No.

In The Supreme Court Of The United States

Jacqueline Moore,

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

Jacqueline Moore's Petition for a Writ of Certiorari

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Questions Presented

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court identified the mens rea necessary for the status element under 18 U.S.C. §§ 922(g) and 924(a)(2), expanding the government's burden of proof for conviction and narrowing the class of persons susceptible to criminal liability. Similar to the petitioner in *Greer v. United States*, No. 19-8709, *cert. granted*, 2021 WL 77241 (U.S. Jan. 8, 2021), Moore was convicted by a jury prior to *Rehaif* for possessing a firearm and a bullet without the government proving that, at the time of her alleged possession, she knew her "status as a person barred from possessing a firearm" or ammunition. 139 S. Ct. at 2200.

The questions presented are:

I. When applying plain error review based on an intervening United States Supreme Court decision, may an appellate court consider information outside the trial record to determine if the error affected the fairness, integrity, or public reputation of the trial proceedings?

II. Does an indictment that omits the defendant's knowledge-of-status element fail to allege a federal offense?

List of Proceedings

United States Court of Appeals (9th Cir.):

1. Appendix A, Pet. App. 1a, contains *United States v. Moore,* No. 18-10437 (9th Cir. Nov. 23, 2020) (unpublished) (Order denying Petition for Rehearing under *Rehaif*).
2. Appendix B, Pet. App. 2a-6a, contains *United States v. Moore,* No. 18-10437, 825 F. App'x 453 (9th Cir. Sept. 9, 2020) (unpublished) (Mem. affirming conviction and sentence and supplemental request for relief under *Rehaif*).

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Petition for Certiorari

Petitioner Jacqueline Moore respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's summary denial of Moore's petition for rehearing and en banc review is unpublished. Pet. App. 1a. The Ninth Circuit's memorandum opinion affirming Moore's conviction and sentence and denying relief under *Rehaif* is unpublished but reprinted at *United States v. Moore*, 825 F. App'x 453 (9th Cir. 2020). Pet. App. 2a-6a.

Jurisdiction

The Ninth Circuit Court of Appeals denied Moore's request for rehearing and rehearing en banc on November 23, 2020. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This Petition is timely filed per Supreme Court Rule 13.1 and this Court's order issued March 19, 2020, extending the deadline from 90 days to 150 days to file a petition for a writ of certiorari after the lower court's order denying discretionary review.

Constitutional and Statutory Provisions Involved

1. The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. Section 922(g)(1) of Title 18 of the United States Code provides: "It shall be unlawful for any person . . . who has been convicted" of a felony to possess a firearm.

4. Section 924(a)(2) of Title 18 of the United States Code provides "Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be . . . imprisoned not more than 10 years."

Statement of the Case

I. Moore proceeded to a jury trial prior to *Rehaif*

Petitioner Jacqueline Moore was indicted, tried, and convicted on two counts of violating 18 U.S.C. §§ 922(g)(l) and 924(a)(2), before this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The only mens rea element presented for the grand and petit juries' consideration was whether she knowingly possessed one round of .25 caliber ammunition (Count One) and one firearm (Count Two). Excerpts of Record (EOR) 72-74.[1] At the close of the government's case-in-chief during her 2018 trial, Moore moved for acquittal due to insufficient evidence. EOR 56-58. The district court denied her motion, and the jury convicted on both counts. EOR 928-929. Moore timely appealed her conviction to the Ninth Circuit Court of Appeals.

[1] The Excerpts of Record reference the electronically available record filed in Moore's direct appeal in the Ninth Circuit, Case No. 18-10437. References to the "App. Dkt." reference the electronically available appellate briefs in Moore's direct appeal.

