No.

IN THE

SUPREME COURT OF THE UNITED STATES

DEANGELO JOHNSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court clarified that in a prosecution under 18 U.S.C. § 922(g), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. This Court, however, expressly left open the question "what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions," such as in 18 U.S.C. § 922(g)(9), which prohibits anyone knowingly convicted of a misdemeanor crime of domestic violence from possessing a firearm. *Id.* This petition thus presents a question expressly left open in *Rehaif*, on which the circuits are now split. The question presented is:

> Whether, to support *Rehaif*'s knowledge-of-status element in a prosecution for unlawful possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, 18 U.S.C. § 922(g)(9), the government must prove that the defendant knew that he had:
>
> (1) been convicted of an offense that has "as an element, the use or attempted use of physical force" and thus qualifies as a misdemeanor crime of domestic violence as defined under federal law; or
>
> (2) merely engaged in conduct that constitutes "physical force" as defined in *United States v. Castleman*, 572 U.S. 157, 163 (2014), whether or not the defendant knew how *Castleman* defines the term.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Deangelo Johnson respectfully petitions for a writ of certiorari to review the published decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Johnson*, 981 F.3d 1171 (11th Cir. 2020).

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case under 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291, the Court of Appeals for the Eleventh Circuit had jurisdiction to review the final order of the district court. The Eleventh Circuit issued its decision on December 2, 2020, and it denied the petition for rehearing en banc on March 24, 2021. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 922(g)(9), Title 18, of the U.S. Code, provides: "It shall be unlawful for any person***who has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

The term "misdemeanor crime of domestic violence" is defined as: (i) "a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon***" 18 U.S.C. § 921(a)(33)(A)

STATEMENT OF THE CASE

A. Pre-Trial Proceedings

In early 2018, a Jacksonville Sheriff Officer stopped Mr. Johnson while driving because of an outstanding warrant. Doc. 49. When Mr. Johnson stepped out of his car to be arrested, the officer saw a gun on the floorboard near the driver's seat. *Id.* Mr. Johnson told the officer that he bought the gun, a Cobra, .380 caliber pistol, for protection. *Id.* The United States later indicted Mr. Johnson on one count of violating 18 U.S.C. § 922(g)(9), alleging that he had been convicted of "a misdemeanor crime of domestic violence, that is, Domestic Battery, in the County Court, Duval County, Florida, on or about June 14, 2010" and, on or about January 31, 2018, he "did knowingly possess, in and affecting interstate commerce, a firearm, that is, a Cobra, .380 caliber pistol." Doc. 1.

The relevant misdemeanor was a 2010 Florida conviction for domestic battery, for which Mr. Johnson was sentenced to two days in Duval County Jail and one year of probation. *Id.*; *see also* PSR, Doc. 52 at ¶ 26; Fla. Stat. § 784.03(1)(A). The federal indictment did not charge Mr. Johnson with knowing that he had been convicted of a misdemeanor crime of domestic violence at the time of the alleged firearm possession. *Id.*

Mr. Johnson moved to dismiss the indictment for failure to state an offense because Florida does not abrogate the civil rights of individuals convicted for the misdemeanor offense of domestic battery and does not prohibit such individuals from

exercising control over firearms. Doc. 40; *see also* Fla. Stat. § 790.23; § 790.233; § 944.292. The district court denied Mr. Johnson's Motion to Dismiss. Doc. 44 at 2-3.

B. Stipulated Bench Trial

Mr. Johnson proceeded to a stipulated bench trial. Docs. 45, 47, 70. As relevant to his prior misdemeanor, the parties stipulated that:

> Prior to January 31, 2018" Mr. Johnson "was convicted of a misdemeanor crime of domestic violence, that is, Domestic Battery, in the County Court, Duval County, Florida, on or about June 14, 2010, in case number 16-2010-MM-010847-AXXX-MA, a misdemeanor under the laws of the State of Florida. The victim in the misdemeanor crime of domestic violence was the Defendant's wife. The Defendant was represented by counsel during his domestic battery case and the Defendant was entitled to a jury trial. The Defendant entered a plea agreement with the State Attorney's Office and agreed to plead to domestic battery. At his plea hearing on June 14, 2010, before Judge Tanner, the Defendant knowingly and intelligently waived his right to a jury trial and pled guilty to the charge of domestic battery.

Doc. 49.

