No. 21-816

In the Supreme Court of the United States

MELVYN GEAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined on plain-error review that, in a prosecution for possession of a firearm by a noncitizen admitted to the United States under a nonimmigrant visa, in violation of 18 U.S.C. 922(g)(5)(B) and 924(a)(2), the record evidence established that petitioner knew of his status.

2. Whether the court of appeals appropriately determined that petitioner failed to make an adequate representation on appeal that he would have rebutted at trial the evidence that he knew of his status as a noncitizen admitted under a nonimmigrant visa at the time he possessed a firearm.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 3-26) is reported at 9 F.4th 1040. An earlier, superseded opinion is reported at 985 F.3d 759.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2021. A petition for rehearing was denied (Pet. App. 1-2), and an amended opinion was filed (Pet. App. 3-26), on August 30, 2021. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on November 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on one count of possessing a firearm as a noncitizen admitted to the United States under a nonimmigrant visa, in violation of 18 U.S.C. 922(g)(5)(B) and 924(a)(2). Judgment 1. Petitioner was sentenced to 15 months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1-26.

1. In 2013, petitioner, a citizen of Australia, moved to Hawaii to work for a solar-power company. Pet. App. 4. Petitioner was admitted to the United States under an "E-3 visa," *ibid.* (citing 8 U.S.C. 1101(a)(15)(E)(iii)), a type of visa that permits a national of Australia to enter the United States to perform a "specialty occupation" in the United States if certain requirements are satisfied, *ibid.* (quoting 8 U.S.C. 1101(a)(15)(E)(iii)). Petitioner's E-3 visa was later renewed, and he subsequently obtained an "H-1B" visa, another type of nonimmigrant visa tied to a noncitizen's employment in the United States in a specialty occupation. *Ibid.* (citing 8 U.S.C. 1101(a)(15)(H)(i)(B)).

In 2016, petitioner traveled to Australia and retrieved certain property he had left there, including parts of a Lithgow .22-caliber rifle, which he brought with him when he returned to Hawaii. Pet. App. 4. Petitioner's then-wife shipped to petitioner in Hawaii the remaining rifle parts and a gun safe. *Ibid.*

Petitioner subsequently was terminated from his job and accordingly lost his nonimmigrant H-1B visa. Pet. App. 4. He applied for and obtained a new one, and in January 2017 he was admitted to the United States under that new H-1B visa. *Id.* at 4-5.

In 2017, the Department of Homeland Security (DHS) was advised by Australian law enforcement that petitioner was an Australian citizen present in the United States on a nonimmigrant H-1B visa who might be in possession of a Lithgow rifle. Pet. App. 5; see Presentence Investigation Report (PSR) ¶ 5. After confirming petitioner's immigration status and investigating, DHS agents executed a search warrant at his residence in Hawaii. Pet. App. 5-6; PSR ¶¶ 6-13. In response to questioning by the agents, petitioner initially denied possessing a firearm, stating that "he couldn't possess a firearm in the State of Hawaii because he was not a U.S. citizen." Pet. App. 5-6. Petitioner ultimately admitted, however, that the rifle and gun safe were in his garage, and the agents recovered them there. *Id.* at 6; PSR ¶ 14.

2. a. A grand jury in the District of Hawaii returned an indictment charging petitioner with one count of knowingly possessing a firearm as a noncitizen admitted to the United States under a nonimmigrant visa, in violation of 18 U.S.C. 922(g)(5)(B). Indictment 2. Under 18 U.S.C. 924(a)(2), "[w]hoever knowingly violates," *inter alia*, Section 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." *Ibid.*

Section 922(g)(5) provides, subject to limited exceptions not at issue here, that

> [i]t shall be unlawful for any person * * * who, being an alien * * * , has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))) * * * 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.

18 U.S.C. 922(g)(5)(B). Under 8 U.S.C. 1101(a)(26), the term "nonimmigrant visa" is defined as "a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter." Section 1101(a)(15) lists "classes of nonimmigrant aliens," including "an alien * * * who is coming temporarily to the United States to perform services * * * in a specialty occupation." 8 U.S.C. 1101(a)(15)(H)(1)(b).

