NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

Justin Sholley-Gonzalez - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether a new trial based on plain *Rehaif v. United States* error is required where the defendant maintained at all times during his pre-*Rehaif* prosecution that the state court judge's failure to mark any of multiple relevant boxes on a restraining order form concerning an intimate partner relationship or the potential imperilment of Second Amendment rights, created not just an absence of circumstances to alert him his rights were restricted, but also an affirmative presence of circumstances that would cause an ordinary person to believe his rights were not impacted.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

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The petitioner, Justin Sholley-Gonzalez, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 19-2914, entered on May 10, 2021. Sholley-Gonzalez' petition for panel and en banc rehearing was denied on August 19, 2021.

OPINION BELOW

On May 10, 2021, a panel of the Eighth Circuit Court of Appeals affirmed Sholley-Gonzalez's convictions under 18 U.S.C. §§ 922(a)(6) and (g)(8), concluding the lower court's plain error in failing to require the *Rehaif v. United States*, 139 S. Ct. 2191 (2019), "knowledge of status" element was harmless, and did not warrant a new trial.

JURISDICTION

The Court of Appeals entered its judgment on May 10, 2021, and denied Sholley-Gonzalez's request for rehearing on August 19, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

18 U.S.C. § 922 (g)(8)) . . .

> (g) It shall be unlawful for any person. . .
>
> 8. who is subject to a court order that—
> **(A)** was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> **(B)** restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> **(C)** **(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
> **(ii)** by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate

> partner or child that would reasonably be expected to cause bodily injury[.]

18 U.S.C. § 921(a)(32):

> The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

STATEMENT OF THE CASE

On October 12, 2017, an Iowa state court judge issued an Order of Protection restraining Sholley-Gonzalez from contacting or committing "any acts of abuse or threats of abuse" against S.O. PSR ¶ 6; Crim. Doc. 29-2.[1] Although the Order of Protection contained a "firearms warning for law enforcement" box on page one, the box was not checked. Crim. Doc. 29-2. On page two, where the judge was directed to check either the "intimate partner" box or the "'other' than intimate partner" box, neither box is checked. When the intimate partner box is checked, the judge is also directed to check box 5, which directs a defendant to deliver his firearms to local law enforcement within 48 hours, and advises him that his right to possess firearms or ammunition may be affected, pursuant to 18 U.S.C. §§ 922(g)(8). Box 5 is not checked. *Id.*

While the Order of Protection was in effect, Sholley-Gonzalez went to a federally licensed firearms dealer, and attempted to purchase a firearm. PSR ¶ 9. He used an in-store automated system to complete ATF Form 4473, a Firearms Transaction Record, responding "no" to Question 11(h), which asked "(a)re you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner." PSR ¶¶ 9–10; Crim.

[1] In this brief, references to documents from Sholley-Gonzalez's criminal court case, S.D. Iowa Case No. 4:18-cr-00090, will be referred to as "Crim. Doc.," followed by the district court's docket entry number. Additionally, "PSR" refers to the presentence report (Crim. Doc. 76), and "Trial Tr." refers to the transcript of the March 26, 2019 bench trial (Crim. Doc. 95).

Doc. 29-3. A subsequent investigation of the attempted purchase led law enforcement to obtain a search warrant for Sholley-Gonzalez's residence, where multiple rounds of varied gauge ammunition were seized. PSR ¶ 15.

On September 27, 2018, Sholley-Gonzalez was indicted in four-counts: (Count One) unlawful possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(8) and 924(a)(2); (Count Two) false statement during the purchase of a firearm, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2); (Count Three) false statement during the purchase of a firearm, in violation of 18 U.S.C. §§ 924(a)(1)(A) and 924(a)(1)(D); and (Count Four) unlawful possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(8) and 924(a)(2). Given that Eighth Circuit case law did not require knowledge of prohibited status as an element of § 922(g)offenses,[2] Sholley-Gonzalez found himself in an untenable situation, where he was precluded from arguing the most obvious and reasonable defense available to him: that the omissions on the face of the restraining order reasonably caused him to believe that his rights to possess firearms and ammunition were <u>un</u>affected, such that he reasonably did not know he belonged to the § 922(g)(8) class of people prohibited from possessing firearms and ammunition, and in turn, did not knowingly made a false statement pursuant to § 922(a)(6) regarding his status.

