No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

SYLVIA DIAZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

_____

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Robert Clary
Counsel of Record
Robert Clary, PLLC
405 Windward Dr.
Murphy, Texas 75094
(972) 757-5690
rclary662@gmail.com

QUESTIONS PRESENTED

Petitioner plead guilty to one count of conspiring to commit straw purchases of firearms (as proscribed by 18 U.S.C. § 922(a)(6)) in violation of 18 U.S.C. § 371. She was not informed that the offense required the Government to prove that the conspirators must have known they were making straw purchases from sellers whom they knew to be "Licensed Dealers." Further, Petitioner is the only person the United States has ever prosecuted for a firearms offense after signing and complying with an ATF Cease-and-Desist letter. The Questions Presented are as follows:

QUESTION 1: IN LIGHT OF THIS COURT'S DECISION IN *REHAIF V. UNITED STATES,* 588 U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019) IS AN ESSENTIAL ELEMENT OF THE "STRAW PURCHASE" OFFENSE DESCRIBED IN 18 U.S.C. § 922(a)(6) THAT THE DEFENDANT HAVE KNOWN THE SELLER FROM WHOM SHE PURCHASED THE FIREARM TO BE A "LICENSED DEALER"?

QUESTION 2: DID THE FIFTH CIRCUIT ERR IN HOLDING THAT PETITIONER COULD BE CONVICTED OF VIOLATING 18 U.S.C. § 371 FOR CONSPIRING TO COMMIT A FEDERAL SUBSTANTIVE OFFENSE [18 U.S.C. § 922(a)(6)] WITHOUT A FACTUAL BASIS DEMONSTRATING THAT SHE HAD THE REQUISITE *MENS REA* TO CONVICT HER OF THE UNDERLYING SUBSTANTIVE OFFENSE [i.e. 18 U.S.C. § 922(a)(6)]?

QUESTION 3: IF THE ANSWER TO BOTH 1 AND 2 ABOVE IS "YES", WAS PETITIONER'S GUILTY PLEA KNOWING AND VOLUNTARY?

QUESTION 4: WAS PETITIONER'S PROSECUTION A SELECTIVE PROSECUTION IN VIOLATION OF PETITIONER'S RIGHT TO EQUAL PROTECTION, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

LIST OF PARTIES BELOW

The parties in the proceedings below were Petitioner, Sylvia Diaz and the United States.

Petitioner was the appellant in the court below; Respondent United States was the appellee in the court below.

LIST OF DIRECTLY RELATED PROCEEDINGS

The following proceedings are directly related to the case in this Court:

1. United States Court of Appeals for the Fifth Circuit:

   United States v. Sylvia Diaz, Case No. 19-11112 (5th Cir. March 1, 2021) (reported at 989 F.3d 390), *reh'g denied* (5th Cir. March 22, 2021).

2. United States District Court for the Northern District of Texas:

   United States v. Sylvia Diaz, 3:18-cr-00293-N (N.D. Tex. - Judgment entered on 10/4/2019).

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

Cases: **Page(s)**

<u>Statutes</u>:

PETITION FOR WRIT OF CERTIORARI

Petitioner Sylvia Diaz entered a plea of guilty to one count of conspiring to make straw purchases of firearms in violation of the general federal conspiracy statute [18 U.S.C. § 371]. The underlying substantive offense is 18 U.S.C. § 922(a)(6). This Court decided *Rehaif v. United States*[1] one week before the June 27, 2019 rearraignment hearing at which Petitioner changed her plea to guilty. *Rehaif* held that, in prosecutions under 18 U.S.C. § 922(g) [felon in possession of a firearm], the Government must prove that the defendant had the requisite scienter with respect to his status (i.e. that the defendant knew he or she was a convicted felon). The *mens rea* for both 18 U.S.C. §§ 922(g) and 922(a)(6) is found in the same statute: 18 U.S.C. § 924(a)(2).

Like prosecutions under 18 U.S.C. § 922(g), prosecutions under 18 U.S.C. § 922(a)(6) have a status element. To convict for straw purchases in violation of the substantive offense codified at 18 U.S.C. § 922(a)(6), the Government must prove that the defendant knew that he or she was making straw purchases from a "Licensed Dealer." Petitioner entered her plea of guilty to the conspiracy charge without being informed of that element, and would not have done so if she had been made aware of that requirement. The Fifth Circuit rejected Petitioner's contention that her plea was neither knowing nor voluntary on the ground, *inter*

[1] 588 U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019).

alia, that the level of scienter set out in 18 U.S.C. § 924(a)(2) for substantive violations of 18 U.S.C. § 922(a)(6) [i.e. knowingly] does not apply to prosecutions for conspiracy to violate § 922(a)(6). As explained below, that holding directly contradicts precedent established by this Court and calls into question the level of scienter required to convict a defendant for conspiring to commit *any* federal offense.

Another cert-worthy aspect of this case is that Petitioner is the only person ever prosecuted for a firearms offense after signing an ATF Cease and Desist Letter [Pet. Appx. D] and complying with its terms. As set out below, she was prosecuted only because her husband breached his oral commitment to cooperate with ATF Agents in a dangerous sting operation. Petitioner submits that her prosecution was a serious and abusive overreach by the Department of Justice, and violated her right to equal protection under the Fifth Amendment's Due Process Clause. The Fifth Circuit did not reach the merits of this claim because it held the claim barred from review by the appeal waiver in Petitioner's plea agreement. If Petitioner's plea of guilty was constitutionally invalid, however, the appeal waiver falls with Petitioner's plea.

