beyond the trial record to make its own determination of a defendant's guilt on an essential element of the crime. In recognition of a criminal defendant's important constitutional rights, the Third Circuit, in an en banc decision, has limited appellate review of *Rehaif* claims to the evidence in the trial record. *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc). The Fourth Circuit initially took the same approach, but has since granted rehearing en banc. *United States v. Medley*, 972 F.3d 399, 413-414 (4th Cir. 2020), *reh'g en banc granted*, 828 F. App'x. 923 (4th Cir. Nov. 12, 2020).

The First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits permit the appellate court to search beyond the trial record to assess *Rehaif* claims. *See United States v. Lara*, 970 F.3d 68, 88 (1st Cir. 2020); *United States v. Miller*, 954 F.3d 551, 560 (2d Cir. 2020), *pet. for cert. pending*, No. 20-5407 (filed Aug. 14, 2020); *United States v. Staggers*, 961 F.3d 745, 756 (5th Cir.), *cert. denied*, 2020 WL 5883456 (U.S. Oct. 5, 2020); *United States v. Ward*, 957 F.3d 691, 695 & n.1 (6th Cir. 2020); *United States v. Maez*, 960 F.3d 949, 961 (7th Cir. 2020), *pet. for cert. pending*, No. 20-6226 (filed Oct. 28, 2020); *United States v. Owens*, 966 F.3d 700, 706-07 (8th Cir. 2020), *pet. for cert. pending*, No. 20-6098 (filed Oct. 13, 2020); *United States v. Johnson*, 979 F.3d 632, 638 (9th Cir. 2020); *United States v.*

Reed, 941 F.3d 1018, 1021 (11th Cir. 2019), *pet. for cert. pending*, No. 19-8679 (filed June 8, 2020); *United States v. Greer*, 798 F. App'x 483 (11th Cir. 2020), *pet. for cert. granted*, No. 19-8709 (Jan. 8, 2021).

The majority approach impermissibly allows appellate judges to serve as factfinders to adjudicate guilt on the elements of the underlying criminal offense. This Court should grant certiorari and vacate Mr. Martinez's convictions because, as the government's own briefs in the Ninth Circuit make plain, the government expressly relied on matter outside the trial record to argue that Mr. Martinez's convictions should not be reversed. Gov't Answering Brief, Dkt. 68 at 7.

B. The Circuits Have Split Regarding Whether Non-Trial Matter May Be Considered on Plain Error Review, Warranting This Court's Review

The Constitution and this Court's precedent limit review under plain error's third and fourth prongs[7] to the actual trial record.

The Ninth Circuit conducted what appears to be its most thorough analysis of this issue in *United States v. Johnson*, 979 F.3d 632, 638 (9th Cir. 2020).[8] In *Johnson*, the Ninth Circuit considered the defendant's post-*Rehaif* argument that the government failed to present sufficient evidence at his bench trial that he knew

[7] The Ninth Circuit in *Johnson* assumed without deciding that *Rehaif* error affected Johnson's substantial rights for purposes of *Olano*'s third prong, and considered matters outside the trial record in relation to the fourth prong. 979 F.3d at 636-37.

[8] The panel in Mr. Martinez's case cited an earlier decision in which the Ninth Circuit also appears to have relied on non-trial matter in assessing a *Rehaif* claim, albeit without addressing the propriety of such a practice. *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019).

he was a felon. In order to avoid controlling circuit authority requiring de novo review of sufficiency claims raised after a bench trial, the Ninth Circuit instead construed the defendant's claim as jury instruction error, applied plain error review, and reached beyond the trial record to conclude that any retrial would be futile. *Id.* at 636-38.

The Ninth Circuit recognized that when the error under review "involves omission of an element of the offense, the record on appeal will often not disclose what additional evidence the government would introduce to prove" that element. *Id.* at 638. However, the Ninth Circuit concluded:

> if the record on appeal *does* disclose what that evidence consists of, and the evidence is uncontroverted, we can think of no sound reason to ignore it when deciding whether refusal to correct an unpreserved error would result in a miscarriage of justice.

Id.

In fact, there are many "sound reasons" for an appellate court to decline to act as a fact-finder to resolve fact-bound questions which have arisen on appeal, and which go to the defendant's mens rea, not the least of which are the defendant's fundamental rights under the Fifth and Sixth Amendments. *Compare Nasir*, 982 F.3d at 170 ("Given our view of the due process and jury trial rights at issue, our analysis of Nasir's claim of plain error will be confined to the trial record and the evidence the government actually presented to the jury.").

Indeed, judges within the Ninth Circuit have not taken a uniform view regarding whether appellate judges may adjudicate guilt in the first instance and

look outside the trial record. *See Gear*, 2021 WL 163090, *7 (Bumatay, J., concurring in part and dissenting in part). In *Gear*, as noted earlier, the Ninth Circuit considered the mens rea requirement for § 922(g)(5)(B), which prohibits firearm possession by any person who is an alien, and has been admitted to the United States under a nonimmigrant visa. *Id.* at *3. *Gear* concluded that under *Rehaif*, the government was required to prove that the defendant "*knew* he was admitted into the country "under a nonimmigrant visa."' *Id.* (emphasis in original).

