No. 21-5060

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN BROWN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Court's intervention is needed. The circuits are undeniably split on an important legal question: whether, in a 18 U.S.C. § 922(g)(9) prosecution, *Rehaif v. United States*, 139 S. Ct. 2191 (2019), requires the government to prove that a defendant knew his conviction qualified as a "misdemeanor crime of domestic violence," including that his prior offense had, as an element, the use or attempted use of physical force. This case presents an ideal vehicle for the Court to resolve that issue.

The government does not deny the importance of this question. Nor does it deny that this case presents an excellent vehicle for the Court to address it. Instead, the government denies that a circuit split exists and argues that Mr. Brown is wrong on the merits. BIO at 10–16. Neither assertion is correct. The split is well-acknowledged. And on the merits, Mr. Brown is correct. But regardless of the correct answer, the divergent views on this important question only underscore the need for this Court's intervention.

I. The circuits are divided on how the government may prove the *Rehaif* mens rea element in a § 922(g)(9) case.

The government tries to deny the circuit split exists, BIO at 19–25, but it misreads both the Seventh Circuit's decision in *United States v.*

Triggs, 963 F.3d 710 (7th Cir. 2020), and the Ninth Circuit's decision in *United States v. Door*, 996 F.3d 606 (9th Cir. 2021). Indeed, the dissenting view in *United States v. Johnson*, which the government does not even acknowledge, expressly recognized the split. *See* 981 F.3d 1171, 1199–1200 (11th Cir. 2020) (Martin, J., concurring in part and dissenting in part) (stating that the Eleventh Circuit "create[d] a split with the Seventh Circuit in *Triggs*" and that if it were up to her, she "would follow the Seventh Circuit's approach in *Triggs*"). And the Seventh Circuit has since confirmed its holding that, in a § 922(g)(9) prosecution, the government must show the defendant knew his prior misdemeanor conviction came within the complex definition of a "misdemeanor crime of domestic violence." *United States v. Cook*, 970 F.3d 866, 882, 885 (7th Cir. 2020) (citing *Triggs*, 963 F.3d at 715–16). Thus, the circuit split here is undeniable.

a. Despite the clear existence of this split, the government insists these decisions are not in tension, let alone in conflict. The government could not be more wrong. As explained in Mr. Brown's petition, Pet. at 8–10, the Seventh Circuit in *Triggs* vacated the defendant's guilty plea in a § 922(g)(9) case based on the complexity of

the "misdemeanor crime of domestic violence" definition. 963 F.3d at 715–16 (distinguishing "the straight-forward definition" of a "crime punishable by imprisonment for a term exceeding one year" in § 922(g)(1) from the "comparative complexity" of the definition of a "misdemeanor crime of domestic violence" in § 922(g)(9)).

The government acknowledges *Triggs*'s holding, BIO at 20–21, but argues that *Triggs* also depended on another ground—the messiness of the underlying misdemeanor proceedings. BIO at 21–22 (stating that *Triggs* was a "factbound" decision). But *Triggs*'s holding did not hinge on any such messiness. To the contrary, the Seventh Circuit held—based on only the complexity of the definition of "misdemeanor crime of domestic violence"—that the defendant had a "viable avenue of defense" and thus had a right to relief. 963 F.3d at 716 ("Given the comparative complexity of this definition . . . . *Rehaif* improves Trigg'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."); *id.* (explaining that Triggs had a "viable avenue of defense" because in a § 922(g)(9), *Rehaif* imposes a "burdensome knowledge element" on the government). The Seventh Circuit's discussion about the messy misdemeanor proceedings

was an independent basis on which to grant plain-error review, "[b]eyond the complexity of the statutory definition." *Id.* But the Seventh Circuit would have granted Triggs relief even without that added discussion. *See id.* at 717 ("What matters is that in light of *Rehaif*, he has a plausible defense. Triggs has carried his burden to establish a reasonable probability that he would not have pled guilty had he known of the government's *Rehaif* burden."). In other words, the discussion about the misdemeanor proceedings was merely frosting on the cake. And the Seventh Circuit later confirmed that understanding in *Cook*, in which it cited *Triggs* and noted that it granted the *Triggs* defendant relief based on the complexity of the § 922(g)(9) definition. 970 F.3d at 882, 885. Thus, the Seventh Circuit's decision in *Triggs* conflicts with the Eleventh Circuit's decisions here and in *Johnson*.[1]

b. In *Door*, the Ninth Circuit showed that it would likely rule the same way as the Seventh Circuit in *Triggs*. There, the Ninth Circuit addressed the mens rea for an offense similar to § 922(g)(9)—possessing