II. *Rehaif* issued during pendency of Moore's direct appeal

While Moore's direct appeal was pending in the Ninth Circuit Court of Appeals, this Court issued *Rehaif*. It was in *Rehaif* that this Court clarified for the first time that the mens rea element for Moore's convictions required a mens rea element entirely missing from her trial. 139 S. Ct. at 2201. *Rehaif* held a conviction under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) requires the government prove (or the defendant admit) the defendant knew her prohibitive status at the time of the alleged firearm or ammunition possession. *Id.* *Rehaif* overturned decades of federal circuit precedent limiting the mens rea requirement in §§ 922(g)(1) and 924(a)(2) to the possession element, which was the law in effect during Moore's trial.[2]

After *Rehaif*'s landmark holding, the parties filed supplemental briefs in Moore's appeal. Moore argued there was no federal jurisdiction as her *Rehaif*-defective indictment failed to allege a federal offense, requiring dismissal. App. Dkt. 33, pp. 4-10. Alternatively, she argued the jury instructions failed to apprise jurors that the government must prove *Rehaif* knowledge-of-status element beyond a reasonable doubt, requiring remand for a new trial. App. Dkt. 33, pp. 10-15.

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[2] *See United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012); *United States v. Langley*, 62 F.3d 602, 604-08 (4th Cir. 1995) (en banc); *United States v. Rose*, 587 F.3d 695, 705-06 & n.9 (5th Cir. 2009); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997); *United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997).

The Ninth Circuit concluded "no plain error resulted from the indictment's failure to allege, and the district court's failure to instruct on, the knowledge element of a prosecution under 18 U.S.C. §§ 922(g) and 924(a)(2) as established in *Rehaif*. . . ." Pet. App. 6a. Relying on information never presented to the jury, the court summarily stated Moore did not satisfy plain error's fourth prong, because *"[t]he record on appeal* indicates" she "had two previous felony convictions for which she served more than one year of imprisonment for each." Pet. App. 6a (emphasis added) (citing *United States v. Johnson*, 963 F.3d 847, 852 (9th Cir. 2020) (holding that, as part of our sufficiency-of-the-evidence analysis on plain-error review, we may "review the entire record on appeal—not just the record adduced at trial")).[3] Presumably, the "record on appeal" on which the panel relied included the Presentence Investigation Report (PSR) setting forth Moore's criminal history.

Moore petitioned for panel rehearing and rehearing en banc. App. Dkt. 68. Therein, she explained the panel erroneously adjudicated her *Rehaif* trial claim by expanding its review beyond the evidence adduced *at trial*. App. Dkt. 68, pp. 1, 12-15.[4] She urged the court to limit review to the trial record to protect her Fifth Amendment due process rights to have the government prove all of the elements of

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[3] The *Johnson* decision the *Moore* panel relied on was subsequently amended and superseded by *Johnson*, 979 F.3d 632, which is now pending a petition for certiorari in this Court. *See Johnson v. United States*, No. 20-1784 (U.S. Feb. 12, 2021).

[4] Moore also requested the Ninth Circuit review her convictions under the traditional sufficiency-of-the-evidence standard under *Jackson*, 443 U.S. 307, not the plain error standard the parties erroneously initially suggested applied. App. Dkt. 68, pp. 1, 9-14.

the offense and have a jury determine if the government met its evidentiary burden. App. Dkt. 68, p. 13. Moore explained that by denying relief under the fourth prong based on the panel's expanded review of the "[t]he record on appeal," the panel affirmed a conviction based on evidence the government never proved, the jury never received, and she never had reason or an opportunity to rebut. App. Dkt. 68, pp. 13-14. She also explained the panel's approach impermissibly assumed the government could prove the *Rehaif* element beyond a reasonable doubt, even though courts are not free to speculate what evidence or defenses would have been presented to it. App. Dkt. 68, pp. 13-14. The Ninth Circuit declined rehearing and rehearing en banc. Pet. App. 1a.

Reasons for Granting the Petition

I. When applying plain error review based on an intervening United States Supreme Court decision, may an appellate court consider information outside the trial record to determine whether the error affected the fairness, integrity, or public reputation of the trial proceedings?

Since this Court issued *Rehaif*, a novel and dangerous practice has gained acceptance in several federal circuit courts that threatens defendants' Fifth and Sixth Amendment rights. This practice expands appellate review beyond the evidence and arguments presented at trial where defendants were convicted before *Rehaif*'s issuance. In these cases, under plain error's fourth prong, appellate courts rely on an expanded appellate record to decide defendants' guilt in the first instance on the knowledge-of-status element based on alleged facts never presented or proven at trial. The Court has already determined this practice presents an

important issue for the Court's consideration. *See Greer v. United States*, No. 19-8709, *cert. granted*, 2021 WL 77241 (U.S. Jan. 8, 2021).[5] The Court's decision in *Greer* may thus provide guidance here.