Reviewing the elements that the government needed to prove for a conviction under § 922(g)(9), the district court found that Mr. Johnson admitted "by his stipulation that prior to January 31, 2018, he was convicted of a misdemeanor crime of domestic violence, that is, domestic battery, in Duval County court, in Case No. 16-2010MM-010847." Doc. 70 at 22-23. Neither the district court nor the stipulation, however, addressed whether Mr. Johnson knew he had been convicted of a misdemeanor crime of domestic violence, as that term is defined in 18 U.S.C. § 921, at the time of the alleged possession. Docs. 70, 49.

C. Sentencing

The presentence investigation report (PSR) advised that, based on a total offense level of 12 and a criminal history category of II, Mr. Johnson's applicable guidelines range was 12 to 18 months' imprisonment. Doc. 52 (Final PSR) at ¶ 67.

At sentencing, the government stated that Mr. Johnson's "prior record, while minimal, is what actually makes this a crime." Doc. 71 at 5. With respect to the relevant misdemeanor, the government noted that it was charged as a felony but was reduced to a misdemeanor, and Mr. Johnson was sentenced to probation, but violated that probation and served six months for that offense. *Id.* at 5-6. Noting Mr. Johnson's "tragic" family history, drug dependence, good work history, and consistent paying of child support, the government asked the district court to impose a guideline sentence. *Id.* at 6-8.

Defense counsel noted that Mr. Johnson is not a felon, and when he pled to the 2010 misdemeanor, he was not advised that he could not possess a firearm, as most felons are advised, because in Florida he could possess a firearm. Doc. 71 at 11. Defense counsel also explained that the instant offense "becomes a strict culpability statute regardless of the knowledge of the part of the defendant" and "Mr. Johnson did not know that he was not supposed to possess a firearm." *Id.* at 11. Counsel clarified that Mr. Johnson proceeded with a stipulated bench trial in order "to preserve [Mr. Johnson's] right to be able to appeal the conviction for what we believe should not have been -- should not have been entered because of the fact that he

lacked knowledge and also because in the state of Florida, he's not a prohibited person." *Id.* at 12.

Finally, defense counsel asked the district court to impose time served because "from his perspective, he did not have knowledge that he was not supposed to possess a firearm, but also the multitude of issues that are present in the presentence investigation report as it related to his childhood and upbringing." Doc. 71 at 12-13.

Upon sentencing Mr. Johnson, the district court first noted that "this is an unusual offense in that it isn't often that individuals end up before the Court charged with something that they can genuinely say they didn't know was unlawful, and that under the circumstances of this case, it is significant." Doc. 71 at 17. After reviewing the applicable sentencing factors in 18 U.S.C. § 3553, the district court found that it would impose "time-served plus one day, because I think under the somewhat unusual facts of this case that is an appropriate sentence." *Id.* at 18. The district court sentenced Mr. Johnson to time served plus one day, to be followed by three years of supervised release. Doc. 55; Doc. 71 at 19. In its Statement of Reasons section entitled "18 U.S.C. § 3553(a) and other reason(s) for a variance," the court checked the boxes for "mens rea" and for "The history and characteristics of the defendant." Doc. 56.

D. Appellate Proceedings

While on appeal, this Court decided *Rehaif v. United States*, holding that convictions under § 922(g) require the government to "show that the defendant knew

he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. 2191, 2194 (2019). Given *Rehaif*'s holding, Mr. Johnson argued that the stipulated facts at his bench trial did not sufficiently prove that he knew he had been convicted of a "misdemeanor crime of domestic violence" at the time of alleged possession. Thus, the stipulated facts did not show that he knew his status under § 922(g)(9), as required by *Rehaif*.

After oral argument, this Court affirmed Mr. Johnson's conviction in a 2-1 decision. *See United States v. Johnson*, 981 F.3d 1171 (11th Cir. 2020). Reviewing Mr. Johnson's insufficiency argument for plain error, the majority agreed that "the error there was plain to the extent that the stipulated facts did not demonstrate that Johnson had knowledge of his status as a domestic-violence misdemeanant." *Id.* at 1180. The majority reasoned that determining whether the plain *Rehaif* error affected Mr. Johnson's substantial rights "hinges on the evidence of record showing whether Johnson knew his status—domestic-violence misdemeanant—when he possessed the gun." *Id.* at 1181.