Over a strong dissent by Judge Bumatay, the *Gear* majority adjudicated the defendant's guilt on the knowledge-of-status element and concluded that the third prong of the *Olano* test was not satisfied because "the record overwhelmingly indicates that he knew it was illegal for him to possess a firearm." *Id.* at *5. In support, the *Gear* majority expressly relied on Gear's "admi[ssion] to Department of Homeland Security agents that he was barred from firearm possession because he was not a U.S. citizen," and rejected the defendant's objection that this admission "constitutes hearsay and was untested during trial." *Id.*

Judge Bumatay sharply criticized the majority's approach in light of the "paramount importance" of the right to jury trial at the time of our Nation's founding. *Gear*, 2021 WL 163090 at *7 (Bumatay, J., concurring in part and dissenting in part). As he explained, "[t]his right requires that 'the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'" *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). Judge Bumatay further explained that "since a three-judge

panel is no substitute for twelve of Gear's peers, our review is not simply whether we think the result would've been different." *Id.* at *8. Instead, the test is whether ""it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."' *Id.* (quoting, inter alia, *Neder*, 527 U.S. at 17). Judge Bumatay sharply disagreed with the majority's conclusion that the evidence in *Gear* met this standard, noting that Gear might have altered his trial strategy, and might have challenged the introduction of his verbal admissions, if the mens rea element had been alleged. *Id.* at *9.

As Judge Bumatay explained in his partial dissent in *Gear*, "[j]udges—and federal judges in particular—are 'proper objects of that healthy suspicion of the power of government,' which prompted the people to 'reserve[ ] the function of determining guilt to themselves, sitting as jurors.'" *Gear*, 2021 WL 163090, *9 (Bumatay, J., concurring in part and dissenting in part) (quoting *Neder*, 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part).

This Court should instead adopt the Third Circuit's en banc analysis in *Nasir*. *Nasir* respects this Court's precedent, the Fifth and Sixth Amendments, and the fairness concerns plain error is intended to address by limiting third[9] and fourth prong review to the trial record where the appellant proceeded to trial.

Nasir emphasized that the Fifth Amendment's Due Process Clause protects defendants from a conviction absent "'proof beyond a reasonable doubt of every fact

[9] *Nasir* noted that some Circuits have "acknowledge[d] that a reviewing court is restricted to the trial record at the first three steps of plain-error review," but have ventured beyond the trial record at the fourth *Olano* prong. *Nasir*, 982 F.3d at 167.

necessary to constitute the crime'" charged. 982 F.3d at 162 (quoting *Winship*, 397 U.S. at 364). This due process inquiry "necessarily focus[es] on whether the government did prove—or at least introduced sufficient evidence to prove—each element of the offense beyond a reasonable doubt at the actual trial." *Id.* at 163. Otherwise, appellate courts could freely "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"—an approach no Supreme Court decision ever condoned. *Id.* (emphases in original). *Nasir* also recognized the Sixth Amendment right to jury trial "allocates the role of 'proper factfinder' to the jury," not to "appellate judges after the fact." *Id.* at 162 (quoting 4 William Blackstone, Commentaries on the Laws of England, 343-44 (1769)).

Nasir comprehensively reviewed post-*Rehaif* circuit decisions and compared them to this Court's plain error authority. 982 F.3d at 160-77. Doing so, *Nasir* correctly recognized that this Court "limited itself to the trial record in analogous cases" at the fourth prong of plain error review. *Id.* at 163 (citing *Johnson v. United States*, 520 U.S. 461 (1997)).

In this case, if the panel had correctly applied the relevant status category under § 921(a)(33), and if the panel had then limited its review to the facts contained in the trial record, the panel would have been obligated to reverse Mr. Martinez's convictions for insufficient evidence. Indeed, as noted, the government expressly relied on evidence outside the trial record to argue against reversal. Accordingly, the plain error in this case affected Mr. Martinez's substantial rights

and seriously affected the fairness, integrity or public reputation of judicial proceedings.

C. This Court's Precedent Demonstrates the Ninth Circuit's Error in Looking Outside the Trial Record

A proper sufficiency-of-the-evidence review serves multiple constitutional interests. It is "tailored to ensure that a defendant receives the minimum that due process requires: a 'meaningful opportunity to defend' against the charge against him and a jury finding of guilt 'beyond a reasonable doubt.'" *Musacchio v. United States*, __ U.S. __, 136 S. Ct. 709, 715 (2016) (quoting *Jackson*, 443 U.S. at 314-15).

Through *Johnson* and *Benamor*, the Ninth Circuit impermissibly allows the appellate court to venture beyond the "record evidence" at trial, and to adjudicate the appellant's guilt in the first instance on the omitted element. As the Third Circuit explained, reaching outside the record "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." *Nasir*, 982 F.3d at 169.