The Constitution provides no support for this practice. The Due Process Clause protects defendants from conviction unless every fact constituting the charged crime is proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. amend. V. Fundamental to due process is the defendant's right to "establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). 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. Thus, allowing fourth prong review to encompass non-trial evidence not subjected to adversarial testing violates a sacred tenet underlying the Fifth and Sixth Amendments—protection from unilateral guilt adjudications.

This Court's caselaw also provides no support for this practice. The Court's decisions do not condone expanding the appellate record beyond the trial record to or included hypothetical guilt postulations. Nor have this Court's decisions extended plain error's fourth prong to allow consideration of unreliable information

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[5] *Greer* also inquires "[w]hether, 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. . . ."? The Ninth Circuit, however, did not address the third prong of plain error, and thus, it is not addressed here.

beyond the trial record as a substitute for an omitted offense element. Two particular decisions from this Court are instructive.

First, in *Johnson v. United States*, 520 U.S. 461, 463 (1997), this Court considered whether its recent decision requiring the jury (instead of the judge) to determine the materiality of a false statement required relief under the fourth prong. Limiting review to the trial record, the Court considered the evidence, defense, and arguments presented at trial, noting "the evidence supporting materiality was 'overwhelming'" and "[m]ateriality was essentially uncontroverted at trial and ha[d] remained so on appeal." *Id.* at 470. A footnote explained the appellate record remained uncontroverted on materiality because the government already proved materiality at trial, i.e., the petitioner had an opportunity to defend against materiality at trial but did not. *See Johnson*, 520 U.S. 470 & n.2. *Johnson* should not apply where, as here, the parties had no notice of the omitted knowledge-of-status issue during trial, the government did not present (let alone prove by overwhelming evidence) the omitted element, and the defense did not have reason or opportunity to defend against it.

Second, in *United States v. Cotton*, 535 U.S. 625, 633-34 (2002), this Court held that omitting a fact enhancing a statutory drug maximum *sentence* from the indictment did not warrant relief under the fourth prong where the *trial record* evidence of the omitted fact was both "overwhelming" and "essentially uncontroverted." Because the trial evidence still established respondents participated "in a vast drug conspiracy," this Court found no plain error due to the

missing sentencing enhancement element. *Id.* *Cotton* should not apply where, as here, the omitted offense element was germane to factual guilt outside of a sentencing context and where there was no evidence of the element at trial.

Yet, the federal circuits have split over the limits of fourth prong review post-*Rehaif*. These varying views to the limits of the fourth prong of plain error for those on direct review requires guidance from this Court.

The First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits all review information never presented at trial and adjudicate guilt in the first instance on an omitted essential offense element under the fourth prong. This expanded review includes PSRs and judicially noticed documents from prior, separate proceedings, with appellate judges sitting as factfinders deciding defendants' knowledge-of-status based on the expanded record.[6]

But the Third Circuit, appreciating the constitutional threat posed to defendants by expanding plain error review beyond the trial record and the impropriety of allowing appellate judges to adjudicate guilt on an essential offense element, limits plain error review to the actual trial record. *United States v. Nasir*,

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[6] *See United States v. Lara*, 970 F.3d 68, 88 (1st Cir. 2020), *pet. for cert filed sub nom. Williams v. United States*, No. 20-7019 (U.S. Jan. 19, 2021); *United States v. Miller*, 954 F.3d 551, 560 (2d Cir. 2020), *pet. for cert. filed,* No. 20-5407 (U.S. 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. filed*, No. 20-6226 (U.S. Oct. 28, 2020); *United States v. Owens*, 966 F.3d 700, 706-07 (8th Cir. 2020), *pet. for cert. filed,* No. 20-6098 (U.S. Oct. 13, 2020); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019), *pet. for cert. filed*, No. 19-8679 (U.S. June 8, 2020).