Petitioner proceeded to a jury trial. Pet. App. 6. At trial, petitioner stipulated that he was a noncitizen who had been admitted to the United States under a nonimmigrant visa. *Ibid.* The jury found petitioner guilty. *Ibid.*

b. Following petitioner's trial but before he was sentenced, this Court decided *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), which held that, in a prosecution of a prohibited person who possessed a firearm in violation of Sections 922(g) and 924(a)(2), "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," *id.* at 2194.

Petitioner thereafter moved for a new trial, contending that, under *Rehaif*, the jury must be instructed that, to find petitioner guilty, it had to find that petitioner knew he had been admitted to the United States under a nonimmigrant visa. Pet. App. 7. The district court denied the motion. *Ibid.* The court explained that "the omitted element (that [petitioner] knew that he had entered the United States on a nonimmigrant visa) was supported by overwhelming evidence," and that the instructional error was therefore "harmless." D. Ct. Doc. 138, at 14 (Sept. 13, 2019); see *id.* at 14-20.

The district court sentenced petitioner to 15 months of imprisonment. Judgment 2.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 3-26.

a. On plain-error review, the court of appeals rejected petitioner's contention that his conviction must be vacated on the theory that the jury instructions had failed to require the jury to find that petitioner knew he had been admitted under a nonimmigrant visa. Pet. App. 8-16. The court recognized that, after the verdict was returned in petitioner's case, this Court had held in *Rehaif* that a conviction under Sections 922(g) and 924(a)(2) requires "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; see *id.* at 2195-2200; see also Pet. App. 8-14. The court of appeals reasoned that, to be convicted under Section 922(g)(5)(B), "[a] defendant must therefore know that he was admitted into the country under a 'nonimmigrant visa.'" Pet. App. 10. The court concluded that petitioner had therefore shown an error that was plain, satisfying the first two elements of plain-error review. *Id.* at 14.

The court of appeals determined, however, that petitioner was not entitled to relief because he had not satisfied the third plain-error element: "show[ing] that the error affected his substantial rights," which required him to "'show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" Pet. App. 14-15 (quoting *Molina-Martinez* v. *United States*, 578 U.S. 189, 194 (2016)). The court explained that the government may prove that a defendant "knew his particular visa was 'nonimmigrant'" either "by demonstrating [petitioner] knew that his visa was classified as a 'nonimmigrant visa,' or by showing

he knew his visa possessed the components that constitute a nonimmigrant visa." *Id.* at 11. The court observed, in particular, that it is "well established" under this Court's precedent that "the government may prove a defendant's knowledge of a given statutory designation by proving his knowledge of the 'offending characteristics' that undergird that designation." *Id.* at 12 (quoting *Staples* v. *United States*, 511 U.S. 600, 620 (1994), and citing *McFadden* v. *United States*, 576 U.S. 186, 196 (2015)). And the court determined that the record in this case "overwhelmingly" demonstrated "that [petitioner] knew that he had a nonimmigrant visa." *Id.* at 15.

The court of appeals observed that "piles of evidence showed that [petitioner] was aware of th[e] fact" that he was in the country on a nonimmigrant visa, including that the visa "explicitly stated" that it was time-limited, "making clear that [petitioner] could not remain permanently in the United States"; petitioner "was aware of his temporary status because he had sent a prior email to his then-wife discussing his 'visa extension'"; petitioner had previously "had to obtain a new visa after being fired from his prior job"; petitioner had "worked with his wife to obtain" the visa using a form that "prominently states on the first page that it is a 'Petition for a Nonimmigrant Worker'"; and petitioner "admitted to [DHS] agents that he was barred from firearm possession because he was not a U.S. citizen." Pet. App. 15.