[2] *See, e.g.*, *United States v. Parsons*, 946 F.3d 1011, 1014 (8th Cir. 2020) ("Until recently, possession of a firearm by a [prohibited person' required the government to prove three elements . . . [*Rehaif*] added a fourth element: that the defendant 'knew he belonged to the relevant category of persons barred from possessing a firearm.'" (citations omitted)).

In an effort to defend himself from the charges of the indictment in the face of insurmountable legal roadblocks, Sholley-Gonzalez moved to dismiss the indictment, arguing that because of the many omissions on the face of the restraining order, "a reasonable person reading [it] would be led to believe that there was no firearms prohibition affecting him," and that as a matter of law, he was therefore not "subject to a court order" as described in § 922(g)(8), and could not have knowingly made a false statement under § 922(a)(6). Crim. Doc. 41, pp. 3–4. The district court rejected Sholley-Gonzalez's arguments, concluding the indictment adequately pled the elements of the charged offenses because §§ 922(g)(8) [and] 922(a)(6) . . . do not require that a defendant "be subject to a protective order that states, on its face, the protected party is his intimate partner." Crim. Doc. 41, p. 10.

In March 2019, Sholley-Gonzalez entered into a "Stipulation to Trial Without Jury and Waiver of Rights" with the government. Crim. Doc. 52. Sholley-Gonzalez proceeded to a bench trial on Counts Two and Four on March 26, 2019.[3] Crim. Doc. 51–54. The parties submitted the case based on stipulated exhibits and facts summarized as follows:

(1) On October 12, 2017, Polk County Iowa Judge Carol Coppola issued an Order of Protection, restraining Sholley-Gonzalez from committing any acts of abuse or threats of abuse, or having any contact with S.O. through October 12, 2022.

(2) Sholley-Gonzalez received actual notice of the protective order hearing, and also an opportunity to participate in the hearing.

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[3] *See* Trial Tr. p. 9 (establishing that the bench trial was on Counts Two and Four only, and the government would dismiss Counts One and Three at sentencing).

(3) The Order of Protection restrained Sholley-Gonzalez from: (1) communicating or attempting to communicate with S.O.; (2) being in the immediate vicinity of S.O.'s places of residence and employment; (3) threatening, assaulting, stalking, molesting, attacking, harassing, or otherwise abusing S.O., and (4) using, or attempting to use, or threatening to use physical force against S.O. that would reasonably be expected to cause bodily injury.

(4) The Order of Protection does not specify whether S.O. was an intimate partner of Sholley-Gonzalez at the time of issuance.

(5) S.O. was, in fact, an intimate partner of Sholley-Gonzalez.

(6) On February 16, 2018, Sholley-Gonzalez attempted to purchase a firearm from the Ankeny Walmart, a federal licensed firearms dealer. As part of this purchase, he completed at ATF Form 4473, Firearms Transaction Record. He responded "no" to Question 11(h), which asked "(a)re you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner?"

(7) On April 25, 2018, law enforcement executed a search warrant at Sholley-Gonzalez's residence and located multiple rounds of ammunition.

(8) Sholley-Gonzalez knowingly possessed the ammunition.

(9) The ammunition was transported across a state line at some time during or before Sholley-Gonzalez's possession of it.

Crim. Doc. 52-1, ¶¶ 1–9.

In his trial brief and at the bench trial, Sholley-Gonzalez's counsel continually argued that the state court's failure to check relevant boxes on the restraining order could be construed by a reasonable person as the equivalent of "a direct statement that this is not an intimate partner relationship in this case" and that "there was no firearms prohibition affecting [Sholley-Gonzalez]." Trial Tr. p. 26; Crim. Doc. 48, p. 4; *see also* Trial Tr. p. 24 ("Every opportunity the . . . state

court had to indicate that that was the nature of that order, the state court declined or decided not to check that box. . . how could he knowingly make a false statement about something that's on its face . . . did not restrict him from contacting an intimate partner."); Crim. Doc. 48, p. 6 ("[T]he order of protection essentially found that it did *not* restrain contact with an intimate partner."); *id*. p. 5 ("[Because the] judicial officer expressly declined to check these boxes[,] [t]he finding of the judicial officer . . . was that S.O. was not an intimate partner."). The district court, however, found Sholley-Gonzalez guilty of both Counts Two and Four, making a specific "find[ing that] 18 U.S.C. §§ 922(a)(6) and (g)(8) apply when a firearm or ammunition purchaser is subject to a protective order that restrains him against an intimate partner as a factual matter." Crim. Doc. 54; *see* Trial Tr. pp. 23–29.