This inquiry, the majority explained, turned on determining "what facts Johnson needed to know in light of *Rehaif*." *Id.* at 1182. Those facts, the majority concluded, are: "the defendant have known [that] he must have engaged in or threatened to engage in conduct that constitutes 'physical force' as the Supreme Court has defined it for purposes of a misdemeanor crime of domestic violence under Section 922(g)(9)—whether or not the defendant actually knew that the Supreme Court had defined the term and what that definition was." *Id.* at 1182-83. So to

"satisfy *Rehaif*'s knowledge-of-status requirement under Section 922(g)(9), the evidence must establish that Johnson knew all the following: (1) he had been convicted of a misdemeanor under state law, 18 U.S.C. § 921(a)(33)(A)(i); (2) to be convicted of that misdemeanor, he must have knowingly or recklessly engaged in at least 'the slightest offensive touching'; and (3) the victim was his current or former spouse at the time he committed the crime." *Id.* at 1183 (citing 18 U.S.C. § 921(a)(33)(A)(ii)).

Applying this knowledge-of-status requirement, the majority concluded that "the record includes sufficient evidence to establish that Johnson had the requisite knowledge of his status as a domestic-violence misdemeanant when he was found with the gun in his possession." *Id.* at 1187.

REASONS FOR GRANTING THE WRIT

This Court should grant Mr. Johnson's petition to answer a question expressly left open in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), about the government's burden of proof to support the knowledge-of-status element in a prosecution for unlawful possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, 18 U.S.C. § 922(g)(9). Certiorari is warranted because, as Judge Beverley Martin's dissent notes, the majority's decision in the case below "reliev[es] the government of its burden to obtain convictions under section 922(g)" following *Rehaif* and creates "a split with the Seventh Circuit." *United States v. Johnson*, 981 F.3d 1171, 1200 & n.7 (11th Cir. 2020) (Martin, J., dissenting). Further, this is an ideal case to decide the issue given the district court's finding that Mr. Johnson lacked the mens rea separating innocent from otherwise criminal conduct. Thus, the Court should grant the petition on this important question about mens rea.

I. The circuits are split on the burden of proof the government must satisfy to meet *Rehaif*'s knowledge-of-status element in a § 922(g)(9) prosecution.

1. In the decision below, the Eleventh Circuit concluded that to "satisfy *Rehaif*'s knowledge-of-status requirement under Section 922(g)(9), the evidence must establish that Johnson knew all the following: (1) he had been convicted of a misdemeanor under state law, 18 U.S.C. § 921(a)(33)(A)(i); (2) to be convicted of that misdemeanor, he must have knowingly or recklessly engaged in at least 'the slightest offensive touching'; and (3) the victim was his current or former spouse at the time he committed the crime." *Id.* at 1183 (citing 18 U.S.C. § 921(a)(33)(A)(ii)).

The key facts the government had to show to meet this test, the majority concluded, are: "the defendant have known [that] he must have engaged in or threatened to engage in conduct that constitutes 'physical force' as the Supreme Court has defined it for purposes of a misdemeanor crime of domestic violence under Section 922(g)(9)—whether or not the defendant actually knew that the Supreme Court had defined the term and what that definition was." *Id.* at 1182-83.

Applying this test under plain-error review, the majority found that Mr. Johnson knew of his status as a domestic-violence misdemeanant because he: (1) "knew at the time he possessed the gun that he had been convicted of the misdemeanor crime of battery under Florida Statute § 784.03(1);" and (2) "knew that the misdemeanor to which he pled guilty—battery—required that he had, at a minimum, recklessly engaged in at least 'the slightest offensive touching.'" *Id.* (quoting *Castleman*, 572 U.S. at 163).

2. As Judge Martin dissent notes, the *Johnson* majority decision below splits with the Seventh Circuit's decision in *United States v. Triggs*, 963 F.3d 710 (2020). *See id.* at 1200 n.7. There, in 2015, Triggs went to his son's school to discuss violent social media threats his son made against a teacher. *Id.* at 712. The police asked Triggs if he had firearms in his home, and Triggs acknowledged he owned several hunting rifles and agreed to let the officers inspect them. *Id.* Later, the government charged Triggs with unlawfully possessing hunting rifles based on a 2008 misdemeanor battery conviction. *Id.* at 713-14.

Triggs moved to dismiss the indictment raising an as-applied second amendment challenge, and conditionally plead guilty to preserve his second amendment claim. *Id.* at 714.

As in Mr. Johnson's case, this Court issued *Rehaif* while Triggs was on appeal, leading to Triggs asking the Seventh Circuit to vacate his guilty plea, arguing that his plea did not satisfy *Rehaif*'s knowledge requirement. *Id.* The Seventh Circuit agreed, finding that Triggs "carried his burden to establish a reasonable probability that he would not have pleaded guilty had he known of the government's *Rehaif* burden." *Id.* at 717.

