No. 21-816

In The
Supreme Court of the United States

MELVYN GEAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Absent a grant of certiorari, petitioner Melvyn Gear will be imprisoned and then deported based on his possession of a single .22 caliber bolt-action rifle. This punishment will be imposed even though the jury at his trial did not find the *Rehaif* knowledge element. Indeed, it is *undisputed* in this case that Gear's Fifth and Sixth Amendment rights to a jury verdict on each element were violated.

Gear seeks a new trial so that a jury may determine his guilt on the omitted element. The government, eager to avoid troublesome but constitutionally mandated procedures such as jury trial, urges this Court to ignore Gear's case. It contends that this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), does not, in fact, render a mistake of collateral law a defense to an offense under 18 U.S.C. § 922(g). And it contends that Gear somehow failed to sufficiently "assert" his mistake of law defense below.

Both these contentions involve a bare denial of reality. Certiorari is warranted.

ARGUMENT

I. Under Both the Text of the Statute and this Court's Decision in *Rehaif*, a Mistake of Collateral Law is a Defense.

1. The government argues that *Rehaif* does not require knowledge of collateral law. Instead, according

to the government, the *Rehaif* knowledge requirement for prosecutions under § 922(g) is satisfied if a defendant "knew the relevant facts." Opp. at 14. That argument is contrary to both the text of the statute and the core rationale of *Rehaif*.

Start with the statutory text. It prohibits possession of firearms by those present in the United States on "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)))." 18 U.S.C. § 922(g)(5)(B). Possession of a nonimmigrant visa, as that term is defined by the INA, is an element of the offense. The portion of the statute defining the criminal offense includes an explicit knowledge requirement. In *Rehaif*, this Court held that the knowledge requirement applies to each and every statutory element of the offense. 139 S. Ct. at 2196.

The conclusion of the syllogism is straightforward: A defendant must know that he has a nonimmigrant visa, as that term is defined by the INA. But the government denies that the text means what it says.

2. If the statutory text were not clear enough, consider the core rationale of *Rehaif*. This Court centered its decision on an extensive discussion of the collateral law doctrine. Under that doctrine, where an element of a criminal offense is defined by a "'collateral' question of law," a mistake about that question of law is a defense. *Id*. at 2198.

Again, that rationale applies straightforwardly here. An element of the offense here is defined by a

question of collateral law—namely, the INA's definition of a "nonimmigrant visa." Thus, under the collateral law doctrine, if a defendant misunderstands what kind of visa he has, then he is not guilty of the crime. In this context, a mistake of law *is* a defense.

To make this more concrete, consider a hypothetical defendant who knows that he has an H1-B visa, but does not know that such a visa counts as a "nonimmigrant visa" under 8 U.S.C. § 1101(a)(26). Is that person guilty of a federal offense—subject to imprisonment or deportation—based on his mistake? This is analytically no different from a person convicted of an assault who thereafter does not realize that his assault is a felony for purposes of the offense of being a felon in possession of a firearm. *See United States v. Games-Perez*, 667 F.3d 1136, 1142-44 (10th Cir. 2012) (Gorsuch, J., concurring) (discussing such a case).

Under the collateral law doctrine, as applied by this Court in *Rehaif*, the answer to both hypotheticals is "no"; the required knowledge to commit the offense is absent. But the government denies that *Rehaif* means what it says.

3. How does the government justify its position? One might have expected the government to argue that *Rehaif*, which interpreted § 922(g)(5)(A), does not apply to the other subsections, including § 922(g)(5)(B). That sort of distinction, although implausible, is within every competent lawyer's bailiwick.

But the government appears to make an even broader argument, suggesting that *Rehaif* itself does not require any knowledge of collateral law. The government relies heavily on *Liparota v. United States*, 471 U.S. 419 (1985), and *Staples v. United States*, 511 U.S. 600 (1994), Opp. at 12-13—neither of which involved the collateral law doctrine. The government's opposition barely discusses *Rehaif* itself, much less acknowledges the collateral law doctrine, which was *the* central principle underlying the holding of *Rehaif*.

When the government finally, begrudgingly mentions the collateral law doctrine, here is its argument:

> 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. . . . But the record here instead showed "overwhelming[]" evidence that petitioner knew the relevant facts.

Opp. at 14.

The first sentence of that quotation flips the burden. A defendant does not need to "demonstrate his ignorance or mistake"—rather, the government must affirmatively prove his knowledge beyond a reasonable doubt. The second sentence elides the very distinction that is at the heart of this case. Even if it were true that Gear "knew the relevant facts"—such as that he had an H1-B visa—that would not show that he

knew he had "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)))." 18 U.S.C. § 922(g)(5)(B).

4. Finally and inevitably, the government comes to the Real Reason for its opposition: Applying *Rehaif* straightforwardly would make it too hard to prosecute people. The government complains that because few defendants have the "legal acumen" to understand immigration law, requiring knowledge of collateral law would place an "unduly heavy burden" on the government. Opp. at 15.

As always, "the Government exaggerates the difficulties." *Santos v. United States*, 553 U.S. 507, 519 (2008) (plurality op. of Scalia, J.). Millions of visa holders know that they have nonimmigrant visas, in part because most visas are clearly identified as such. H1-B visas are admittedly problematic, because they are "dual intent" visas, meaning they allow someone to immigrate temporarily while also proclaiming the intent to stay permanently. *See* 8 C.F.R. § 214.2(h)(16)(i); *Dandamundi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012). They have characteristics of a legal fiction, existing in some gray area between immigrant and nonimmigrant visas. But if H1-Bs are difficult to classify legally, that only means that it might be difficult to prosecute H1-B holders under § 922(g)(5)(B). That problem does not extend to the scores of other types of visa.