[1] Notably, the Seventh Circuit afforded the *Triggs* defendant relief on plain-error review. Mr. Brown's claim might be even stronger than the *Triggs* defendant's because Mr. Brown preserved his claim in the district court.

body armor after being convicted of a felony "crime of violence," in violation of 18 U.S.C. § 931(a). *See* Pet. at 11 (explaining that both offenses address "similar statuses—statuses in which a defendant ha[s] a prior conviction for a crime that had, as an element, the use or attempted use of physical force"). The *Door* court held that in a § 931(a) prosecution, the government must prove the defendant "knew that (1) he was convicted of a felony and, (2) the felony of which he was convicted had as an element 'the use, attempted use, or threatened use of physical force.'" 996 F.3d at 615–16 (quoting 18 U.S.C. § 16(a)).

The government claims that *Door* aligns with the Eleventh Circuit's decision in *Johnson* because of the *Johnson* majority's statement that the government had to prove a defendant's conviction had as an element the use or attempted use of force. BIO at 24 (quoting *Johnson*, 981 F.3d at 1183 n.7). The *Johnson* court, however, merely held that the government must prove that a defendant knew his conviction required knowingly or recklessly touching someone in an offensive way. 981 F.3d 1182–83. But as the *Johnson* dissent recognized, the *Johnson* majority's holding does not require the government to show an individual know he is conviction for a "misdemeanor crime of domestic violence."

Id. at 1196 (Martin, J., concurring in part and dissenting in part) ("[T]hose facts might show [a defendant] knew of his conduct and the offense to which he pled guilty, but [they] do not show that [a defendant] knew his offense was a misdemeanor crime of domestic violence under federal law."); *id.* at 1196–97 ("It is irrelevant under section 922(g) and *Rehaif* that a defendant knows that an offense requires certain conduct for a conviction if he does not know that conduct ultimately makes the offense a misdemeanor crime of domestic violence."); *id.* ("[E]ven if a defendant knows the facts that resulted in his conviction for what is, in fact, a misdemeanor crime of domestic violence, he does not necessarily know it was a misdemeanor crime of domestic violence."). In other words, regardless of the defendant's understanding of his conduct and prior offense, the government must prove that a defendant knew his status when he possessed a gun—*that* is what separates innocent from blameworthy conduct. *See id.* at 1197 ("[T]his is a subtle distinction, but it is one that matters.").

Contrary to the government's argument, the Ninth Circuit in *Door* aligned with the *Johnson* dissent, not the *Johnson* majority, when it recognized that "[b]ecause 'the possession of a gun can be entirely

innocent' it is 'the defendant's *status*, and not his conduct alone, that makes the difference.'" 996 F.3d at 615 (quoting *Rehaif*, 139 S. Ct. at 2197). And since *Door*, the Ninth Circuit has again confirmed that understanding when addressing the mens rea for possessing a gun as an alien admitted to the country under a nonimmigrant visa under § 922(g)(5)(B), explaining that a person who "know[s] that he or she has an H-1B visa, without any knowledge that it is a 'nonimmigrant visa' . . . . lacks the requisite guilty mind for violating § 922(g)." *United States v. Gear*, --- F.4th ---, 2021 WL 3862290, *6 (9th Cir. Jan. 19, 2021). Under the *Johnson* majority's reasoning, however, in a § 922(g)(5)(B) case, the government would merely need to prove an alien knew he had an H-1B visa, even if he did not know it was a nonimmigrant visa. That approach fails to give meaning to the distinction between innocent and blameworthy conduct. And it also shows that, despite the government's contrary efforts to convince this Court otherwise, the split here is undeniable.

c. In a last-ditch effort to avoid the implications of a circuit split, the government argues that even if there is a split, it is shallow and new. BIO at 25–26. But as explained, the Eleventh and Seventh Circuits

have definitively ruled on this issue.[2] And the Ninth Circuit has made its view abundantly clear. Thus, the split is well-developed.

The government also fails to explain, and cannot explain, how further percolation would help. There are only two options here. Either the government must prove that a defendant knew his conviction qualified as a "misdemeanor crime of domestic violence," including that his prior offense had, as an element, the use or attempted use of physical force, or it does not. The Seventh, Ninth, and Eleventh Circuits have marked their lines in the sand. Waiting longer to resolve this important question would provide the Court with little to no benefit, and it would prolong the disparate treatment of defendants in the courts below.