On June 21, 2019, around three months after Sholley-Gonzalez's bench trial, the Supreme Court decided *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019). Sholley-Gonzalez thereafter filed a Motion for New Trial, arguing that *Rehaif* is directly on point because he "lack[ed knowledge] result[ing] from a conscious decision of the judicial officer issuing the protective order to leave unchecked every box on the form indicating that the order protected an intimate partner." Crim. Doc. 65-1, p. 4 ("Objectively, one would not know they possessed a firearm while subject to a restraining order protecting an intimate partner when the judicial officer specifically declined to identify it as falling into that class of orders . . . one does not knowingly make a false statement in answering 'no' to a

question about intimate partner protective orders on a firearms registration record, when that person essentially was told by the judicial officer that it was not such an order."). The district court declined Sholley-Gonzalez's request for a new trial, finding that the *Rehaif* error was harmless because the court's finding on Count Two that Sholley-Gonzalez "knowingly ma[de] a false statement regarding his membership in a prohibiting class" necessarily means that he had the same knowledge of his status in relation to Count Four. Crim. Doc. 79, p. 7. The district court alternatively found that, based on the evidence presented at the bench trial and its ruling on Sholley-Gonzalez's Motion to Dismiss, sufficient evidence supported both convictions because Sholley-Gonzalez necessarily knew of his prohibited status because he knew of the restraining order, and § 922(g)(8) does not require that the restraining order state whether the restrained person and the victim are intimate partners.

Sholley-Gonzalez appealed, and on May 10, 2021, a two-judge majority of the assigned Eighth Circuit panel rejected his bid for a new trial under *Rehaif*, concluding that the "stipulated facts overwhelmingly show that a rational fact finder would find that Sholley-Gonzalez met the knowledge of status element" because he "was aware of the facts that made him part of 'the relevant category of persons barred from possessing a firearm.' He need not have known that he was barred from possessing firearms or ammunition because of those facts[.]" App. A., p. 33. The majority additionally found that the Count Two false statement

conviction compelled conviction on the § 922(g)(8) offense in Count Four, because it "would defy reason for the district court to have found that Sholley-Gonzalez simultaneously knew [for purposes of the § 922(a)(6) conviction] and did not know the facts that fit him into the § 922(g)(8) category." *Id*. p. 15. One judge on the panel dissented, concluding that under the "totality of the unusual circumstances," the case is a "rare" one, deserving of a new trial under *Rehaif*. *Id*. pp. 21–22 (Loken, J., dissenting). Although two Eighth Circuit judges voted to grant rehearing, Sholley-Gonzalez's petitions for panel and en banc rehearing were denied on August 19, 2021. *See* App. C.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is necessary because the Eighth Circuit has decided an extremely important federal question in this case in a way that directly conflicts with the Supreme Court's controlling authority in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and *Greer v. United States*, 141 S. Ct. 2090 (2021).[4] *See* S.C. Rule 10(c). Absent an exercise of this Court's supervisory powers, Sholley-Gonzalez will stand convicted of two federal felonies, even though no factfinder has ever fairly considered whether he knowingly violated 18 U.S.C. §§ 922(a)(6) and (g)(8). The missing *Rehaif* element in this case permeated every aspect of Sholley-Gonzalez's prosecution and convictions, unfairly and unjustly turning a temporary limitation on his Second Amendment rights into a permanent prohibition.