More fundamentally: The government's burden *should* be heavy. Just as there are good reasons for the high burden of proof in criminal cases, there are good reasons that criminal statutes must be interpreted narrowly. It is supposed to be hard to put people in prison and deport them. Fairness and the constitution demand nothing less.

Moreover, as a matter of public choice and democratic lawmaking, strict interpretations of criminal statutes "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Santos*, 553 U.S. at 514. If prosecutions under § 922(g)(5)(B) are too difficult after *Rehaif*, then Congress can amend the statute—it could list the prohibited visas, or it could remove the knowledge requirement altogether. The Department of Justice is the most powerful lobbying force in the country on any matter of federal criminal law, so if it needs the law changed, it is free to lobby Congress to do so. What it cannot do is ignore the clear holdings of this Court.

Rehaif does indeed make it harder to prosecute offenses under § 922(g). That's ok. The world has not ended as a result of applying *Rehaif* to other subsections, and it will not end as a result of applying *Rehaif* to § 922(g)(5)(B). Both law and logic require it.

II. The Defendant Deserves an Opportunity to Make a Showing Regarding the Omitted Element.

1. *Rehaif* was not decided until after Gear's trial, and *Greer v. United States* not decided until Gear's appeal was nearly complete. 141 S. Ct. 2090 (2021). In part as a result, Gear never had an opportunity to offer any evidence regarding the omitted element. Now, demonstrating a remarkable degree of chutzpah (or shamelessness), the government claims that Gear "did not avail himself of multiple opportunities to show how he might have countered the evidence." Opp. at 8. And yet the government never describes where in the record these chimerical opportunities appear.

Let us return to reality. Prior to trial, the district court excluded all evidence and argument regarding innocent possession—because it held, consistent with then-existing precedent, that the only knowledge requirement was knowing possession of a gun.

Consequently, the issue was not disputed at trial, and Gear had no opportunity to counter the evidence. The government cynically exploits that lacuna. For example, quoting the Ninth Circuit opinion, the government says that when agents showed up at his house, Gear admitted that he could not possess a firearm because he was not a citizen. Opp. at 3. The government presents this as an undisputed fact. To be clear: Gear denies that he ever said any such thing. But there was no reason for Gear to testify at trial to counter the arresting officers' testimony in this

regard—because it did not go to an essential element of the offense, and because the bulk of his testimony was barred by the trial court's *in limine* order.

The evidence cited by the government only *looks* convincing—undisputed and "overwhelming"—because Gear had no meaningful opportunity to contest it at trial.

2. And of course Gear could not testify or submit an affidavit or other new evidence on appeal. He could only make legal arguments based on the existing record. That is in part because his briefing was filed before *Greer* was decided.

In his briefing, he repeatedly noted that no evidence regarding the element was admitted by either party at trial because it was barred by the trial court order. The government faults Gear for failing to "assert" in his briefing that he did not know he had a nonimmigrant visa. Opp. at 19. That is pure sophistry. Here is but one example where Gear made this point: "There is no evidence in the record that he understood an H-1 B was still, legally, a 'nonimmigrant visa.' Nor is it inherently obvious that a layperson like Mr. Gear would have understood the legal distinction, given the absurdly complex structure of the INA." Pet. C.A. Reply Br. 2.

At oral argument on appeal, Gear again emphasized that he was precluded from testifying at trial—and that even without his testimony, there was evidence in the record that Gear "was planning and hoping to remain in the United States permanently"

and that he "thought he was here on immigrant status." C.A. Oral Arg. at 13:05-14.

Gear cannot be faulted for failing to make a more formal proffer or submit evidence on appeal—because any such move would have violated the then-existing rules of appellate procedure and Ninth Circuit case law.

In *Greer*, this Court held for the first time that defendants in omitted element cases should be given an opportunity to make an "argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon." *Id*. at 2100. Following *Greer*, Gear filed both a 28(j) letter and also a petition for rehearing where he requested the opportunity to do just that. He stated clearly that he would—if given the opportunity—present evidence that he did not know he had a nonimmigrant visa.

But the Ninth Circuit simply ignored his request and affirmed the majority opinion.

3. The government states that "*Greer* did not specify any particular procedure for defendants to how on appeal how they would have proceeded differently but for an error." Opp. at 20. That is true, and it is precisely the problem—in the absence of some direction from this Court regarding *what* procedures are appropriate, lower courts will often take the easy path and give defendants *none*. Which is exactly what happened below.

Even if it would be better for the circuits to work this out in the first instance, the proper result here would be for this Court to grant, vacate, and remand with instructions for the court below to make available *some procedure* so that the defendant can make a proffer or showing on the omitted element.

It is not simply that such a result is necessary to give concrete meaning to *Greer*—it is also that such a result is necessary to enforce the Fifth and Sixth Amendments. Under the Constitution, a defendant cannot be found guilty of an offense until a jury finds each element beyond a reasonable doubt. In this case, it is undisputed that those rights were violated. The government's Kafkaesque arguments notwithstanding, Gear never had a chance to contest those elements. All he requests is some opportunity to show that he did not, in fact, know that he had a nonimmigrant visa and therefore that he is not guilty of this offense.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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