The court of appeals further observed that, "on appeal[,]" petitioner had "largely failed to articulate how he would have proceeded differently at trial other than to argue that he lacked the intent and that the government did not meet its burden." Pet. App. 15. The court found that generic assertion insufficient to create "a

'reasonable probability' that the outcome at trial would have been different but for the error." *Id.* at 15-16 (quoting *Greer* v. *United States*, 141 S. Ct. 2090, 2097 (2021)).

b. District Judge Silver, sitting by designation, filed a concurring opinion. Pet. App. 16-18. Judge Silver "agree[d]" that petitioner's "conviction should be affirmed." *Id.* at 16. Judge Silver wrote separately to express her view that "it would not be enough" to establish the requisite knowledge under Sections 922(g)(5)(B) and 924(a)(2) "for the government to prove solely that a defendant knew his particular visa was a 'nonimmigrant visa,'" if he were unaware of what made it a nonimmigrant visa. *Id.* at 17. Instead, in Judge Silver's view, the government must prove that the defendant was aware that "his visa possessed the components that constitute a nonimmigrant visa"—namely, that it was "issued to (1) an alien, (2) who came temporarily to the United States to perform services . . . in a specialty occupation, and (3) who met the requirements for the occupation specified in section 1184(i)(2) of Title 8." *Id.* at 16-17 (brackets, citation, and internal quotation marks omitted). Judge Silver, like the majority, observed that "the jury was presented with overwhelming evidence" that petitioner knew each of those facts. *Id.* at 17-18.

c. Judge Bumatay filed an opinion concurring in part and dissenting in part. Pet. App. 19-26. Judge Bumatay agreed with the panel's holding that Section 922(g)(5)(B)'s "knowledge requirement can be established in two ways: (1) by demonstrating [petitioner] knew that his visa was classified as a nonimmigrant visa; or (2) by showing he knew his visa possessed the components that constitute a nonimmigrant visa." *Id.* at 21 (brackets, citation, and internal quotation marks

omitted). In Judge Bumatay's view, however, the state of the evidence was such that petitioner had shown a reasonable probability that the outcome of the trial would have been different absent the *Rehaif* error. *Ibid.*; see *id.* at 20-26.

ARGUMENT

Petitioner renews his contention (Pet. 2, 13-16, 19-21) that he is entitled to relief because the jury instructions did not require the jury to find that petitioner knew he was a noncitizen "admitted to the United States under a nonimmigrant visa," 18 U.S.C. 922(g)(5)(B), at the time he possessed a firearm. The court of appeals correctly denied such relief, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court has recently denied petitions for writs of certiorari presenting similar questions as to the knowledge required for another category of persons prohibited from possessing a firearm under Section 922(g). See *Johnson* v. *United States*, No. 21-5432 (Nov. 22, 2021); *Brown* v. *United States*, No. 21-5060 (Oct. 12, 2021). The Court should follow the same course here.

Petitioner additionally contends (Pet. 23-27) that the court of appeals deprived him of an adequate opportunity to demonstrate that the alleged instructional error affected his substantial rights. That contention lacks merit. Petitioner did not avail himself of multiple opportunities to show how he might have countered the evidence, which both courts below found "overwhelming[]," Pet. App. 15; D. Ct. Doc. 138, at 14, that he had the requisite knowledge of his nonimmigrant-visa-holder status. In any event, the court of appeals' case-specific, factbound consideration of the record in this case would not warrant this Court's review.

1. a. Federal law prohibits possession of a firearm or ammunition by certain categories of people, including noncitizens who "ha[ve] been admitted to the United States under a nonimmigrant visa." 18 U.S.C. 922(g)(5)(B). A separate provision, 18 U.S.C. 924(a)(2), specifies criminal penalties for anyone who "knowingly violates" one of the prohibitions contained in Section 922(g).

In *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), this Court held that the word "knowingly" in Section 924(a)(2) modifies "both * * * the defendant's conduct"—*i.e.*, his possession of a firearm—"and * * * the defendant's status" as a member of a particular restricted group, *id.* at 2194. The petitioner in *Rehaif* had challenged his conviction for possessing a firearm as a member of a different group than the one at issue here—namely, noncitizens who are "illegally or unlawfully in the United States." *Ibid.* (quoting 18 U.S.C. 922(g)(5)(A)). The Court reversed the judgment affirming the defendant's conviction under that provision, but it "express[ed] no view * * * about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here." *Id.* at 2200. The Court expressed "doubt," however, "that the obligation to prove a defendant's knowledge of his status" would be particularly "burdensome," because "'knowledge can be inferred from circumstantial evidence.'" *Id.* at 2198 (quoting *Staples* v. *United States*, 511 U.S. 600, 615 n.11 (1994)).

b. The court of appeals properly applied *Rehaif* to the circumstances of this case in determining that the district court's omission of a jury instruction on the knowledge-of-status element did not affect petitioner's substantial rights because the trial evidence "over–

whelmingly" established that he had such knowledge. Pet. App. 15.