Under the unique factual circumstances of this case—where the face of the restraining order itself can reasonably be read as affirmatively not implicating either an "intimate partner" or gun rights—there is a reasonable probability that the outcome of the case would have been different had *Rehaif* been the law at the time of Sholley-Gonzalez's prosecution. The plain error test of *United States v. Olano*, 507 U.S. 725 (1993), is satisfied, as is Federal Rule of Criminal Procedure 52(b), in that the plain *Rehaif* error in this case seriously affects "the fairness, integrity or public reputation of judicial proceedings." *See* Fed. R. App. P.

[4] The decision also conflicts with prior published decisions of the Eighth Circuit applying plain error review to *Rehaif* issues, such as *United States v. Davies*, 942 F.3d 871 (8th Cir. 2019), and *United States v. Jawher*, 950 F.3d 576 (8th Cir. 2020).

35(b)(1)(B). The Supreme Court should grant certiorari, vacate the Eighth Circuit's Opinion and Judgment, and remand the case with direction that Sholley-Gonzalez's convictions be reversed and that he be granted a new trial on all counts.

Argument

Respectfully, the Eighth Circuit majority decision is premised squarely on reasoning this Court expressly rejected in *Rehaif*. Mr. Rehaif, of course, was in the United States on a nonimmigrant student visa. 139 S. Ct. at 2194. After being dismissed as a student, the university told him that his "immigration status" would be terminated if he left the country or failed to transfer to another university. *Id*. He did neither, and his visa expired. *Id*. Sometime thereafter, he went to a local firing range and shot two firearms, which eventually resulted in his conviction by a jury of possession of a firearm by an alien unlawfully in the United States, pursuant to 18 U.S.C. § 922(g)(5). *Id*.

In resisting Mr. Rehaif's appeal, the government argued it had no obligation to prove to a factfinder that Mr. Rehaif knew of his unlawful status because the question of whether an alien is illegally in the United States within the meaning of § 922(g)(5) is one of law, not fact. *See* 139 S. Ct. at 2198 (citing *Cheek v. United States*, 498 U.S. 192, 199, 111 S. Ct. 604, 112 L.Ed.2d 617 (1991)). The Supreme Court expressly rejected the argument:

> This maxim [that "ignorance of the law" or "mistake of law" is no excuse] normally applies where a defendant has the requisite mental state in respect to the elements of the crime but claims to be "unaware of the existence of a statute proscribing his conduct." 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 5.1(a), p. 575 (1986). In contrast, 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. *Ibid*.; *see also* Model Penal Code § 2.04, at 27 (a mistake of law is a defense if the

> mistake negates the "knowledge . . . required to establish a material element of the offense"). Much of the confusion surrounding the ignorance-of-the-law maxim stems from "the failure to distinguish [these] two quite different situations." LaFave, *Substantive Criminal Law* § 5.1(d), at 585.
>
> We applied this distinction in *Liparota*, where we considered a statute that imposed criminal liability on "whoever knowingly uses, transfers, acquires, alters, or possesses" food stamps "in any manner not authorized by the statute or the regulations." 471 U.S. at 420, 105 S. Ct. 2084 (quotation altered). We held that the statute required scienter not only in respect to the defendant's use of food stamps, but also in respect to whether the food stamps were used in a "manner not authorized by the statute or regulations." *Id.*, at 425, n. 9, 105 S. Ct. 2084. We therefore required the Government to prove that the defendant knew that his use of food stamps was unlawful—even though that was a question of law. *See ibid.*
>
> This case is similar. The 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. A defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require.

Rehaif, 139 S. Ct. at 2198.

Sholley-Gonzalez's case is directly on point with Mr. Rehaif's. Here, the Eighth Circuit held that a "rational fact finder" could "only" make one reasonable inference from the stipulated evidence: that Sholley-Gonzalez knew of his status under § 922(g)(8) "because he was aware of the facts that met the statutory requirements for the court order." App. A, p. 33. In other words, the panel found that Sholley-Gonzalez necessarily knew he was a prohibited person in possession of ammunition because he knew the basic facts that legally defined him as a prohibited person under § 922(g). But Mr. Rehaif also knew the facts that legally

defined him as a person unlawfully in the United States. The question of knowledge of status is focused on a defendant's guilty intent, which the *Rehaif* Court specifically held can be undermined by a misunderstanding of the law or facts.