Petitioner respectfully requests that the Court grant her Petition for a Writ of Certiorari and review the Fifth Circuit's ruling in this case.

CITATION OF REPORTS OF ORDERS AND OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *United States v. Diaz*, 989 F.3d 390 (5th Cir. 2021). Pet. Appx. A. The Fifth Circuit's Order denying Petitioner's Petition for Rehearing was entered on March 22, 2021 and is reflected in the docket sheet of Fifth Circuit Case No. 19-11112. Pet. Appx. B.

The United States District Court for the Northern District of Texas assigned case number 3:18-CR-00293-N to Petitioner's case. The District Court's opinions and orders are unreported. There are three orders of the District Court that are relevant:

(i) The Magistrate Judge's Report and Recommendation that the District Court accept Petitioner's plea of guilty to violating 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. § 922(a)(6) is located at docket entry # 69;

(ii) The District Court's acceptance of the Magistrate Judge's Report and Recommendation is at docket entry # 70; and

(iii) The District Court's Final Judgment entered on October 4, 2019 sentencing Petitioner to 58 months in prison and two years of supervised release is at docket # 79. Pet. Appx. C.

STATEMENT OF JURISDICTION

Petitioner seeks review of a final judgment of the United States Court of Appeals for the Fifth Circuit entered on March 1, 2021. Pet. Appx. A. Petitioner filed a timely petition for rehearing. That petition was denied on March 22, 2021. Pet. Appx. B. In accordance with the orders of this Court dated March 19, 2020 and July 19, 2021, Petitioner's deadline to file a Petition for a Writ of Certiorari is 150 days from the denial of Petitioner's Petition for Rehearing. In accordance with those Orders, this Petition is timely filed.

This Court has jurisdiction to entertain this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The following Constitutional provisions and statutes are involved in this case:

1. Fifth Amendment To The Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. § 921(a)(11):

(11) The term "dealer" means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

4. 18 U.S.C. § 922(a)(6):

(a) It shall be unlawful—….

> (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

5. 18 U.S.C. § 924(a)(2):

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Petitioner Sylvia Diaz and her husband, Jose Diaz, engaged in straw purchases of firearms for a person known only as "Jorge." Jorge would pay the Diazes $200 for each gun they purchased and delivered to him.

Agents with the Justice Department's Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") became aware of the Diazes' activity and approached Jose Diaz to inquire about their gun purchases. Mr. Diaz immediately admitted to the ATF Agents that he and his wife, Petitioner Sylvia Diaz, had made straw purchases for Jorge. Jose Diaz fully cooperated with the Agents. He provided them with Jorge's phone number, produced a gun that he had purchased for Jorge, and told the Agents that he was scheduled to meet with Jorge at an upcoming gun show in Lewisville, Texas.

The Agents informed Jose Diaz that what the Diazes had been doing violated the law. One of the Agents then produced a Cease-and-Desist Letter for both Diazes to sign. Petitioner Sylvia Diaz, who up to that point had not been involved in any of Jose's discussions with the Agents, was called over to join the group for the purpose of executing the Cease-and-Desist Letter.[2] The Cease-and-Desist Letter explained that reselling firearms without a license violates federal law, "officially advise[d]" the Diazes that they were to "cease and desist engaging

[2] A copy of the Cease-and-Desist Letter is set out in the Appendix hereto. Pet. Appx. D.

in the business of dealing in firearms without a license", and informed the Diazes that their "[c]ontinued activity without the required license could result in a recommendation for criminal prosecution." Pet. Appx. D.

After the Cease-and-Desist Letter had been signed by both ATF Group Supervisor Joseph Patterson and the Diazes, the Agents continued their conversation with Jose Diaz. The Agents informed Jose that they were interested in having him participate in a sting operation targeting Jorge. At first, Jose Diaz expressed reluctance to become involved. Mr. Diaz explained to the Agents that he feared Jorge was associated with a Mexican drug cartel and that his participation in the sting would risk endangering his family. The Agents persisted, telling Jose that he and his family might be eligible for the federal witness protection program, keeping them safe from Jorge and his associates. Eventually, Mr. Diaz relented and agreed to meet the Agents at a designated time and location to plan the sting operation.[3]

At the appointed day and time, Jose Diaz failed to appear for his meeting with the ATF Agents. The Agents subsequently learned that Jose, Sylvia and their children had left for Mexico.

[3] Significantly, the Cease-and-Desist Letter did not mention or require that either Diaz participate in the sting operation. Pet. Appx. D.

The Indictment And Jurisdiction In The Court of First Instance:

Shortly after learning that the Diazes had departed for Mexico, the Government secured an indictment charging both Diazes with (i) violating the substantive offense described in 18 U.S.C. § 922(a)(6) by making straw purchases of firearms; and (ii) violating 18 U.S.C. § 371 by conspiring to commit the offense described in 18 U.S.C. § 922(a)(6). Subsequently, the Government secured a Superseding Indictment. Count 1 of the Superseding Indictment charged Petitioner Sylvia Diaz with conspiracy to violate 18 U.S.C. § 922(a)(6) under 18 U.S.C. § 371. The District Court had jurisdiction to adjudicate the charges contained in the Superseding Indictment pursuant to 18 U.S.C. § 1331.

All of the firearms' offenses described in the Superseding Indictment (including the agreements and overt acts purporting to establish the conspiracy) occurred prior to March 23, 2018, the date the Diazes executed the Cease-and-Desist Letter. Pet. Appx. D. Nothing in the record suggests that Petitioner (or, for that matter, either Diaz) violated the terms of the Cease-and-Desist Letter. Significantly, neither the undersigned counsel nor counsel for the United States has unearthed a single case – reported or unreported – in which any signatory to an ATF Cease-and-Desist Letter who subsequently complied with its terms was thereafter prosecuted for firearms offenses committed prior to the date he or she executed the Cease-and-Desist Letter.