982 F.3d 144 (3d Cir. 2020) (en banc). 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 decision from this Court has ever condoned. *Id.* at 163 (emphases in original). "[T]he Due Process Clause," requires "focus 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.* The question is thus "'not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the *case at hand*.'" *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993)) (emphasis added by *Nasir*). *Nasir* also firmly acknowledged the Sixth Amendment does not allocate the role of factfinder to "appellate judges after the fact." 982 F.3d at 163 (quoting 4 William Blackstone, *Commentaries on the Laws of England*, 343-44 (1769)).

And while the Fourth Circuit is currently reviewing its leading case *en banc*, it initially rejected the government's "substantial post-trial evidence supporting [the defendant's] knowledge of his prohibited status," as it failed to produce that evidence at trial, and "[the defendant] had no reason to contest that element during pre-trial, trial, or sentencing proceedings." *United States v. Medley*, 972 F.3d 399, 417 (4th Cir.), *reh'g en banc granted*, 828 F. App'x 923 (4th Cir. 2020). The Fourth Circuit thus held the indictment failed to the put the defendant on notice of the

knowledge-of-status element, failing to describe the element, ultimately satisfying the third and fourth prongs of plain error. *Id.* at 406-17.[7]

This Court defines "a fair trial" to be "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). Whether the federal circuits' unprecedented expansion of the fourth prong impedes defendants' fair trial rights in turn affects the fairness, integrity, and public reputation of the trial proceedings is a critical question for the Court. Given its growing acceptance amongst the circuit courts, the Court should decide whether fourth prong review is limited to the trial record, or if the post-*Rehaif* practice of allowing appellate judges to expand the appellate record to consider untested information and adjudicate guilt on a previously unnoticed offense element necessary for conviction is itself an affront to fairness, integrity, and public reputation of the trial under the fourth prong of plain error review.

II. Does an indictment that omits the defendant's knowledge-of-status element fail to allege a federal offense?

A. Appellate courts are divided over whether an indictment that fails to allege all the elements of the federal offense confers federal jurisdiction.

Congress limits federal judicial jurisdiction, stating the "district courts of the United States shall have original jurisdiction . . . of all offenses *against the laws of the United States*." 18 U.S.C. § 3231 (emphasis added). Thus, if an indictment fails

[7] Understanding the Fourth Circuit's grant of rehearing en banc vacates the panel's opinion in *Medley*, Johnson cites *Medley* herein simply to demonstrate the circuit discord on this issue.

to allege a federal crime *at all*, that indictment fails to confer jurisdiction on the federal courts.

The federal circuit courts are split, however, over the legal effect of omitting an essential element from an indictment. *See United States v. Muresanu*, 951 F.3d 833, 838 (7th Cir. 2020) (recognizing split, noting Eleventh Circuit requires indictment to "charge some federal crime" to maintain federal jurisdiction, while Fifth and Tenth Circuits do not). Already faced with this split, circuit confusion has become particularly keen post-*Rehaif*, as some federal circuits now deviate from their own prior holdings when asked to correct *Rehaif* indictment errors arising for the first time on direct appeal, like Moore's. In these cases, the pre-*Rehaif* indictment did not allege the necessary mens rea element, and defendants were charged and convicted with an indictment failing to allege a cognizable federal offense. But, even in circuits where such defects would have inhibited federal jurisdiction before *Rehaif*, these same circuits now hold *Rehaif*-defective indictments *do* confer federal jurisdiction.

The resulting jurisdictional questions and inter-circuit conflicts often turn on the varying interpretations of *United States v. Cotton*, 535 U.S. 625 (2002), which addressed a defective drug indictment. The *Cotton* indictment did "not allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)." *Id.* at 628. *Cotton* held indictment defects "do not deprive a court of its power to adjudicate a case," but reviewed whether the court had subject-

matter jurisdiction. *Id.* at 630. Thus, the *Cotton* indictment defect did not deprive the district court there of jurisdiction. *Id.* at 632.

Cotton based its jurisdictional holding on *Lamar*, 240 U.S. 60. In *Lamar*, the defendant argued the allegations in his indictment failed to allege a crime against him, failing to confer jurisdiction on the court. *Id.* at 64. The *Lamar* indictment alleged the defendant "falsely pretended to be an officer of the Government of the United States, to wit, a member of the House of Representatives." *Lamar*, 240 U.S. at 64. As a congressperson is not a United States "officer," the defendant argued the indictment did not charge a federal crime and, as such, the federal court did not have jurisdiction. *Id.* The *Lamar* Court rejected this jurisdictional argument.