Here, such a misunderstanding reasonably could have come from the state court judge's failure to properly complete the restraining order. Because a factfinder could easily agree, there is a "reasonable probability" that the outcome of Sholley-Gonzalez's case would have been different if *mens rea* been an element of both offenses. Indeed, the record in this case is even more clear than in *Rehaif* itself, that if the "fourth element" had been required during Sholley-Gonzalez's prosecution, he would have put his fate in the hands of a jury, allowing it to decide whether he had "a mistaken impression concerning the legal effect of some collateral matter [the state court's failure to make intimate partner and gun rights findings] and that mistake result[ed] in his misunderstanding the full significance of his conduct, thereby negating an element of [both] offense[s]." *Rehaif*, 139 S. Ct. at 2198.

Ironically, the majority panel decision in this case is completely inconsistent with even the Eighth Circuit's *own* precedent, where it has reversed for a new trial in situations where, as here, a defendant's guilt was decided pre-*Rehaif*, without proof of his knowledge of status. For instance, in *United States v. Davies*, 942 F.3d 871, 872–73 (8th Cir. 2019), the Eighth Circuit held that all elements of the plain

error test were satisfied where the defendant pled guilty to two Iowa felonies in September, possessed a gun in October, and then received a deferred judgment in December. It found that, even though Iowa law says a guilty plea counts as a conviction, "it seems reasonable that someone in [the defendant's position], after pleading guilty, might nevertheless think he could possess firearms because he had not yet been sentenced." *Id*. at 874. Thus, the defendant in *Davies* had "shown a reasonable probability that the outcome would have been different," and because his behavior may have been an "innocent mistake," the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 874.

In *United States v. Jawher*, 950 F.3d 576, 578 (8th Cir. 2020), the Eighth Circuit likewise remanded for a new trial based on plain error where a defendant pled guilty without proof of the *Rehaif* element. Where the defendant had been in the United States for 10 years, was married to a U.S. citizen, was in regular contact with immigration authorities, and was in the midst of seeking adjustment of his immigration status at the time he possessed firearms, the circumstances failed to prove that Jawher knew he was unlawfully in the United States. *Id*. p 581. The Court further found that, "[a]t the very least, Jawher has established that he had reasonable grounds on which to contest his knowledge of his prohibited status to a jury," observing that it would be an "unacceptable risk" to allow the conviction to stand where the defendant might have "lack[ed] the intent needed to make his behavior wrongful." *Id*. at 580–81.

Just as in *Jawher*, it is an unacceptable risk to allow Sholley-Gonzalez's convictions to stand where *mens rea* was at all times his overarching objection to prosecution in this case, but the law did not allow him to rely on it as the proper focus of his defense at trial. Where, as here, a restraining order has multiple places clearly intended to alert a defendant of the potential imperilment of his Second Amendment rights, but the state court judge fails to use any of them, there is not just an "absence of circumstances that should alert" Sholley-Gonzalez to the impact on his rights; there is an affirmative presence of circumstances that would cause an ordinary person to believe his rights were not impacted. *See Lambert v. California*, 355 U.S. 225, 288 (1957). Under these conditions, "it seems reasonable that someone in [Sholley-Gonzalez's] position, after [receiving a restraining order without "intimate partner" or gun rights findings], might nevertheless think he could possess firearms [based on those omissions]." *Davies*, 942 F.3d at 874. Even accepting the general proposition that "everyone knows" that possession of a firearm by someone subject to a restraining order is highly regulated, the restraining order in this case, on its face, objectively and reasonably could lead an ordinary person to believe such concerns do not impact them. *United States v. Miller*, 646 F.3d 1128, 1131 (8th Cir. 2011); *see generally Lambert v. California*, 355 U.S. at 228.