In so finding, the Seventh Circuit explained that "[m]any prosecutions under § 922(g)(1) involve violations of subsection (1), the felon-dispossession provision, which prohibits firearm possession by any person "who has been convicted in any court of [ ] a crime punishable by imprisonment for a term exceeding one year." *Id.* at 715 (citing § 922(g)(1)). "Under this simple definition, a defendant will have difficulty establishing prejudice from a *Rehaif* error because the new knowledge element is quite easy to prove, especially when the defendant previously served more than a year in prison. *Id.*

But, *Triggs* explained, "[u]nlike the straight-forward definition in the felon-dispossession provision, the definition of the term the government must prove that the defendant knew that he had 'misdemeanor crime of domestic violence' as used in § 922(g)(9) is quite complex." *Id.* at 716. "Given the comparative complexity of this definition," *Triggs* found that "*Rehaif* improves Triggs's trial prospects." *Id.*

716. And "while the record contains evidence that works against *Triggs* on the *Rehaif* element," the Seventh Circuit concluded that "[w]hat matters is that in light of *Rehaif*, he has a plausible defense." *Id.* at 717. Because "Triggs has a colorable argument that he was unaware that he was convicted of a misdemeanor crime of domestic violence as that term is used in § 922(g)(9)," the Seventh Circuit found "[t]his is a proper case to exercise our discretion authority to correct" the unpreserved *Rehaif* error.

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The Seventh and Eleventh Circuits are thus at odds on the government's burden to prove *Rehaif*'s knowledge-of-status element in a § 922(g)(9) prosecution. This Court should grant the petition to resolve the circuit split and hold that the government must show that the defendant knew he had been convicted of an offense that has "as an element, the use or attempted use of physical force," and thus qualifies as a misdemeanor crime of domestic violence as defined under federal law.

II. The majority's decision below contradicts *Rehaif*.

Along with needing to resolve the circuit conflict, the Court should grant the petition because the decision below contravenes *Rehaif*. In *Rehaif*, this Court held that in a prosecution under § 922(g), the government must "show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. at 2194. There, the relevant status the government had to prove was that Rehaif knew he was "illegally or unlawfully in the United States" under § 922(g)(5). *Id.* at 2198.

Rehaif explained that a "defendant's status as an alien 'illegally or unlawfully in the United States' refers to a legal matter, but this legal matter is what the commentators refer to as a 'collateral' question of law." *Id.* The Court also explained that the "ignorance of the law" maxim does not apply to these "collateral" questions of law, because "the maxim does not normally apply where a 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,' thereby negating an element of the offense." *Id.* (citing 1 W. LaFave & A. Scott, Substantive Criminal Law § 5.1(a), p. 575 (1986), and Model Penal Code § 2.04, at 27); *see also id.* (discussing *Liparota v. United States*, 471 U.S. 419, 425 & n.9 (1985)).

Rehaif thus held that when a knowing mens rea applies to elements of an offense containing a legal component—as § 922(g)(9) undeniably does—the government cannot rely on the ignorance of the law maxim to relieve of its burden to establish an element of the offense. Rather, when "there is a legal element in the definition of the offense," a person's lack of knowledge about that legal element can be a defense. *Liparota*, 471 U.S. at 425 n. 9.

Here, the definition of a "misdemeanor crime of domestic violence" contains a legal element—that the offense "has an element, the use or attempted use of physical force." As Judge Martin's dissent explains, in a prosecution under § 922(g)(9), *Rehaif* requires "the government to show that Mr. Johnson actually knew he was convicted of an offense that had, 'as an element, the use or attempted use of physical force' and thus qualified as a misdemeanor crime of domestic

violence." *Johnson*, 981 F.3d at 1196 (Martin, J., dissenting) (quoting § 921(a)(33)(A)(ii)). Indeed, "[b]ecause it requires knowing a specific legal 'element of the offense,' knowledge of status under section 922(g)(9) is a 'question of law.'" *Id.* (quoting *Rehaif*, 139 S. Ct. at 2198).