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

Lamar, 240 U.S. at 65 (internal citation omitted).

In rejecting the jurisdictional challenges based on the specific indictment defects in both *Lamar* and *Cotton*, this Court properly adhered to 18 U.S.C. § 3231's jurisdictional mandate. The *Lamar* indictment alleged all the essential elements of a federal crime—"personation with intent to defraud." 240 U.S. at 64-65. However, the defendant argued the method for proving one element—his alleged personation of a "officer"—did not meet the statutory requirement. *Id.* This Court appropriately found the defendant's argument went to whether he committed the

elements of the crime charged, i.e., the merits, not whether the indictment alleged a cognizable federal crime. *Id.*

The *Cotton* indictment similarly alleged all the essential elements of the federal crime—conspiracy and possession with intent to distribute cocaine and cocaine base under 21 U.S.C. §§ 846 and 841(a)(1)—but failed to allege "the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)." 535 U.S. at 628. Conspiring and possessing with intent to distribute *any* amount of cocaine and cocaine base violates federal law. *See* 21 U.S.C. § 841(a), (b). The drug quantity controls only the statutory sentencing range. *Id.* Thus, despite the indictment defect in *Cotton* for failing to allege the drug quantity, this Court appropriately found the defect did not affect the merits of the cognizable federal offense. *Cotton*, 535 U.S. at 627-29.

Before *Rehaif* and consistent with this Court's reasoning in *Cotton* and *Lamar*, as well as the text of 18 U.S.C. § 3231, at least three circuits held an indictment that fails to allege a violation of federal law by omitting an element of the offense does *not* to confer jurisdiction because it does not allege a federal offense.

The Eleventh Circuit held an indictment defective for failing to allege a violation of federal law and concluded that defect rendered the district court without jurisdiction. *Peter*, 310 F.3d at 713-14. The *Peter* court reached this conclusion noting "there was no claim in *Cotton* that the indictment consisted only of specific conduct that, as a matter of law, was outside the sweep of the charging

statute." *Id.* *Peter* correctly recognized *Cotton* "did not address whether the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges, and on which a subsequent guilty plea is based, describe conduct that is not proscribed by the charging statute." *Peter*, 310 F.3d at 713-14.

The Sixth Circuit similarly held, prior to *Rehaif*, a jurisdictional challenge will succeed where "a defendant who enters a guilty plea [can] establish that the face of the indictment failed to charge the elements of a federal offense." *Martin*, 526 F.3d at 934.

And the First Circuit held an indictment that tracks the charging statute's language is generally sufficient but only if "the excerpted statutory language sets out all of the elements of the offense without material uncertainty." *Troy*, 618 F.3d at 34.

There does not appear to be a published pre-*Rehaif*, post-*Cotton* Fourth Circuit case addressing whether indictment defects affect jurisdiction.[8] However, district courts in the Fourth Circuit, have relied on pre-*Cotton* Fourth Circuit precedent to recognize indictments omitting an essential offense element fail to confer jurisdiction.[9]

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[8] *But see Carr*, 303 F.3d at 543 (stating Cotton's issuance prompted defense counsel to concede at oral argument that indictment defects do not preclude jurisdiction).

[9] *See, e.g., United States v. Woodley*, No. 4:17-cr-128, 2018 WL 773423, at *1 (E.D. Va. Feb. 7, 2018) ("An element is necessary or essential if it is "one whose specification . . . is necessary to establish the very illegality of the behavior and thus the court's jurisdiction.'") (citation omitted); *United States v. McTague*, No. 5:14-cr-055, 2017 WL 1378425, at *7, *11-12 (W.D. Va. Apr. 10, 2017) (same); *Weaver*, 2010

Conversely, the Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuit pre-*Rehaif* decisions uniformly relied on *Cotton*'s language that "defects in an indictment do not deprive a court of its power to adjudicate a case."[10]

Now, in post-*Rehaif* direct appeals where defendants were convicted before *Rehaif*'s issuance, circuits have further broadened the inter- and intra-circuit division in how they resolve jurisdiction-based indictment challenges. For instance, the Eleventh, Sixth, and First Circuits have each ruled in post-*Rehaif* decisions inconsistently with their prior positions about jurisdictional indictment defects.