This Court's recent decision in *Greer v. United States*, 593 U.S. ___, 141 S. Ct. 2090 (June 14, 2021), further weighs in favor of a conclusion that Sholley-Gonzalez

is entitled to a new trial on all counts. In *Greer*, the Court found that the defendant had not proved the substantial rights prong of the plain error test because, "bottom line," he never made any argument or representation that he "would have presented evidence at trial that he did not in fact know he was a felon." *Id*. at 2100. By contrast, Sholley-Gonzalez has at all times in this litigation maintained that the face of the restraining order made it reasonable for him to think that he did not fall within the prohibition in § 922(g)(8), based on the judge's omissions in completing the form order. Moreover, unlike the defendant in *Greer*, Sholley-Gonzalez is not subject to any sort of "uphill climb in trying to satisfy the substantial rights prong of the plain-error test based on an argument that he did not know he was a felon." *Id*. at 2097. To the contrary, the only requirement to satisfy the third prong of plain error review is that Sholley-Gonzalez "show a reasonable probability that a properly instructed jury would have had reasonable doubts about the knowledge-of-status element." *Id*. at 2103 (Sotomayor, J., concurring in part). Unlike the defendant in *Greer*, there is no definitive evidence one way or the other as to whether Sholley-Gonzalez actually knew of his prohibited § 922(g) status. A rational factfinder could believe that Sholley-Gonzalez lacked knowledge of his status, and made an "innocent mistake" in either, or both, his possession of ammunition and his "no" response to Question 11(h) on ATF Form 4473. *Rehaif*, 139 S. Ct. at 2197.

In closing, Sholley-Gonzalez refers the Court to Eighth Circuit Judge James B. Loken's dissenting opinion, which provides an extremely apt and concise

summary of why a "grant, vacate, remand" order is imperative in this case:

> [The] stipulated facts did not establish that Sholley-Gonzalez knew he was subject to a court order that put him in the § 922(g)(8) category. With the boxes putting a restrained person in that status unchecked, Sholley-Gonzalez might have believed that the state court did not conclude S.O. was his intimate partner, or did not intend to subject him, a hunting and target shooting enthusiast, to this burdensome federal law restraint. Unlikely, perhaps, but no more unlikely than the circumstances in [*Davies*] where we reversed a felon-in-possession conviction for plain error under *Rehaif* because the defendant might not have known he was a convicted felon when he had not been sentenced at the time he committed the felon-in-possession offense. Sholley-Gonzalez has never been convicted or charged with an offense involving firearms.
>
> The court reasons that, because the district court found that Sholley-Gonzalez "knowingly ma[de] a false statement about his status" when he answered the Wal-Mart form, it necessarily found he had knowledge of status. *Infra* p. 896. This begs the essential *Rehaif* question. Knowledge that he was under an order protecting a person who was in fact his intimate partner is not necessarily knowledge the state court issued an order that put him in the § 922(g)(8) category under federal law when the order did not check the box that said so. A reasonable fact finder could find Sholley-Gonzalez guilty of violating 18 U.S.C. § 922(a)(6) but not § 922(g)(8). Indeed, at a new trial where fewer facts are stipulated because his mens rea is properly in focus, both acts could be "innocent mistake[s]" evincing a "lack of intent needed to make his behavior wrongful." *Rehaif*, 139 S. Ct. at 2197. In that case, he could be found guilty of neither offense.
>
> I agree with the court that a rational fact finder could find on these facts that Sholley-Gonzalez had knowledge of his status under § 922(g)(8). But I disagree that the evidence was "so overwhelming that no rational [fact finder] could find otherwise." *United States v. Beckham*, 917 F.3d 1059, 1064 (8th Cir. 2019). I conclude there is a reasonable probability the outcome of Sholley-Gonzalez's trial would have been different because the government did not prove this element of the § 922(g)(8) offense —that Sholley-Gonzalez knew he was "subject to a court order that . . . restrains [him] from harassing, stalking, or threatening an intimate partner." *See Rosales-Mireles v. United States*, —— U.S. ——, 138 S. Ct. 1897, 1904–05, 201 L.Ed.2d 376 (2018) (standard for plain

> error relief). Weighing the totality of these unusual circumstances, I conclude this is the rare case, like *Davies* and *Rehaif* itself, where *Rehaif's* significant change in the law warrants a new trial.

App. A, pp. 40–42 (Loken, J., dissenting).

CONCLUSION

For the foregoing reasons, Justin Sholley-Gonzalez respectfully requests that the Petition for Writ of Certiorari be granted, that Eighth Circuit's opinion and judgment be vacated, and the case be remanded with instruction that Sholley-Gonzalez is entitled to a new trial pursuant to *Rehaif*.

RESPECTFULLY SUBMITTED,

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