

No. \_\_\_\_\_  
\_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

EVARISTO CONTRERAS SILVA — PETITIONER

VS.

UNITED STATES — RESPONDENT

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

Douglas Lee Harville # 27235  
The Harville Law Firm, LLC  
P.O. Box 52988  
Shreveport, Louisiana 71135-2988  
Telephone: (318) 222-1700  
Telecopier: (318) 222-1701  
lee.harville@theharvillelawfirm.com  
APPELLATE ATTORNEY FOR  
EVARISTO CONTRERAS SILVA,  
DEFENDANT/APPELLANT/PETITIONER

## QUESTION PRESENTED

Whether, in prosecutions under 18 U.S.C. § 922(g)(5), the Government must—in order to separate wrongful acts from innocent acts—offer direct evidence to establish a defendant, such as Evaristo Contreras Silva, acted with a vicious or evil intent (e.g., evidence establishing a defendant, such as Mr. Contreras, actually knew he was not legally present in the United States) in order to prove guilt beyond a reasonable doubt when a defendant, such as Mr. Contreras, offered direct evidence, including his testimony, bond paperwork, and a Form I-94 “permit,” to support his mistaken belief the Form I-94 permit had an effect on his immigration status, a mistaken impression falling squarely within *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019) (“a mistaken impression concerning the legal effect of some collateral matter . . . that . . . results in his misunderstanding the full significance of his conduct, . . . negat[es] an element of the offense[]” (internal citation and quotation marks omitted)).

The majority of a 3-judge panel at the United States Fifth Circuit Court of Appeals found “[t]he Government provided sufficient evidence under *Rehaif* for a reasonable jury to find, beyond a reasonable doubt, that Contreras Silva knew he was in the United States unlawfully when he possessed a firearm. That there was evidence pointing in the other direction does not in itself justify a judgment of acquittal. The jury weighed the evidence, including Contreras Silva’s testimony, and concluded that he knew he was in the United States

unlawfully. The jury's verdict was not unreasonable or based on insufficient evidence." *United States v. Silva*, 92 F.4th at 553.

Judge James E. Graves, in dissent, noted "[t]he government had the burden of proof to provide sufficient evidence that Contreras knew he was in the category barred from possessing a firearm. Even if the jury implicitly deemed Contreras' testimony that he did not know he was in that category as not credible, it in no way makes up for the government's failure to offer evidence that he knew otherwise. Instead, the government conceded that Contreras 'thought' the Form I-94 'permit' had an effect on his immigration status. That 'mistaken impression' falls squarely within *Rehaif*. *Id.* at 2198." *Silva*, 92 F.4th at 555.

For the reason set forth herein and in Judge Graves' dissent, the Fifth Circuit panel erred and construed the provision of § 922(g) in a manner that would "require no knowledge of status. . . and might well apply to an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status[,"] a result this Court warned about in *Rehaif*. 139 S. Ct. 2197-98. Because the Fifth Circuit's decision implicates this Court's above-referenced concerns noted in *Rehaif*, this Court should grant a writ of certiorari, correct this error, and provide guidance for this situation that is likely to recur given the confusion created by the Government's issuance of Form I-94 permits and similarly-worded documents to aliens released on immigration bonds.

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

AUSA Leon Harrell Whitten and  
AUSA William Gaskins  
United States Attorney's Office  
Western District of Louisiana  
300 Fannin Street  
Suite 3201  
Shreveport, Louisiana 71101  
(for the United States), and

AUSA T. Forrest Phillips  
United States Attorney's Office  
Western District of Louisiana  
800 Lafayette Street, Suite 2200  
Lafayette LA 70501-6865  
(for the United States).

## RELATED CASES

1. *United States v. Silva*, 2022 U.S. Dist. LEXIS 142891, 2022 WL 3233295 (W.D. La. Aug. 9, 2022)
2. *United States v. Silva*, 92 F.4th 547 (5th Cir. Feb. 12, 2024)

## TABLE OF CONTENTS

QUESTION PRESENTED .....	i
LIST OF PARTIES.....	iii
RELATED CASES .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES CITED .....	v
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT.....	7
CONCLUSION.....	14

## INDEX TO APPENDICES

APPENDIX A	Oral reasons denying motions for judgment of acquittal, <i>United States v. Silva</i> (W.D. La. Aug. 16, 2022)
APPENDIX B	Written reasons denying motion for judgment of acquittal, <i>United States v. Silva</i> , 2022 U.S. Dist. LEXIS 142891, 2022 WL 3233295 (W.D. La. Dec. 8, 2022)
APPENDIX C	Decision of the United States Fifth Circuit Court of Appeals, <i>United States v. Silva</i> , 92 F.4th 547 (5th Cir. Feb. 12, 2024)

## TABLE OF AUTHORITIES CITED

	PAGE NUMBER
<b>CASES</b>	
<i>Rehaif v. United States</i> , 139 S. Ct. 2191, 2198 (2019) .....	i-ii, 6-7
<i>United States v. Silva</i> , 92 F.4th 547 (5th Cir. Feb. 12, 2024) .....	ii-iii, 1, 6, 11-13
<i>United States v. Silva</i> , 2022 U.S. Dist. LEXIS 142891, 2022 WL 3233295 (W.D. La. Aug. 9, 2022) .....	1
<b>STATUTES AND RULES</b>	
8 C.F.R. 241-16(A).....	10-11
18 U.S.C. § 922(g).....	ii
18 U.S.C. § 922(g)(5) .....	i, 3, 5
28 U.S.C. § 1254(1).....	2

IN THE  
SUPREME COURT  
OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

The opinion of the United States Fifth Circuit Court of Appeals appears at Appendix C to the petition and is reported at *United States v. Silva*, 92 F.4th 547 (5th Cir. Feb. 12, 2024).