Reviewing a *Rehaif*-defective indictment, the Eleventh Circuit holds "[s]o long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction"—even when that element is necessary for conviction. *United States v. Moore*, 954 F.3d 1322, 1336-37 (11th Cir. 2020), *pet. for cert. filed*, No. 20-6781 (U.S. Dec. 17, 2020). The Sixth Circuit

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WL 1633319, at *1 ("The omission of an essential element is fatal to the indictment as the Court is therefore without jurisdiction to try the defendant on the defective count.") (citation omitted).

[10] *See, e.g., United States v. Vitillo,* 490 F.3d 314, 320 (3d Cir. 2007), *as amended* (Aug. 10, 2007) (stating indictment defects do not deprive court of jurisdiction); *United States v. Scruggs*, 714 F.3d 258, 262-64 (5th Cir. 2013) (holding objection that indictment fails to charge a crime goes to merits); *United States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019) (rejecting argument that indictment defects are jurisdictional); *United States v. Velasco-Medina*, 305 F.3d 839, 845-46 (9th Cir. 2002) (holding "whether an indictment charged a proper offense goes to the merits, not subject matter jurisdiction") *United States v. De Vaughn*, 694 F.3d 1141, 1147-48 (10th Cir. 2012) (interpreting *Cotton* to include indictment omissions and arguments that the indictment does not charge a federal offense); *United States v. Palmer*, 854 F.3d 39, 51(D.C. Cir. 2017 (holding "whether an indictment charged a proper offense goes to the merits, not subject matter jurisdiction") (citation omitted).

broadly holds an indictment's omission of *Rehaif*'s mens rea element does not deprive the court of jurisdiction. *Hobbs*, 953 F.3d at 856, *pet. for cert. filed*, No. 20-171 (U.S. Aug. 13, 2020). And, the First Circuit found an indictment sufficient to confer jurisdiction though its excerpted statutory charging language did not set out all of the offense elements with material certainty. *United States v. Lara*, 970 F.3d 68, 85-87 (1st Cir. 2020), *pet. for cert. filed sub nom. Williams v. United States*, No. 20-7019 (U.S. Jan. 19, 2021).

Post-*Rehaif*, the Second, Seventh, and Ninth Circuits continue to rely on *Cotton*'s language that "defects in an indictment do not deprive a court of its power to adjudicate a case," but resolve the ultimate question of jurisdiction differently.[11] For example, confronted with a *Rehaif*-based jurisdiction challenge to an indictment, the Second Circuit viewed *Rehaif*'s knowledge-of-status requirement as detailing what conduct violates § 922(g). *Balde*, 943 F.3d at 90-91. It concluded the *Rehaif* element "as telling us 'what conduct [the statute] prohibits' and how the statute would be violated, which is ultimately a merits question and not one that affects the jurisdiction of the court to adjudicate the case." *Id.* (quoting *United States v. Prado*, 933 F.3d 121, 137 (2d Cir. 2019)). The Second Circuit thus held a *Rehaif*-deficient indictment does not "fail[] to allege a federal offense in the sense

[11] *See, e.g., United States v. Balde,* 943 F.3d 73, 91-92 (2d Cir. 2019) (concluding indictment's *Rehaif* omission was not a jurisdictional defect); *United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020) (holding *Rehaif* "omission of an element from an indictment is not a jurisdictional defect" and "guilty plea waived his right to assert that the indictment failed to state an offense").

that would speak to the district court's power to hear the case." *Balde*, 943 F.3d 73, 90-91.

The Ninth Circuit, however, took another approach, as exemplified in Moore's case. The court summarily stated "no plain error resulted from the indictment's failure to allege" the knowledge-of-status element under *Rehaif*. Pet. App. 6a. But to conclude this, it considered an expanded appellate record and conducted a sufficiency-of-the-evidence review under plain error to adjudicate in the first instance whether the *Rehaif* knowledge-of-status element satisfied the fourth prong of plain error, despite omission of that element from the indictment. Pet. App. 6a.