Further, nothing in the record shows that Petitioner participated in any of the discussions regarding ATF's proposed sting operation, that the Agents ever requested that she cooperate with any aspect of the sting operation or that Petitioner was even aware that her husband had been asked to become involved in the sting operation. Petitioner is, literally, a class of one. No one else in her position has ever been prosecuted for a federal firearms offense.

The Guilty Plea:

Petitioner Diaz was arrested when she attempted to re-enter the country. A bit more than a month after her initial arraignment, Petitioner signed a plea agreement, was re-arraigned and entered a plea of guilty to count one of the Superseding Indictment charging her with conspiracy to make straw purchases of firearms prohibited by 18 U.S.C. § 922(a)(6), all in violation of 18 U.S.C. § 371. She was sentenced to 58 months in prison, and two years of supervised release. Pet. Appx. C. Her plea agreement contained an appeal waiver.

The Issues Raised On Appeal To The Fifth Circuit:

Petitioner's appeal waiver was not all encompassing. Among other things, she expressly reserved her right to challenge whether her plea of guilty was

knowing and voluntary.[4] On direct appeal to the Fifth Circuit, Petitioner raised, *inter alia,* the following issues:

1. In light of this Court's ruling in *Rehaif v. United States,* 588 U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), was the Government required to prove, as an element, that Petitioner conspired to make straw purchases of firearms from sellers she knew were "Licensed Dealers", as that term is defined in 18 U.S.C. § 921(a)(11)?[5]
2. Was Petitioner advised of the essential elements of the offense before entering her plea of guilty, and did the factual resume submitted in support of her plea of guilty or any other part of the record below establish that she knew the straw purchases were being made from "federally-Licensed Dealers"?[6]

---

[4] The Plea Agreement provided that Petitioner reserved her right to challenge the voluntariness of "defendant's plea of guilty or this waiver." ROA.120, ¶ 11; *Garza v. Idaho,* 139 S. Ct. 738, 745, 203 L.Ed.2d 77 (2019). Petitioner also reserved her right to bring an appeal if her sentence exceeded the statutory maximum, if there was an arithmetic error in sentencing or if Petitioner's trial counsel was constitutionally ineffective. ROA.120, ¶ 11.

[5] Petitioner's opening brief in the Fifth Circuit put it like this:

> As explained above, the conspirators could not conspire to "knowingly violate" § 922(a)(6) unless they agreed not only to "knowingly" make false statements to a gun dealer, but also to knowingly make false statements to a "dealer" they knew to be a "licensed dealer." As in the case of 922(g), "status" is an element of the 922(a)(6) offense. In the case of 922(a)(6), it is the status of the targeted dealer - the defendant charged with 922(a)(6) offense must know that the dealer is a "licensed dealer." **Pet. B**r., p. 46 (filed in the 5th Circuit on 2/13/2020).

[6] On appeal, Petitioner expressly alleged that

3. Was Petitioner's prosecution a selective prosecution in violation of her right to Equal Protection, as guaranteed by Due Process Clause of the Fifth Amendment to the Constitution of the United States?

The Rulings Below:

A panel of the Fifth Circuit rejected Petitioner's arguments and affirmed the District Court's Judgment. It concluded that *Rehaif* did not require the Government to prove that Petitioner conspired to make straw purchases from sellers whom she knew were "licensed dealers" because

(i) *Rehaif* applies only to prosecutions under 18 U.S.C. § 922(g), and only to the defendant's status as a felon in § 922(g)(1). *United States v. Diaz,* 989 F.3d at 393-394.

(ii) 18 U.S.C. § 924(a)(2), which expressly applies the "knowingly" level of scienter to the substantive offense set out in 18 U.S.C. § 922(a)(6), is inapplicable where the charge is the inchoate offense of conspiracy to violate 18 U.S.C.§ 922(a)(6) under 18 U.S.C. § 371. *United States v. Diaz,* 989 F.3d at 394.

> [N]othing in the Original Indictment, the Superseding Indictment, the Plea Agreement or the Plea Colloquy informed Ms. Diaz that an element of the offense to which she was pleading guilty was that she and her fellow conspirators must have had actual knowledge that at least one of the sellers they targeted was a "licensed dealer." **Pet. B**r., p. 44 (filed in the 5th Circuit on 2/13/2020).

(iii) there is no *scienter* requirement with respect to the "licensed dealer" element set out in 18 U.S.C. § 922(a)(6) because that element is a jurisdictional element. *United States v. Diaz*, 989 F.3d at 394, n. 2.

(iv) Petitioner forfeited any *Rehaif* error by failing to raise it below, and her argument on appeal would require "an extension of precedent." Accordingly, any error did not amount to plain error. *United States v. Diaz*, 989 F.3d at 394.

As for Petitioner's claim of selective prosecution, the Fifth Circuit held that it was barred by the appeal waiver set out in Petitioner's plea agreement. It rejected Petitioner's assertion that her appeal waiver was unenforceable because Petitioner's plea was neither knowing nor voluntary due to the District Court's failure to comply with *Rehaif* by properly advising her of the *mens rea* element associated with "licensed dealer" in 18 U.S.C. § 922(a)(6) before accepting her plea of guilty. *United States v. Diaz*, 989 F.3d at 395, n. 3.