II. The question presented warrants this Court's review.

The government does not deny that the question presented is exceptionally important. Nor can it. The resolution of this issue carries profound, nationwide significance for both state misdemeanor prosecutions and § 922(g)(9) prosecutions. Indeed, the resolution of this question impacts whether the government can imprison individuals for

[2] The Eleventh Circuit has also declined to reconsider this issue en banc twice—here and in *Johnson*.

up to ten years without ever proving they knew they were part of an excluded group that could not possess a gun. And as explained in Mr. Brown's petition, § 922(g)(9) is the only federal offense that strips an individual of a fundamental constitutional right for an infraction punishable by only a fine. Pet. at 20 (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting)). This is an important question. The government does not, and cannot, deny it. This Court's review is warranted.

III. The case is an excellent vehicle.

The government also does not dispute that this case presents an excellent vehicle for this Court to review this question. Nor can it. Mr. Brown preserved this issue in the district court, and the parties fully litigated it throughout his case. And if Mr. Brown is correct, he has a right to relief because his stipulation does not show that when he possessed a gun, he knew his misdemeanor conviction qualified as a "misdemeanor crime of domestic violence." Thus, this case is indisputably an excellent vehicle for the Court to review this question.

IV. The decision below is wrong.

Merits aside, this Court's review is warranted by the mere fact that the circuits are undeniably split on this important question. But as explained in Mr. Brown's petition, the Eleventh Circuit's decision below is wrong on the merits. Pet. at 17–19. The government raises several responses, but none hold water.

First, the government mischaracterizes Mr. Brown's argument, accusing him of arguing that the government must prove that a § 922(g)(9) defendant knew his conduct constituted a crime. *See* BIO at 13–15; *see also* BIO at 17–18 (accusing Mr. Brown of advocating for a "willfulness" requirement). But that is not, and has never been, Mr. Brown's position. *Rehaif* did make clear, however, that if a mens rea element includes a legal component, like § 922(g)(9)'s mens rea element does, then a defendant can raise a mistake of law defense as to that collateral legal matter. 139 S. Ct. at 2198 (explaining that the "ignorance of the law" maxim does not apply to "collateral" legal questions (citing 1 W. LaFave & A. Scott, Substantive Criminal Law § 5.1(a), p. 575 (1986), and Model Penal Code § 2.04, at 27)). But both the government, BIO at 15, and the *Johnson* majority "fail[ ] to engage

with *Rehaif*'s recognition that this mistake of law negates an element of the offense." *Johnson*, 981 F.3d at 1197 (Martin, J., concurring in part and dissenting in part).[3]

Second, the government also repeatedly mischaracterizes Mr. Brown's argument as a requirement to prove that a defendant knew the categorical approach. BIO at 12–13, 15–16. That is, again, not Mr. Brown's argument. The government does, however, need to show that a defendant knew his prior misdemeanor conviction qualified as a "misdemeanor crime of domestic violence," including that it had, as an element, the use or attempted use of physical force. That requirement does not force the government to prove that a defendant knew the categorical approach. To the contrary, like any mens rea element, the

[3] Relatedly, both the government, BIO at 17, and the *Johnson* majority also insist that in a § 922(g)(9) prosecution, the government need only prove that the defendant knew his conviction involved a slight touching. *Johnson*, 981 F.3d at 1182–83. As explained *supra* Section I.b, this position erroneously allows the government to convict individuals of violating § 922(g)(9) even if they did not know their misdemeanor conviction qualified as a "misdemeanor crime of domestic violence." If an individual does not know he has a "misdemeanor crime of domestic violence," he is not engaging in wrongful conduct. *Rehaif*, 139 S. Ct. at 2198.

government can rely on circumstantial evidence to prove this element.[4] For example, the government could prove a defendant knew he had a "misdemeanor crime of domestic violence" if it shows that the defendant was advised during his misdemeanor proceedings that his offense qualified as a predicate offense for federal purposes. Alternatively, the government could also prove a defendant had the requisite mens rea by showing, through the defendant's conduct, that he knew he was prohibited from possessing a gun.[5] In any event, the government must prove, through direct or circumstantial evidence, that a defendant knew his status by proving he was aware of the statutory definition's

[4] Relying on *Liparota v. United States*, 471 U.S. 419, 434 (1985), and *Staples v. United States*, 511 U.S. 600, 619 (1994), the government argues it need not show that a defendant knew the statutory definition of a "misdemeanor crime of domestic violence" and can instead establish the *Rehaif* mens rea element based on circumstantial evidence. BIO at 13–15; *see also* BIO at 10 (quoting *Rehaif*, 139 S. Ct. at 2198). As explained in this paragraph, Mr. Brown agrees.