This Court's precedent demonstrates the error of the Ninth Circuit's approach, because "a fair trial is one in which evidence *subject to adversarial testing* is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (emphasis added). At the very heart of our criminal justice system lie the presumption of innocence, and the right to trial by a jury of one's peers. As previously discussed, if Mr. Martinez receives a new trial, the parties may litigate constitutional or evidentiary challenges to the government's proof of mens rea. Mr.

Martinez could also challenge the weight of any evidence through cross-examination or contrary evidence, and he could choose to testify in his own defense.

The Ninth Circuit relied on *Johnson v. United States*, 520 U.S. 461 (1997), and *United States v. Cotton*, 535 U.S. 625 (2002). 979 F.3d at 637-38. However, both of those cases involved plain-error review of errors based on newly announced rules, rather than questions of statutory construction through which this Court found that the government had failed to prove an element of the offense. The error in *Johnson* was submitting the materiality of a false statement to the judge, rather than the jury. 520 U.S. at 463. The error in *Cotton* was "the omission from a federal indictment of a fact that enhances the statutory maximum sentence." 535 U.S. at 627.

Importantly, in both cases, this Court found evidence of guilt in the trial record alone; neither reached beyond the trial to evidence never presented to the jury. As *Nasir* explained, "[t]he argument for reversal [in *Johnson*] on plain error failed . . . based on the trial record." 982 F.3d at 164 (emphasis added). And as the Ninth Circuit acknowledged, *Cotton* affirmed after "cataloging the evidence introduced at trial." 979 F.3d at 638.

Finally, two additional authorities illustrate the Ninth Circuit's error in relying on PSRs to reject plain error challenges under *Rehaif – Shepard v. United States*, 544 U.S. 13, 26 (2005), and the rules of federal appellate procedure. A PSR is prepared for sentencing proceedings, and thus, by nature, will not be part of the defendant's trial record. As a result, a defendant will never have the opportunity to

defend against a PSR's allegations at trial. Additionally, because the defendant has already been convicted at the time that the PSR is prepared, he does not have the same incentive to challenge the allegations in a PSR as he would if those allegations had been introduced at trial to prove an element of the offense.

Due to the nature of PSRs, this Court has concluded that such documents are not sufficiently reliable to be considered "judicially noticeable" documents for purposes of determining the facts of a prior conviction. *See Shepard*, 544 U.S. at 16. Additionally, in light of the rules governing appellate procedure, an appellant will face inherent obstacles in attempting to mount factual or legal challenges to the PSR in the course of his appeal. The appellate rules limit the "complete record on appeal" to the official district court transcripts, "original pleadings, exhibits and other papers filed with the district court." 9th Cir. R. 10-2 (Dec. 2020).

"Given the due process and Sixth Amendment concerns in play here, [appellate courts] are not free to suppose what the government could have proven at a different trial." *Nasir*, 982 F.3d at 164. Those concerns "cannot be swept aside because of dissatisfaction with the rule that plain error is decided on the basis of the law as it stands at the time of appeal." *Id.* at 175. "Disregarding constitutional norms may be taken as tantamount to saying that rules constraining the government really don't count when we just know someone is guilty." *Id.* at 175-76.

IV. If the Court Does Not Grant Certiorari With Respect to the Ninth Circuit's Approach to §§ 921(a)(33) and 922(g)(9), or With Respect to Whether *Rehaif* Error is Structural Error in the Context of § 922(g)(9), the Court Should Hold the Third and Fourth Questions Presented Pending Resolution of *Gary* and *Greer*

In the event that the Court does not grant certiorari with respect to the Ninth Circuit's approach to §§ 921(a)(33) and 922(g)(9), or with respect to whether *Rehaif* error is structural error in the context of § 922(g)(9), Mr. Martinez respectfully requests that the Court hold the third question presented (regarding structural error) pending the resolution of *Gary*, and hold the fourth question presented (regarding the scope of appellate review) pending the resolution of *Greer*. If this Court affirms in *Gary*, or vacates or reverses in *Greer*, it should thereafter grant, vacate, and remand with respect to those issues.

To ensure similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before it, and, once the related case is decided, resolves the held petitions in a consistent manner. *See, e.g., Flores v. United States*, __ U.S. __, 137 S. Ct. 2211 (2017); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting that the Court has "GVR'd in light of a wide range of developments, including [its] own decisions"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." (emphasis omitted)).

Because *Gary* presents a similar issue regarding structural error in the context of § 922(g)(1), and because this case raises the same question as *Greer* regarding the scope of appellate review, the Court should follow that course here to ensure

that this case is resolved in a consistent manner. If this Court rules that *Rehaif* error is structural error in the context of § 922(g)(1), or that an appellate court may not consider evidence outside the trial record on plain error review, then it would be fundamentally unfair to permit the constitutionally infirm judgment in this case to stand.

CONCLUSION

For the reasons stated above, Mr. Martinez respectfully asks this Court to issue a writ of certiorari with respect to the application of *Rehaif* to §§ 921(a)(33) and 922(g)(9), or to hold his petition until the Court resolves *Gary* and *Greer*, and then dispose of his petition in a manner consistent with *Gary* and *Greer*.

Dated: 1/29/21

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