REASONS FOR ALLOWING THE WRIT

There are multiple reasons for granting Petitioner's writ. Petitioner first addresses the *Rehaif* issues that render Petitioner's guilty plea involuntary, and then discusses the selective prosecution question.

A.

THE FAILURE TO INFORM PETITIONER OF THE *MENS REA* ASSOCIATED WITH THE "LICENSED DEALER" ELEMENT RENDERED HER PLEA CONSTITUTIONALLY INVALID

There are several reasons why the Fifth Circuit's refusal to apply *Rehaif's* reasoning to prosecutions for conspiracy to violate 18 U.S.C. § 922(a)(6) is worthy of certiorari review.

1. The Fifth Circuit's Ruling Conflicts With *Rehaif*:

First, both 18 U.S.C. §§ 922(g) and 922(a)(6) are expressly included in 18 U.S.C. § 924(a)(2). Accordingly, the "knowingly" level of scienter *Rehaif* applied to the "status" element in § 922(g)(1) prosecutions (i.e. the defendant's status as a prior convicted felon) applies with equal force to the "status" element in prosecutions under 18 U.S.C. § 922(a)(6) (the seller's status as a "licensed dealer"). After all, just as a defendant's status as a prior convicted felon "is the 'crucial element' separating innocent from wrongful conduct" in § 922(g)(1) prosecutions, the seller's status as a "licensed dealer" separates innocent from wrongful conduct in § 922(a)(6) prosecutions. *Rehaif v. United States*, 139 S. Ct.

2191, 204 L. Ed. 2d 594 (2019); *Abramski v. United States*, 134 S. Ct. 2259, 2271 (2014) (18 U.S.C. § 922(a)(6) is simply a product of a political compromise in which Congress agreed "to regulate dealers' sales, while leaving the secondary market for guns largely untouched.").

2. The Fifth Circuit's Ruling Conflicts With This Court's Holding In *Feola* And With The Rulings Of All Other Courts of Appeals:

Second, the Fifth Circuit's opinion states that the "knowingly" level of *mens rea* – the level of scienter required to convict for a violation of the substantive offense codified at 18 U.S.C. § 922(a)(6) – is not an element where the charge is conspiracy to violate § 922(a)(6) under 18 U.S.C. § 371. This Court's precedents firmly reject that conclusion. The fact that a conspiracy conviction under the general conspiracy statute requires the Government to prove at least the level of scienter applicable to the underlying substantive offense has been settled law since this Court said precisely that in *United States v. Feola*, 420 U.S. 671, 686, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975):

> "[I]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself."

United States v. Feola, 420 U.S. at 686; *Ocasio v. United States*, 136 S. Ct. 1423, 1429, 194 L.Ed.2d 520 (2016) (Defendant must have "the 'specific intent that the underlying crime be committed 'by some member of the conspiracy.'"); *United*

States v. Bailey, 444 U.S. 394, 405, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980) (conspiracy requires "a heightened mental state"). Thus, the Fifth Circuit's ruling conflicts with this Court's binding precedents. It also conflicts with the holdings of the Courts of Appeals (including the Fifth Circuit's own holdings), all of which apply *Feola*'s scienter requirement to prosecutions under the general conspiracy statute.[7]

Even more troublesome, the Fifth Circuit's opinion references the fact that 18 U.S.C. § 371 does not include "knowingly" as the level of *mens rea* required to convict of conspiracy, but never explains what level of scienter, if any, the Government is required to prove to secure a conviction for conspiracy to violate 18 U.S.C. § 922(a)(6). Apparently, it concluded that 18 U.S.C. § 371's failure to reference any level of *mens rea* means that the Government has no burden to prove *any* level of *scienter* with respect to prosecutions for conspiracy to violate 18

[7] *See, e.g., United States v. Wyatt*, 964 F.3d 947, 951 (10th Cir. 2020); *United States v. Anderson*, 747 F.3d 51, 78 (2nd Cir. 2014); *United States v. Caira*, 737 F.3d 455, 463-464 (7th Cir. 2014); *United States v. Bertling*, 611 F.3d 477 (8th Cir. 2010) ("The Supreme Court made clear in *Feola* that 'in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.'"); *U.S. v. Duran*, 596 F.3d 1283, 1296 (11th Cir. 2010); *U.S. v. Alston*, 77 F.3d 713, 718 (3rd Cir. 1996); *U.S. v. Licciardi*, 30 F.3d 1127, 1131 (9th Cir. 1994); *U.S. v. Sharp*, 4 F.3d 988, 990 (4th Cir. 1993); *U.S. v. Murray*, 928 F.2d 1242, 1251 (1st Cir. 1990). Until this case, the Fifth Circuit itself was faithful to *Feola*. *See, e.g. United States v. Brooks*, 681 F.3d 678, 699 (5th Cir. 2012), *U.S. v. Barnett*, 197 F.3d 138, 146 (5th Cir. 1999); *U.S. v. Weddell*, 800 F.2d 1404, 1407 (5th Cir. 1986).

U.S.C. § 922(a)(6). If that is true, its analysis would extend to prosecutions under 18 U.S.C. § 371 for conspiracy to violate *any* substantive federal criminal offense.

Thus, certiorari should be granted because the Fifth Circuit's decision in this case conflicts with (i) this Court's holding in *Feola*; (ii) this Court's rulings in *Ocasio* and other cases explaining that a conspiracy conviction requires the government to prove the defendant's specific intent to commit the underlying substantive offense, and (iii) the overwhelming weight of authority from the various courts of appeals, including the Fifth Circuit itself. In addition, the holding below is dangerous to the extent it implies that prosecutions for the inchoate offense of conspiracy under the general conspiracy statute [18 U.S.C. § 371] do not require the Government to prove the same level of scienter it must prove to secure a conviction for the underlying substantive offense.