Section 922(g)(5)(B) employs the term "nonimmigrant visa" "as that term is defined in * * * 8 U.S.C. 1101(a)(26)." 18 U.S.C. 922(g)(5)(B). That provision defines a nonimmigrant visa as "a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter." 8 U.S.C. 1101(a)(26). Among the "classes of nonimmigrant" listed in that section is "an alien * * * who is coming temporarily to the United States to perform services * * * in a specialty occupation" under an H-1B visa. 8 U.S.C. 1101(a)(15)(H)(1)(b).

As the court of appeals observed, the record evidence amply demonstrated that petitioner—who has not contested his knowledge that he is a noncitizen—knew all the facts that rendered his entry visa "nonimmigrant." Pet. App. 15-16. Specifically, petitioner's "visa explicitly stated that it expired on November 14, 2019, making clear that he could not remain permanently in the United States"; petitioner "had sent a prior email to his then-wife discussing his 'visa extension'"; petitioner "had to obtain a new visa after being fired from his prior job and thus losing his prior temporary visa"; and petitioner "worked with his wife to obtain a[n] H-1B visa," the application form for which "prominently states * * * that it is a 'Petition for a Nonimmigrant Worker.'" *Id.* at 15. Judge Silver recounted additional evidence of petitioner's knowledge, including the testimony of petitioner's new wife that she and petitioner "established a limited liability company that would employ" him, and that his visa application identified his existing visa status as "H1B—Specialty

Occupation" and sought to continue that status. *Id.* at 18.

In addition, when petitioner initially (and falsely) denied to DHS agents that he possessed a firearm, he explained that he knew he was not permitted to a possess a firearm in Hawaii. Pet. App. 5-6 (petitioner stated to investigators that "he couldn't possess a firearm in the State of Hawaii because he was not a U.S. citizen" and had thrown away the rifle that his ex-wife had sent to him "'because he didn't want the rifle, he couldn't have it'" (brackets omitted)). In his partial dissent, Judge Bumatay discounted those statements because, in his view, they "suggest[ed] that [petitioner] thought only *citizens* could possess a gun—which isn't the law—and demonstrate[d] only that he knew was not a citizen." *Id.* at 22. But even if petitioner's statements did not precisely describe the ambit of noncitizens restricted from firearm possession, petitioner's subjective belief that he was not legally permitted to possess a firearm because of his immigration status supports his having "the guilty state of mind that the statute's language and purposes require." *Rehaif*, 139 S. Ct. at 2198.

c. Petitioner appears to contend (Pet. 13-16) that the government was required to prove not only that he knew of all of the facts that caused his visa to qualify as a nonimmigrant visa, but also that he understood the legal consequences of those facts. Under that theory, a jury must find that a defendant was aware of the definition of "nonimmigrant visa" contained in 8 U.S.C. 1101(a)(26), had compared his visa to that statutory definition, and had concluded that he was part of the category of persons described in Section 922(g)(5)(B). Petitioner's contention lacks merit.

As the court of appeals explained, this Court's decisions have drawn a clear line between a defendant's knowledge of the facts that make his conduct criminal and knowledge that the conduct gives rise to criminal liability upon conviction. See Pet. App. 12-13. The Court has, in particular, "explained that," under its mens rea precedents, "a defendant generally must 'know the facts that make his conduct fit the definition of the offense,'" but need "not know that those facts give rise to a crime." *Elonis* v. *United States*, 575 U.S. 723, 735 (2015) (quoting *Staples*, 511 U.S. at 608 n.3)); see *id.* at 735-736 (discussing prior cases).