Based on these varying approaches to resolving deficient indictment claims, and particularly the troubling expansion of the fourth prong of plain error review as it pertains to *Rehaif* errors for those on direct review, this circuit conflict requires guidance from this Court.

B. The question presented is important.

Whether appellate courts can review material outside the district court record to resolve *Rehaif*-deficient indictments challenges is an important inquiry. This Court recognizes it is the specific knowledge of one's prohibited status at the time of the alleged firearm possession that differentiates the commission of the offense from conduct that could be "entirely innocent." *Rehaif*, 139 S. Ct. at 2198. If a defendant lacks knowledge of the facts and circumstances making possession unlawful, the defendant "lack[s] the intent needed to make his behavior wrongful." *Id.* Without alleging the defendant possessed the necessary mens rea as to prohibited status in an indictment charging an offense under 18 U.S.C. §§ 922(g)(1),

924(a)(2), the indictment charges nothing more than "an innocent mistake to which criminal sanctions normally do not attach." *Id.* at 2197. That a defendant's case was not final when *Rehaif* issued should not lessen the import of *Rehaif*'s critical holding or change the rules for application of its legal principles.

The practice of appellate court judges adjudicating *Rehaif*-based indictment claims by assuming, after expanded record review under the fourth prong of plain error, that the defendant knew his or her prohibited status at the time of the alleged firearm possession under §§ 922(g)(1), 924(a)(2) gives way to the proverbial slippery slope. This erosion of plain error review will inevitably spread beyond *Rehaif* claims. If appellate courts continue deciding defendants' mens rea in the first instance without evidence or notice in the district court, defendants' due process rights will be irrevocably sacrificed, and the role of appellate judges impermissibly expanded. As this Court explained of its own limits:

> This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971).

The same restrictions prohibiting this Court's factfinding should apply to appellate judges attempting to adjudicate defendants' mens rea on an offense element for the first time on appeal based on information never tested in the district

court where the law had previously rendered mens rea challenges futile. *Rehaif* 139 S. Ct. at 2201) (Alito, J., dissenting) (indicating *Rehaif*'s holding overturns an interpretation of § 922(g) that "has been used in thousands of cases for more than 30 years").

Thus, though Moore's case falls within a finite group of cases pending on direct appeal when *Rehaif* issued, these cases require immediate guidance from this Court as they will have substantial impact on future cases given the circuits' handling of plain error review's fourth prong. Without correction from this Court, the fourth prong of plain error is susceptible to continued expansion beyond *Rehaif*. There is no authority permitting appellate judges to sit as factfinders in this way on an essential offense element, and no mechanism for them to do so in a way to permit defendants to present viable defenses on appeal. Allowing appellate judges to adjudicate guilt in the first instance by assuming guilt from an expanded record, and doing with assumptions that only favor the government, is unprecedented and a practice that itself will erode the fairness, integrity, and public reputation of judicial proceedings.

C. This case presents an ideal vehicle for resolving the conflict.

Moore's indictment, as it stands now, violates her Fifth Amendment guarantee that a grand jury find probable cause all elements of the offense, fails to allege a federal offense, and violates her Sixth Amendment right to notice of the nature and cause of the accusation against her. The Court should grant a writ of certiorari to review the Ninth Circuit's finding of jurisdiction. The Court should

also review the Ninth Circuit's expansion of the fourth prong of plain error to resolve this jurisdiction claim.

Conclusion

Moore respectfully requests this Court grant this petition for certiorari. The Ninth Circuit's expansion of the fourth prong of plain error in Moore's case is nearly identical to the question before the Court in *Greer v. United States*, No. 19-8709, *cert. granted*, 2021 WL 77241 (U.S. Jan. 8, 2021). It is therefore anticipated the Court's decision in *Greer* will impact the first question presented. However, the circuit division over the antecedent question of whether a *Rehaif*-deficient indictment fails to allege a federal offense and confer federal jurisdiction has not yet been accepted by the Court for review. The Court should grant review to resolve this important element-based jurisdiction question.

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Respectfully submitted,

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