3. The Fifth Circuit's "Jurisdictional Element" Argument Conflicts With This Court's Holding in *Huddleston* And With The Rulings Of Several Courts of Appeals:

In footnote 2 of its Opinion, the Fifth Circuit offered an alternative rationale to support its conclusion that *Rehaif* is inapplicable to prosecutions for conspiracy to violate 18 U.S.C. § 922(a)(6). There, it stated that the "Licensed Dealer" requirement in 18 U.S.C. § 922(a)(6) is a "jurisdictional element" for which there is no associated *mens rea* requirement. Petitioner agrees that there is no *mens rea* requirement associated with statutory elements that are purely "jurisdictional" in

nature.[8] But that principle has no application here because, as explained below, the "licensed dealer" element is not a jurisdictional element, but, instead, a substantive element that serves to distinguish criminal from non-criminal activity.

Congress did not use the defined term "licensed dealer" in 18 U.S.C. § 922(a)(6) to create a federal "jurisdictional hook." Congress's power to legislate restrictions on the sale of firearms, and to punish those who violate them, is part of its core authority under the Constitution's Commerce Clause.[9] This Court made that clear in *Huddleston v. United States*, 415 U.S. 814, 833, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974), where it affirmed Congress's ability to prohibit straw purchases of firearms in *intrastate* sales on the theory that such sales impact interstate commerce:

> Finally, no interstate commerce nexus need be demonstrated. Congress intended, and properly so, that §§ 922(a)(6) and (d)(1)… were to reach transactions that are wholly intrastate, as the Court of Appeals correctly reasoned, 'on the theory that such transactions affect interstate commerce.'

Id. The Courts of Appeals have uniformly recognized that the Commerce Clause invests Congress with the authority to regulate both *intrastate and interstate* purchases and sales of firearms in *any* transaction:

---

[8] The Court has made it abundantly clear that scienter requirements do not extend to jurisdictional elements. *Rehaif v. United States*, 139 S. Ct. at 2196; *Luna Torres v. Lynch* , 578 U.S. __, 136 S.Ct. 1619, 1630–1631, 194 L.Ed.2d 737 (2016).

[9] U.S. Const., Art.1, § 8.

> The sale of a firearm undoubtedly "is commerce" in its truest form, and the national nature of the market for firearms ensures that this commerce concerns all states, and that its relation to the national interest could hardly be more real or substantial.

U.S. v. Peters, 403 F.3d 1263, 1274 (11th Cir. 2005); *United States v. Hosford*, 843 F.3d 161, 172 (4th Cir. 2016) ("[T]he unlicensed dealing of firearms, even in intrastate sales, implicates interstate commerce and may be constitutionally regulated by Congress under the Commerce Clause."); *U.S. v. Rose*, 522 F.3d 710, 718-719 (6th Cir. 2008); *United States v. Hornbeck*, 489 F.2d 1325, 1326 (7th Cir. 1973); *Mandina v. United States*, 472 F.2d 1110, 1112 (8th Cir. 1973).

Notwithstanding the breadth of Congress's constitutional authority to legislatively restrict or regulate both *intrastate and interstate* purchases and sales of firearms in *any* transaction, it chose to limit the reach of § 922(a)(6) and other subsections of 18 U.S.C. § 922 to specific transactions involving dealers. As this Court has explained, 18 U.S.C. § 922(a)(6)'s focus on "licensed dealers" is simply a product of Congress's decision "to regulate dealers' sales, while leaving the secondary market for guns largely untouched." *Abramski v. United States*, 134 S. Ct. 2259, 2271 (2014). Far from being a mere jurisdictional element, the "licensed dealer" component of § 922(a)(6) is a substantive element; it implements a political compromise that restricts the reach of the statute to firearms transactions with dealers. *Id.* Thus, because § 922(a)(6) does not cover all straw purchase transactions, but only those involving "dealers", the reference to "licensed dealer"

in the statute serves to distinguish legal from illegal transactions. As a non-jurisdictional, substantive element, the "licensed dealer" element in § 922(a)(6), like the defendant's status as a convicted felon in 18 U.S.C. § 922(g), requires the requisite scienter (i.e. "knowingly").

4. <u>There Was Plain Error</u>:

None of the *Rehaif* arguments set forth above were raised in the district court. Accordingly, though the appeal waiver does not bar Petitioner from challenging the voluntariness of her plea, she must satisfy the plain error standard to secure relief.

The Fifth Circuit rejected Petitioner's contention that the District Court's failure to advise Petitioner that she must have known the conspirators were purchasing firearms from a "licensed dealer" amounted to "plain error." It reached this conclusion based on its consideration of only one of the plain error factors identified by this Court in *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).[10] Specifically, it concluded that accepting Petitioner's argument would require an extension of existing authority, and, thus,

[10] *Olano* held that the plain error standard under Fed.R.Crim.P. 52(b) requires the party alleging error based on a forfeited claim to prove (1) there was error that was not intentionally relinquished or abandoned, (2) the error was plain, meaning clear or obvious; (3) the error affected the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

the error could not be plain or obvious. *United States v. Diaz*, 989 F.3d 393-394. But that ruling ignores the fact that *Rehaif* changed the legal landscape.[11]