The majority's holding, however, "requires only that the government show a defendant knew his conviction required particular conduct, regardless of whether the defendant actually knew his conduct qualifies his offense as a misdemeanor crime of domestic violence." *Id.* But this is not what *Rehaif* holds. While certain "facts might show Mr. Johnson knew of his conduct and the offense to which he pled guilty, [ ] they do not show that Mr. Johnson knew his offense was a misdemeanor crime of domestic violence under federal law." *Id.*

Requiring that the government merely prove that a defendant know he merely engaged in conduct that constitutes "physical force" as defined in *United States v. Castleman*, 572 U.S. 157, 163 (2014), whether or not the defendant knew how *Castleman* defined the term, essentially transform § 922(g)(9) into a strict-liability offense, in direct contrast to *Rehaif*'s teachings on proving mens rea. Certiorari is warranted given that the decision below conflicts with *Rehaif*'s.

III. This is an ideal vehicle to resolve the question presented.

This case is an excellent vehicle to resolve the conflict on the government's burden on *Rehaif*'s knowledge-of-status in § 922(g)(9) prosecution for two reasons. First, as this Court recently confirmed, "when an appellate court conducts plain-error review of a *Rehaif* instructional error, the court can examine relevant

and reliable information from the entire record." *Greer v. United States*, 141 S. Ct. 2090, 2098 (2021). Here, the entire record confirms that Mr. Johnson did not know his 2010 Florida prior qualified as "misdemeanor crime of domestic violence," as defined under federal law, and the government has never argued otherwise. Nor could the government make such an argument. As the district court said, "this is an unusual offense" because Mr. Johnson was "charged with something that [he] can genuinely say [he] didn't know was unlawful." (Doc. 71 at 17).

Second, this case is an ideal vehicle because "as in *Triggs*, nothing in this record indicates that Mr. Johnson knew, at the time when he possessed the firearm, that he had been convicted of a misdemeanor crime of domestic violence, which requires he knew his battery offense had, 'as an element, the use or attempted use of physical force.'" 981 F.3d at 1199 (Martin, J., dissenting) (quoting 18 U.S.C. § 921(a)(33)(A)(ii)). As in *Triggs*, the *Rehaif* error here affords Mr. Johnson a strong defense at a trial. Thus, should this Court adopt *Triggs*'s reading of *Rehaif*, Mr. Johnson could meet his burden of showing that the *Rehaif* error affected his substantial rights and that he is entitled to a relief.

IV. The question presented is important.

Finally, certiorari should be granted given the importance of the question presented. This Court has long "emphasized scienter's importance in separating wrongful from innocent acts." *Rehaif*, 139 S. Ct. at 2196 (2019) (collecting cases). The the majority's decision below, however, absolves the government of its burden under *Rehaif* to establish a defendant's guilty state of mind in a § 922(g)(9) prosecution.

Consider a simple analogy to illustrate this point. Suppose Congress created a new provision, § 922(g)(10), prohibiting anyone "convicted of a crime of moral turpitude" from possessing a firearm. For the government to satisfy its burden on the knowledge-of-status requirement, *Rehaif* would require the government to prove a defendant knew his/her prior offense *actually* qualified as a crime of moral turpitude as defined by statute. Simply saying that the defendant was aware of his conduct, however, would not be enough to show the "guilty state of mind that the statute's language and purposes require." *Rehaif*, 139 S. Ct. at 2198. That interpretation would criminalize a broad range of innocent conduct and sweep in individuals with no knowledge of the crucial fact that made their conduct blameworthy—that the prior offense fell within the special federally-defined category of offenses called "crimes of moral turpitude."

The majority below, however, rejects this view. Instead, the majority ignores *Rehaif's* requirement that the government prove a defendant's knowledge of the law when it comes to elements comprised of legal comments, reasoning that Congress would not have expected defendants to perform a categorical analysis to determine whether their prior offense qualified as a misdemeanor crime of domestic violence. *See Johnson*, 981 F.3d at 1182. But speculation about Congress's intent is no reason to ignore the text of § 922(g)(9) and *Rehaif*'s holding on mens rea. Indeed, the very fact that Congress chose to define § 922(g)(9) in legal terms—using the complex definition of "misdemeanor crime of domestic violence"—means that Congress expected the government to prove a defendant *knew* his/her prior conviction

qualified within the unique federal definition under § 922(g). And it is not too much to ask for a defendant to be advised that his prior offense qualifies a "misdemeanor crime of domestic violence," as defined under *federal* law, before holding that defendant responsible for a felony punishable by ten years of imprisonment. To conclude otherwise would mean the government could convict defendants under § 922(g) even though they did not know the crucial fact making their possession of a firearm illegal, which directly contradicts *Rehaif*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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