The transcript of the oral reasons by the United States District Court for the Western District of Louisiana denying the motions for judgment of acquittal appears at Appendix A. See *United States v. Silva* (W.D. La. Aug. 16, 2022) and is unpublished.

The written reasons by the United States District Court for the Western District of Louisiana denying the motion for judgment of acquittal appear at Appendix B and are reported at *United States v. Silva*, 2022 U.S. Dist. LEXIS 142891, 2022 WL 3233295 (W.D. La. Dec. 8, 2022).

## **JURISDICTION**

The United States Court of Appeals decided the case on February 12, 2024.

No petition for rehearing was filed timely in the case. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(5) provides:

It shall be unlawful for any person-

....

- (5) who, being an alien, is illegally or unlawfully in the United States;

....

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.

## STATEMENT OF THE CASE

### A. Relevant Facts

On February 2, 2022, Mr. Contreras was questioned by law enforcement officers at his home. ROA. 334-42. Mr. Contreras admitted he had a firearm in his truck. ROA. 340-42, 453. Mr. Contreras was not arrested. ROA. 334-42.

On February 16, 2022, Mr. Contreras was arrested at his home on charges arising from domestic abuse battery allegations. ROA. 349-54.

On February 18, 2022, ATF agents recovered a firearm from Mr. Contreras' truck. They also recovered ammunition from the firearm and from Mr. Contreras' home. ROA. 400-07, 419-28.

At the time Mr. Contreras possessed the firearm, he was in the United States illegally according to case law and statutory law. However, Mr. Contreras testified he believed he was lawfully in the United States.

Specifically, Mr. Contreras believed he was legally in the United States from the time he was released from immigration custody until the immigration judge ruled on his applications for asylum and for withholding of removal and for cancellation of removal and adjustment of status for certain nonpermanent residents. ROA. 444-53, 457. In part, this belief was based on conversations Mr. Contreras had with his attorneys and because the United States gave Mr. Contreras a "permit," a Form I-94, when it released him on bond pending the resolution of Mr. Contreras' above-referenced applications. R. 179-80, 331-32, 444-53, 457.

B. Action before the District Court

On March 9, 2022, Mr. Contreras was indicted and charged with possession of a firearm by an illegal alien. ROA. 4, 30-31. The Government charged that, “not later than February 18, 2022, the defendant, **Evaristo Contreras Silva**, knowing he had been an alien illegally and unlawfully in the United States, did knowingly possess, in and affecting commerce, ammunition and a firearm, to wit, a Hi-Point, Model: C9 Lugar, Caliber: 9mm, all in violation of Title 18, United States Code, Section 922(g)(5).” ROA. 30. Mr. Contreras entered a plea of not guilty on March 14, 2022. ROA. 4, 33-34.

On August 15, 2022, jury selection occurred. ROA. 7, 111-12. From August 15, to August 16, 2022, a jury trial occurred. ROA. 7-8, 111-12, 114-15, 181-92, 226-519. On August 16, 2022, the jury found Mr. Contreras guilty as charged. ROA. 7, 114-15, 225, 512-15.

Mr. Jones made timely oral and written motions for judgment of acquittal, after the Government’s case-in-chief, after the defense rested, and after the jury returned the verdict. ROA. 7-9, 194-99, 431-34, 459-60. The Government opposed the motions, and the District Court denied the motions. ROA. 7, 201-11, 434-38, 459-60.

On December 13, 2022, the District Court sentenced Mr. Contreras to 15 months of imprisonment. ROA. 9, 213-21, 520-37. A timely notice of appeal was filed from the December 22, 2022, judgment on December 28, 2022. ROA. 9, 222-23.

On February 12, 2023, a divided panel of the United States Fifth Circuit Court of Appeals affirmed Mr. Contreras' conviction and sentence. A dissenting member of the panel found Mr. Contreras' conviction should have been reversed and the matter remanded because Mr. Contreras lacked "the guilty state of mind that the statute's language and purposes require." *See Silva*, 92 F.4th at 552-55. (quoting *Rehaif*, 139 S. Ct. at 2198). Therefore, the Government failed to meet its "burden of proof to provide sufficient evidence that Contreras knew he was in the category barred from possessing a firearm." *Silva*, 92 F.4th at 555.

This timely petition follows.