In discussing the "plain or obvious" prong of the *Olano* test for plain error, this Court has said that a "legal error must be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 129 S. Ct. 1423, 173 L.Ed.2d 266, 556 U.S. 129, 77 USLW 4224 (2009).[12] Here, *Rehaif* is controlling for multiple reasons. First, both 18 U.S.C. § 922(g) and § 922(a)(6) find their *mens rea* component – "knowingly" – in 18 U.S.C. § 924(a)(2). Congress clearly intended the same scienter to apply to all non-jurisdictional elements in both statutes. Second, both *Rehaif* and Petitioner's case involve non-jurisdictional status elements. *Rehaif* requires the Government to prove that a defendant prosecuted under 18 U.S.C. § 922(g)(1) knew that he was a convicted felon at the time he

---

[11] *Rehaif* was decided a few days prior to Petitioner's rearraignment. The issue was not raised by Petitioner's appointed trial counsel at the time she entered her plea or at her subsequent sentencing hearing. Accordingly, under Fifth Circuit precedent review was for plain error. *United States v. McCall*, 833 F.3d 560, 562 (5th Cir. 2016); *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010).

[12] The Fifth Circuit describes the "plain or obvious" component of plain error review in the following terms:

> [A]n "error cannot be plain where there is no controlling authority on point **and where the most closely analogous precedent leads to conflicting results**." *United States v. Gomez*, 706 F. App'x 172, 177 (5th Cir. 2017) (quoting *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003)). Similarly, when any analogy to existing authority would be strained, the district court's actions cannot amount to plain error.

United States v. Stockman, 947 F.3d 253, 260 (5th Cir. 2020).

possessed the firearm; 18 U.SC. § 922(a)(6) requires the Government to prove that the defendant made a straw purchase from a seller the defendant knew was a "licensed dealer."

Thus, *Rehaif* is on point and applying it to prosecutions under 18 U.S.C. § 922(a)(6) [and to prosecutions for conspiracy to violate 18 U.S.C. § 922(a)(6)] is not subject to "reasonable legal dispute"; its application to § 922(a)(6) offenses is neither "strained" nor leads to conflicting results. In fact, refusing to apply *Rehaif* to prosecutions under 18 U.S.C. § 922(a)(6) *creates* an irreconcilable conflict between the statutes, with the status element in § 922(g) prosecutions being subject to "knowingly" scienter and the status element in § 922(a)(6) prosecutions having no such requirement.[13] How can that be when both subsections are subject to the same scienter requirement set out in 18 U.S.C. § 924(a)(2)? *Rehaif* settled the

[13] The Eleventh Circuit applies the following standard for determining whether an error is plain or obvious when the question is one of statutory construction:

> "When the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it."

United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006). In this case, and especially in light of *Rehaif*, the "explicit language" of 18 U.S.C. § 924(a)(2) does resolve the issue. What reason supports applying the "knowingly" standard of *mens rea* to the status element in 18 U.S.C. § 922(g) [convicted felon], but not to the status element in 18 U.S.C. § 922(a)(6) [Licensed Dealer]? Both subsections are expressly mentioned in 18 U.S.C. § 924(a)(2); accordingly, the "knowingly" level of scienter mandated by § 924(a)(2) must apply to the status element in the straw purchase offense codified at 18 U.S.C. § 922(a)(6) [or to the offense of conspiracy to violate § 922(a)(6)] just as it does to the status element required to convict under 18 U.S.C. § 922(a)(6).

issue. When a non-jurisdictional status element [convicted felon in the case of § 922(g) and "licensed dealer" in the case of § 922(a)(6)] serves to distinguish criminal from non-criminal conduct, the "knowingly" level of *mens rea* set out in 18 U.S.C. § 924(a)(2) must be satisfied with respect to that status element.

Accordingly, the fact that Petitioner was not apprised of the fact that she had to know that the conspiracy involved purchasing firearms from sellers whom she knew were "licensed dealers" before she could be convicted of conspiracy to violate 18 U.S.C. § 922(a)(6) was an error that was plain or obvious, and resulted in Petitioner's entering a plea that was neither knowing nor voluntary.[14]

[14] Although the Fifth Circuit did not address the other three components of the plain error standard, Petitioner submits that they were satisfied. As described above, there was error, and it was plain or obvious. It affected Petitioner's substantial rights because she would not have entered a plea of guilty had she been made aware that she had to know the "licensed dealer" status of her sellers. *Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338 1343, 194 L.Ed.2d 444 (2016); *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S. Ct. 2333; 159 L. Ed. 2d 157 (2004) (Petitioner must show that there is a "reasonable probability" that, but for the error, she would not have entered a guilty plea). Petitioner could and would present evidence at trial that she did not know that her sellers were "Licensed Dealers." *Greer v. United States*, 593 U.S. __ (2021). Finally, Petitioner submits that holding her to her guilty plea would seriously affect the fairness, integrity and public reputation of judicial proceedings because her guilty plea, neither knowing nor voluntary, subjected her to a term of imprisonment and supervised release. *See, Rosales-Mireles v. United States*, 585 U.S. ___, 138 S. Ct. 1897 1911, 201 L.Ed.2d 376 (2018). The Court should remand to the Fifth Circuit to allow it to determine whether the other requirements for plain error have been satisfied.

B.