[5] To be clear, the government never needs to prove that the defendant knew his conduct constituted a crime, so the government never needs to prove a defendant knew he could not possess a gun. That said, if the government showed the defendant knew he could not possess a gun—for example, that the defendant obtained a gun in an unlawful way—that would certainly be circumstantial evidence showing that the defendant knew his prior misdemeanor conviction qualified as a "misdemeanor crime of domestic violence."

component parts. Both the government's position and the Eleventh Circuit's holding fail to ensure the government makes that showing.

Third, the government, while acknowledging Justice Alito's statements about § 922(g)(9) in his *Rehaif* dissent, repeatedly emphasizes that the *Rehaif* Court left the question here open. BIO at 10, 16–17. To be sure, the Court left this question open. But Justice Alito criticized the majority opinion because its reasoning compelled the conclusion that the government must prove a § 922(g)(9) defendant knew his conviction qualified as a "misdemeanor crime of domestic violence," including that it had, as an element, the use or attempted use of force. Thus, although the Court did not resolve the specific question here in *Rehaif*, the government—despite its best efforts—cannot ignore the *Rehaif* Court's reasoning.

Fourth, the government notes that Mr. Brown's stipulation stated that the facts in the stipulation were sufficient to allow the district court to find Mr. Brown violated § 922(g)(9) beyond a reasonable doubt. BIO at 11. But the government fails to appreciate that the parties entered that stipulation before this Court decided *Rehaif*. Indeed, the government raised the same argument below and in *Johnson*, and the

Eleventh Circuit twice rejected that argument. *See Johnson*, 981 F.3d at 1178 ("Johnson's acknowledgment that the evidence he stipulated to was sufficient to satisfy the elements of the crime as laid out by then-binding precedent does not preclude him from asserting that the stipulation is not sufficient in light of the Supreme Court's subsequent issuance of *Rehaif*."); *see also United States v. Nasir*, 982 F.3d 144, 173 n.35 (3d Cir. 2020); *United States v. Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017); *United States v. Coffelt*, 529 F. App'x 636, 639 (6th Cir. 2013).

Finally, the government emphasizes the Eleventh Circuit's statement that the evidence was "overwhelming." BIO at 11. As an initial matter, the government introduced only a one-page stipulation in which Mr. Brown admitted he was convicted of battering a woman with whom he cohabitated and who was like a spouse, as well as a composite exhibit containing the documents from his misdemeanor case. That is hardly "overwhelming" evidence. But more importantly, the Eleventh Circuit erroneously held that Mr. Brown knew his misdemeanor had, as an element, the use of force because he stipulated that he committed a battery. *United States v. Brown*, 822 F. App'x 878, 883 (11th Cir. 2020). As the *Johnson* dissent recognized, however, just because an individual

knew he committed a battery does not mean he knew his prior offense had, as an element, the use of force; nor does it show that the individual knew his prior offense qualified as a "misdemeanor crime of domestic violence." 981 F.3d at 1196 (Martin, J., concurring in part and dissenting in part) ("[T]hose facts might show [an individual] knew of his conduct and the offense to which he pled guilty, but they do not show that [he] knew his offense was a misdemeanor crime of domestic violence under federal law."). And if an individual does not know his prior offense is a "misdemeanor crime of domestic violence," his conduct is not wrongful. *Rehaif*, 139 S. Ct. at 2197. Nothing in the stipulation shows that Mr. Brown had the knowledge *Rehaif* requires.[6] Thus, the government's repeated reliance on the Eleventh Circuit's statement is

[6] For this same reason, the government is incorrect in its argument that Mr. Brown's case differs from the hypothetical felon discussed in *Rehaif* who might not know he was a felon because he was sentenced to probation. BIO at 11–12. To the contrary, just like that hypothetical felon, Mr. Brown has a viable defense that he did not know about his membership in an excluded group. *See Triggs*, 963 F.3d at 715–16 (explaining that a § 922(g)(9) defendant has a more viable *Rehaif* defense than a § 922(g)(1) defendant because the definition of "misdemeanor crime of domestic violence" is more complex than the definition of a "crime punishable by imprisonment for a term exceeding one year").

unpersuasive. If anything, it simply underscores the need for this Court's review and is more proof that this case is an excellent vehicle.

* * *

The question here impacts the liberty of countless defendants now and in the future. If Mr. Brown had been convicted in Wisconsin or Washington instead of Florida, his conviction would have been vacated. The imposition of a felony conviction and accompanying deprivation of liberty should not depend on geographical happenstance. This Court's intervention is needed.

CONCLUSION

Mr. Brown respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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