For example, in *Liparota* v. *United States*, 471 U.S. 419 (1985), on which *Rehaif* relied, see 139 S. Ct. at 2198, the Court addressed the mens rea required under a statute prescribing criminal penalties for someone who "knowingly uses, transfers, acquires, alters, or possesses" food stamps "in any manner not authorized by" applicable statutes or regulations, *Liparota*, 471 U.S. at 420 (citation omitted). The Court held that the statute required proof that the defendant knew that those provisions did not authorize his conduct, see *id.* at 423-433, but made clear that the government need not prove that the defendant knew that his unauthorized possession was a crime, see *id.* at 425 n.9. The Court emphasized that "the Government need not show that [the defendant] had knowledge of specific regulations governing food stamp acquisition or possession," nor need it "introduce any extraordinary evidence that would conclusively demonstrate [his] state of mind." *Id.* at 434. Instead, the Court explained that "the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal." *Ibid.*

Similarly, in *Staples* v. *United States*, *supra*, the Court concluded that, to support a conviction for possession of a machinegun that is not properly registered with the federal government, the government must prove only that the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." 511 U.S. at 602; see *id.* at 604-619. As the court of appeals recognized, *Staples* held "that the government may prove a defendant's knowledge of a given statutory designation by proving his knowledge of the 'offending characteristics' that undergird that designation," even if he is not aware that those characteristics trigger a particular statutory definition. Pet. App. 12 (quoting *Staples*, 511 U.S. at 620).

Likewise here, for a defendant to be convicted under Sections 922(g)(5)(B) and 924(a)(2), "the government must show that the defendant knew" at least that "his visa possessed the components that constitute a nonimmigrant visa," meaning that he "knew his visa was issued to him as (1) 'an alien,' (2) 'who came temporarily to the United States to perform services . . . in a specialty occupation,' and (3) 'who met the requirements for the occupation specified in section 1184(i)(2)' of Title 8." Pet. App. 11 (brackets omitted). As the court of appeals explained, "what Congress proscribed was knowingly possessing a firearm with a 'nonimmigrant visa,' or, looking to what 'nonimmigrant visa' actually means: a visa issued to an alien coming temporarily to the United States to perform services in a specialty occupation." *Id.* at 13. A defendant in possession of a firearm who contemporaneously knows the facts that bring him within the category of persons prohibited from such possession has the requisite knowledge under *Rehaif*.

Contrary to petitioner's contention, the court of appeals' commonsense application of *Rehaif* and the precedents upon which it was based did not abrogate the principle that a defendant's "mistake of law—as to [a] collateral legal matter—is a defense" where that legal matter bears on his prohibited status. Pet. 15 (emphasis omitted). Had petitioner demonstrated his ignorance or mistake as to some legal aspect of his visa necessary to bring it within the scope of "nonimmigrant" visas—such as its temporary duration or the purpose for which it was granted—he could have negated the knowledge-of-status element. A misapprehension along those lines would have been consistent with the type of collateral mistakes of law that this Court identified in *Rehaif* as precluding liability under Section 922(g). See 139 S. Ct. at 2197-2198 (doubting that Congress intended to expose to criminal liability "an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status"; "a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is 'punishable by imprisonment for a term exceeding one year'"; or a defendant whose "trial judge had told him repeatedly—but incorrectly—that he would 'leave this courtroom not convicted of a felony.'" (emphasis omitted)). But the record here instead showed "overwhelming[]" evidence that petitioner knew the relevant facts. Pet. App. 15; D. Ct. Doc. 138, at 14.

Petitioner contends (Pet. 20) that even a defendant who "was aware of [the] underlying factual circumstances that give rise to his status" cannot be convicted under Sections 922(g)(5) and 924(a)(2) without an additional showing that the defendant had analyzed and apprehended the resulting statutory classification of his

visa. That assertion reflects "the misimpression that *Rehaif* requires technical knowledge of the law. It doesn't." *United States* v. *Johnson*, 981 F.3d 1171, 1182 (11th Cir. 2020), cert. denied, 142 S. Ct. 567 (2021). It is implausible that Congress confined criminal liability for possession of a firearm by a noncitizen admitted under a nonimmigrant visa to a small, possibly null, subset of defendants with the perspicacity and legal acumen to consult federal immigration law, apply the statutory definition of "nonimmigrant visa" to their entry visas, and subjectively recognize that they fall within the category of prohibited persons identified in Section 922(g)(5)(B). Not only would that approach unrealistically constrict the scope of the provision, but it would impose an "unduly heavy burden on the Government" in proving offenses under that provision—a burden of the kind this Court has repeatedly disavowed. *Liparota*, 471 U.S. at 433-434; see *Rehaif*, 139 S. Ct. at 2198.

d. Petitioner errs in contending (Pet. 17-23) that this Court's review is warranted to resolve a conflict in the courts of appeals as to whether, in certain circumstances, "*Rehaif* requires knowledge of law." As anticipated by this Court in *Rehaif*, "what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions" varies according to the prohibited category at issue. 139 S. Ct. at 2200. Petitioner points to no conflict among the courts of appeals with respect to the knowledge required for nonimmigrant-visa-holders under Section 922(g)(5)(B).