THE GOVERNMENT'S PROSECUTION OF PETITIONER WAS A SELECTIVE PROSECUTION IN VIOLATION OF PETITIONER'S RIGHT TO EQUAL PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Petitioner is the only individual ever prosecuted for a firearms offense after (i) receiving an ATF Cease-and-Desist letter and (ii) complying with its terms.[15] Neither the undersigned counsel nor counsel for the United States identified a single previous instance in which this ever occurred.[16] In fact, the General Accounting Office has reported that the ATF routinely issues Cease and Desist Letters in lieu of prosecution.[17]

Accordingly, in the Fifth Circuit Petitioner asserted that she had been singled out for selective prosecution in violation of her rights under the Due

[15] Arguably, Jose Diaz is also in that class. But, in contrast to Petitioner, Jose reneged on his oral commitment to the ATF to participate in its proposed sting operation. That distinguishes Petitioner's situation from Jose's, but it is unclear whether that it is a material distinction. Jose Diaz, like Petitioner, ceased all involvement in firearms transactions after signing the Cease-and-Desist Letter. The record is unclear as to whether the Agents orally informed Jose that he would be prosecuted unless he participated in the sting.

[16] Of course, there are cases in which a defendant first received a Cease-and-Desist letter from the ATF, *subsequently* violated its terms, and was then prosecuted for doing so. *See, e.g., United States v. Kish*, 424 Fed.Appx. 398 (6th Cir. 2011) (multiple warnings); *United States v. Kennemer*, No. 18-10252 (9th Cir. 2019) (ATF warning letter tended to prove defendant acted knowingly); *United States v. Jones*, Case No. 18-CR-128, n. 1 (E.D. Wis. 2019) ("In December 2015, the ATF served Caldwell with a "warning letter" regarding his activities, but he continued to purchase and sell firearms without a license, and the ATF resumed its investigation of him in November 2017."). That is not the case here.

[17] General Accounting Office, "Law Enforcement: Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use Of Warning Notices In Lieu Of Prosecution", September, 2018. The Report can be found at https://www.gao.gov/assets/700/694290.pdf.

Process Clause of the Fifth Amendment.[18] A claim of selective prosecution is predicated on equal protection principles; the Government may not single out individuals for prosecution based on an "arbitrary classification", including "the exercise of protected statutory and constitutional rights." *Wayte v. United States*., 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1999) (decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights); *U.S. v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (the requirements for a selective-prosecution claim draw on "ordinary equal protection standards." [citation omitted]. Claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." [citation omitted]). As the Fourth Circuit put it, the party alleging selective prosecution must show that the authorities "intentionally treated [her] differently from other similarly situated persons and that the difference in treatment lacked a rational basis." *Willis v. Town of Marshall, N.C.*, 426 F.3d 251, 263 (4th Cir. 2005) (stating the standard for a "class of one" equal protection claim).

[18] Once again, the issue was not raised in the District Court; accordingly, review in the Court of Appeals was for plain error. Notwithstanding the fact that the Cease-and Desist Letter was prominently mentioned in the pre-sentence report, it was not even included in the original record on appeal. The Fifth Circuit granted Petitioner's motion to supplement the record on appeal with the Cease-and-Desist Letter.

There is only one reason that Petitioner was prosecuted in this case: Her husband reneged on his oral commitment to participate in the ATF's proposed sting operation targeting Jorge. In the Court of Appeals, the Government never denied that fact; instead, it asserted that it could elect to prosecute Petitioner notwithstanding the Cease-and-Desist Letter because everyone has an obligation to cooperate with the Government. But that is not true. *Lincoln v. Barnes*, 855 F.3d 297, 304 (5th Cir. 2017) (police may seek the cooperation of citizens, but the latter are under no obligation to provide it); *see, Davis v. Mississippi*, 89 S.Ct. 1394, 1396, n. 6 (1969) ("But these statements merely reiterated the settled principle that, while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.").[19]

Here, no part of the Cease-and-Desist Letter required either Diaz to participate in the ATF's contemplated sting. Further, there was no "plea agreement" or non-prosecution agreement that contained, as a condition, that either Diaz cooperate by participating in the proposed sting operation. The Agents' discussions concerning the proposed sting were exclusively with Jose Diaz. In fact, there is nothing in the record to indicate that Petitioner was even aware that the Agents had requested Jose's assistance in connection with the sting operation.

[19] There is nothing in the record to indicate that Petitioner failed or refused to cooperate with the ATF Agents. As for Jose, the Government cannot simply commandeer a reluctant citizen to participate in one of its sting operations. The Cease-and-Desist Letter makes no mention of Jose's participation in an ATF sting operation as being a condition to the Government's agreement not to prosecute. Pet. Appx. D.

When the ATF issues a Cease-and-Desist Letter to a citizen and the citizen fully complies with its terms, the ATF does not prosecute for firearms offenses committed prior to the date of the Cease-and-Desist Letter. Compliant recipients of a Cease-and-Desist Letter (all except Petitioner Sylvia Diaz) are simply not prosecuted. Petitioner did what she agreed to do under the terms of the Cease-and-Desist Letter – she stopped dealing in firearms. But when Jose Diaz backed out of his oral agreement to participate in the ATF's proposed sting operation targeting Jorge, the Justice Department reacted by doing what it has never done before: It prosecuted Petitioner for firearms offenses antedating Petitioner's Cease-and-Desist Letter.

This case merits certiorari review for several reasons. First, the Court is rarely presented with a bona fide case of selective prosecution. Here, the Court has one. Petitioner is the only person ever prosecuted for a firearms offense after fully complying with an ATF Cease-and-Desist Letter. She was punished not for committing criminal offenses, but for being married to a person who reneged on his oral agreement to participate in an ATF sting operation. There is no reported or unreported decision where the Government has ever done that to anyone else, and the GAO Report indicates that it simply does not happen. *See*, Note 17, *supra*. Petitioner is literally a "class of one." *Willowbrook v. Olech,* 120 S.Ct. 1073, 528 U.S. 562, 145 L.Ed.2d 1060 (2000). Further, the Court's "class of one" equal

protection cases indicate that "the existence of a clear standard against which" the Government's singling out of Petitioner can be measured is the critical factor. *Engquist v. Oregon Dep't of Agric.*, 128 S.Ct. 2146, 170 L.Ed.2d 975, 553 U.S. 591 (2008). Here, there is a clear standard. No other similarly-situated person has ever been prosecuted. As long as Petitioner upheld the terms of her agreement by ceasing all dealing in firearms, she was entitled to be left alone and not to be prosecuted.

Second, the motivation of the Government in this case invites serious scrutiny. Petitioner acknowledges that the Court gives wide discretion to the Government as to whom it will prosecute and what charges it will bring. However, the Government does not have unbridled discretion to prosecute. Where, as in this case, the Government singles out one individual for prosecution after at least implicitly agreeing that it would not do so, and where it treats that individual differently from all other similarly-situated individuals, a question concerning equal protection is fairly raised. What is the Government's rational basis to treat Petitioner differently from all other persons who have complied with ATF Cease-and-Desist Letters? There is no rational basis to support the Government's unique prosecution and disparate treatment of Petitioner. Petitioner was under no obligation to cooperate with law enforcement authorities beyond what she committed to do in her signed Cease-and-Desist Letter. She upheld her part of that

bargain. Petitioner was singled out not because the Government had a legitimate interest in prosecuting her for her pre-Cease-and-Desist Letter crimes, but only because her spouse angered the ATF Agents. That is not a rational basis for the Government to do what it has never done before: Prosecute a compliant defendant for firearms offenses committed prior to the date of her Cease-and-Desist Letter.[20]

The Government's selective prosecution of Petitioner violated her right to equal protection, as guaranteed by the Fifth Amendment's Due Process Clause. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) (Though there is no Fifth Amendment mention of equal protection, it is subsumed within the Fifth Amendment's Due Process Clause, and is applied just as it is in the context of a Fourteenth Amendment claim). The Court should grant certiorari to vindicate Petitioner's claim and to prevent the Government from using its power to prosecute to engage in discriminatory, selective and abusive behavior.

Appeal Waiver And The Fifth Circuit's Ruling On Selective Prosecution:

The Fifth Circuit never reached the merits of Petitioner's selective prosecution claim. It concluded that Petitioner's appeal waiver barred the claim. But, as described above, Petitioner's plea was neither knowing nor voluntary due to the fact that she was never made aware of the *Rehaif* requirement that Petitioner

[20] In fact, Petitioner's prosecution was irrational to the extent it undermined the utility of ATF's own Cease-and Desist Letters. If the recipient of an ATF Cease-and-Desist letter cannot rely on the fact that compliance will ensure that he or she will not be prosecuted, it detracts from the recipient's incentive to comply.

and her co-conspirators had to know that they were making straw purchases of firearms from Licensed Dealers.[21] Petitioner submits that the fact that her plea was neither knowing nor voluntary means that her plea is constitutionally invalid and, thus, her associated plea agreement, including the appeal waiver contained therein, falls as well.[22] Accordingly, the Fifth Circuit erred in refusing to consider Petitioner's claim of selective prosecution.

[21] Appeal waivers are narrowly construed against the Government. *In re Sealed Case*, 901 F.3d 397, 402 (D.C. Cir. 2018); *United States v. Burden*, 860 F.3d 45, 53-54 (2nd Cir. 2017); *United States v. Lo*, 839 F.3d 777, 785 (9th Cir. 2016); *United States v. Hardman*, 778 F.3d 896, 902 (11th Cir. 2014); *U.S. v. McCoy*, 508 F.3d 74, 78 (1st Cir. 2007); *U.S. v. Palmer*, 456 F.3d 484, 487 (5th Cir. 2006) ("Given the significance of the rights they involve, we construe appeal waivers narrowly, and against the government."); *United States v. Caruthers*, 458 F.3d 459, 470 (6th Cir. 2006); *U.S. v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) ("In determining a waiver's scope, we will 'strictly construe[] [appeal waivers] and any ambiguities in these agreements will be read against the Government and in favor of a defendant's appellate rights.' [citations omitted]"); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) (applying appeal waivers in plea agreements narrowly and strictly construing them against the government); *U.S. v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990) (ambiguities in plea agreement construed against the government).

[22] *U.S. v. Watson*, 582 F.3d 974 (9th Cir. 2009) *("*An appeal waiver will not apply if: 1) a defendant's guilty plea failed to comply with Fed.R.Crim.P. 11..."); *United States v. Gonzalez*, 765 F.3d 732, 741 (7th Cir. 2014) ("A defendant's plea agreement often contains a provision waiving his right to appeal and that appeal waiver stands or falls with the guilty plea."); *United States v. Rollings*, 751 F.3d 1183, 1189 (10th Cir. 2014) ("[I]f the defendant did not voluntarily enter into the agreement, the appellate waiver subsumed in the agreement also cannot stand.' [citation omitted]").

CONCLUSION

For all the foregoing reasons, the Court should grant Petitioner Sylvia Diaz's Petition for a Writ of Certiorari.

Respectfully,

/s/Robert Clary
Robert Clary
Robert Clary, PLLC
State Bar No. 04325300
405 Windward Dr.
Murphy, Texas 75248
Phone: (972) 757-5690
Fax: (972) 692-8212

COUNSEL FOR PETITIONER
SYLVIA DIAZ