Petitioner cites decisions addressing other categories of persons prohibited by Section 922(g) from possessing a firearm, but he identifies no conflict concerning those categories either. Petitioner observes that, in

prosecutions of persons who possessed a firearm following a felony conviction, in violation of Sections 922(g)(1) and 924(a)(2), "federal circuits have generally held that a defendant must be aware of his status as a felon." Pet. 18 (citations omitted); see *Rehaif*, 139 S. Ct. at 2194 (indicating "that the Government must prove that a defendant knew * * * that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)"). But courts have consistently recognized that the government may satisfy its burden of proving knowledge of status in Section 922(g)(1) prosecutions by, *inter alia*, demonstrating that the defendant knew that he had been imprisoned for longer than a year—and thus that his prior offense had been "punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g)(1); see, *e.g.*, *United States* v. *Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020), cert. denied, 141 S. Ct. 2807 (2021); cf. *Greer* v. *United States*, 141 S. Ct. 2090, 2102 (2021) (Sotomayor, J., concurring in part and dissenting in part) (observing that a defendant's having "served * * * two separate sentences of well over a year" was "relevant to whether [he] ha[d] shown an effect on his substantial rights" from the omission of a knowledge-of-status element at trial). Thus, consistent with the decision below, courts reviewing convictions under Section 922(g)(1) have permitted "the government [to] prove a defendant's knowledge of a given statutory designation by proving his knowledge of the 'offending characteristics' that undergird that designation." Pet. App. 12.

Petitioner also cites (Pet. 18-19) cases applying *Rehaif* to prosecutions of domestic-violence misdemeanants under Section 922(g)(9), but he again identifies no circuit conflict. As petitioner acknowledges, the Eleventh

Circuit has recognized that "knowledge of facts constituting [domestic-violence-misdemeanant] status can be sufficient." Pet. 21-22 (citing *Johnson*, 981 F.3d at 1182). Petitioner cites (Pet. 18) *United States* v. *Benton*, 988 F.3d 1231 (10th Cir. 2021), but it does not support his approach. In *Benton*, the Tenth Circuit denied relief on plain-error review of a defendant's claim that *Rehaif* required the government to prove that he knew he was barred from possessing firearms. *Id.* at 1239. The defendant there did "not dispute he had the requisite mental state in respect to the elements of the crime—that is, he d[id] not dispute that he knowingly possessed a firearm and that he knew at the time of his possession he was a person convicted of a misdemeanor crime of domestic violence." *Ibid.* The court accordingly did not address how the government may prove a defendant's knowledge of his domestic-violence-misdemeanant status under Section 922(g)(9).

Finally, petitioner cites (Pet. 18-19) isolated statements from other decisions, but he identifies no holding that conflicts with the decision below. For example, petitioner quotes (Pet. 19) the Second Circuit's statement in *United States* v. *Balde*, 943 F.3d 73 (2019), that it is insufficient for the government to prove "that the defendant knew *the facts* that the law deems constitute 'illegal' status." *Id.* at 96 (citation omitted). But the court in that case vacated the defendant's conviction in light of confusion about a fact relevant to his immigration status—specifically, whether he had been "paroled into the country when he was released from detention." *Id.* at 84. That "hotly contested" question enabled the defendant to plausibly maintain that he had been ignorant of or mistaken as to a predicate fact underlying his membership in the prohibited group. *Id.* at 97. The court

noted that a differently situated defendant—such as "a defendant who had crossed the border into the United States surreptitiously and without inspection"—"would have no realistic defense that he in good faith believed that he was legally present in the United States," without regard to whether he had consulted the immigration statutes and arrived at a firm assessment of his status. *Ibid.*

2. Petitioner alternatively contends (Pet. 23-27) that review is warranted to clarify what opportunity an appellate court applying plain-error review to a forfeited omitted-element claim should afford to a defendant to demonstrate how he would have contested the element. That contention does not warrant review.

a. In *Greer* v. *United States*, *supra*, this Court applied the traditional plain-error framework under Federal Rule of Criminal Procedure 52(b) to forfeited omitted-element claims in cases predating *Rehaif*. 141 S. Ct. at 2096-2100. To prevail on appellate review of an error that "was not brought to the [district] court's attention," the defendant must show, *inter alia*, that the error "affect[ed his] substantial rights." Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (Under Rule 52(b), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice."). *Greer* explained that, in the context of a *Rehaif* claim, the defendant has the burden of showing that, but for the omission, "he would have presented evidence in the district court that he did not in fact know he was a [prohibited person] when he possessed firearms." 141 S. Ct. at 2097. The Court observed that, "if a defendant does not make such an argument or representation on appeal, the appellate court will have no reason to believe that the defendant would

have presented such evidence to a jury, and thus no basis to conclude that there is a 'reasonable probability' that the outcome would have been different absent the *Rehaif* error." *Ibid.* Because neither defendant at issue in *Greer* had made such an assertion on appeal, the Court upheld their convictions. *Id.* at 2097-2098.

Petitioner asserts (Pet. 24) that he "had no opportunity to present any evidence on the *Rehaif* knowledge element at trial" and "also had no opportunity to make such a showing on appeal." That assertion lacks merit. Petitioner was afforded multiple opportunities to raise such an argument, yet he failed to do so until after the panel's opinion issued. In his post-*Rehaif* motion for a new trial, petitioner argued that he was "entitled to a new trial for the government to establish [his] guilt on *all* elements," but he did not assert that he was ignorant of his status as a noncitizen admitted under a nonimmigrant visa and was prepared to offer evidence to that effect. D. Ct. Doc. 122, at 10 (Aug. 7, 2019). In his opening brief in the court of appeals, petitioner asserted that, as the law stood at the time of his trial, he "would not have been permitted to testify to his ignorance that his legal status as a non-immigrant alien prohibited him from possessing a firearm," Pet. C.A. Br. 19; but he did not assert that he was unaware of the nonimmigrant-visa-holder status itself, or that he could have offered testimony to that effect. See Pet. C.A. Reply Br. 22.

Indeed, it was the government that sought unsuccessfully to enlarge the record to facilitate plain-error review of petitioner's claim of *Rehaif* error. While petitioner's appeal was pending, the government filed a motion in the district court seeking to expand the record on appeal, in anticipation that the Ninth Circuit would "consider[] evidence from outside the trial record" in

evaluating petitioner's *Rehaif* claim, D. Ct. Doc. 157, at 3 (Dec. 26, 2019). Petitioner opposed that motion, D. Ct. Doc. 161 (Dec. 30, 2019), and the district court denied it, D. Ct. Doc. 165, at 13 (Jan. 27, 2020).

Only after the panel issued its initial opinion affirming his conviction did petitioner assert that he "would welcome the opportunity to submit new evidence on the *Rehaif* element" and "would deny that he knew he was a prohibited person," C.A. Pet. for Reh'g 14-15. When the panel denied rehearing, it amended its opinion to note that petitioner "on appeal largely failed to articulate how he would have proceeded differently at trial other than to argue that he lacked the intent and that the government did not meet its burden." Pet. App. 15. Petitioner contends (Pet. 26) that the court of appeals should have afforded him a further opportunity to develop the record or to make a proffer. But petitioner was not entitled to a second chance after his conviction was upheld on plain-error review to carry his burden of showing how the district court's error affected his substantial rights.

b. Petitioner does not contend that the court of appeals' case-specific, factbound determination that he failed adequately to show how he would have proceeded differently at trial but for the omission of the knowledge-of-status element from the jury instruction conflicts with any decision of another court of appeals. And although petitioner asserts (Pet. 26) that the court of appeals failed properly to apply this Court's decision in *Greer*, he acknowledges (Pet. 27) that *Greer* did not specify any particular procedure for defendants to show on appeal how they would have proceeded differently but for an error. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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