## REASONS FOR GRANTING THE PETITION

Mr. Evaristo Contreras Silva's jury was instructed the Government had to prove beyond a reasonable doubt: "Third: That at the time of possession of the firearm or ammunition, the defendant knew he was an alien illegally or unlawfully in the United States[.]" ROA. 186; *accord Rehaif*. Mr. Contreras testified he believed he was in the United States legally from the time he was released from immigration custody on bond with his government-issued Form I-94 permit until the immigration judge ruled on his applications for asylum and for withholding of removal and for cancellation of removal and adjustment of status for certain nonpermanent residents. ROA. 444-53, 457. The hearing before the immigration judge was set to occur in January 2023, after the date of Mr. Contreras' instant arrest. ROA. 295-96, 443.

Mr. Contreras testified this belief was based in part on advice from his immigration attorneys while he was in immigration custody and his government-issued Form I-94 permit. *See* ROA. 179-80, 444-53, 457. Further, Mr. Contreras noted his immigration bond, which released him from immigration custody/detention, had only 2 conditions, no new arrests and no driving without a driver's license. *See* ROA. 444-53, 457. Until the time of Mr. Contreras' arrest in this matter, he complied with both conditions. ROA. 444-53, 457.

Marlowe Spellman, "a deportation officer with the Homeland Security, Immigration and Customs Enforcement" testified a Form "I-94 is what you receive

when you legally enter the United States. It gives you the reason you are admitted, and it also gives you the length of time you're allowed to stay." ROA. 242.

As Officer Spellman testified, a Form I-94 signifies a legal entry into the United States, and a Form I-94 number is assigned along with the Form I-94. ROA. 273. At the time of his arrest, Mr. Contreras had in his custody a government-issued Form I-94 permit. ROA. 179-80, 307-09. Mr. Contreras's government-issued Form I-94 permit read:

You are required to retain this permit in your possession and surrender it to the transportation line at the time of your departure unless you depart over the land border of the United States in which case you must surrender it to a Canadian immigration officer on the Canadian border, or to a United States immigration officer on the Mexican border.

ROA. 180 (emphasis added), *accord* ROA. 308-10.

The Government addressed Officer Spellman's testimony and the plain language of the Form I-94 permit by arguing Officer Spellman gave an inartful explanation of the impact on the Form I-94 permit. Gov't Br., 14 n.2. One only can wonder what inartful explanation was given to Mr. Contreras by his attorneys and by Department of Homeland Security officials who lacked Officer Spellman's training and preparation before he testified under oath at Mr. Contreras' trial. This "wonder" alone establishes the Government failed to rebut beyond a reasonable doubt Mr. Contreras' sworn testimony he believed the plain language of his government-issued Form I-94 permit made legal his presence in the United States on bond while his immigration status was resolved.

The United States described the Form I-94's use of the word "permit" as fleeting. Gov't br., 12-13. However, words have consequences and meaning. The Government's arguments at trial and in its briefing offer no proof beyond a reasonable doubt Mr. Contreras' interpretation of his government-issued Form I-94 permit was unreasonable or that Mr. Contreras did not reasonably believe his government-issued Form I-94 permit made lawful his presence on bond in the United States pending the determination of his immigration status.

The Government notes three documents advised Mr. Contreras they did not "grant any immigration status." Gov't br., 4; *accord, e.g.*, Gov't br., 14. The Government did introduce Form I-797C, Notice of Action. ROA. 291-97, 328-29. This form provides "THIS NOTICE DOES NOT GRANT ANY IMMIGRATION STATUS OR BENEFIT." ROA. 409-13.

These document were nothing more than notices of appointment times and locations. *See* ROA. 313. As such, it was reasonable for Mr. Contreras to believe these documents could not grant or take away the status his Form I-94 permit provided to him. For these reasons, these notice documents were irrelevant to Mr. Contreras' reasonable belief his government-issued Form I-94 permit granted him lawful status in the United States while on bond from immigration custody/detention pending a final determination of his immigration status. ROA. 321-22.

Again, Mr. Contreras testified he believed his government-issued Form I-94, which the Department of Homeland Security refers to in the Form I-94 itself as a "permit," made his presence in the United States lawful while Mr. Contreras was on

lawful bond awaiting a ruling on his lawfully-filed immigration documents to change his immigration status. At the time of his arrest, Mr. Contreras possessed his government-issued Form I-94 permit, which he believed, according to his testimony, made it lawful for him to be in the United States pending the determination of his immigration status. ROA. 261-74, 282-90. Based on the plain language of this government-issued Form I-94 permit, Mr. Contreras believed he had lawful status/permission (a permit) to be in the United States on bond while Mr. Contreras' immigration status was decided. ROA. 179-80.

The reasonableness of Mr. Contreras' belief was buttressed by Mr. Contreras' interaction with law enforcement before his instant arrest. When interacting with law enforcement prior to his instant arrest, Mr. Contreras admitted he possessed a firearm. ROA. 340-42, 453. Mr. Contreras was not arrested when he initially made this admission or when law enforcement initially found Mr. Contreras in possession of a firearm when he was in Bossier Parish on lawful bond. ROA. 334-42.

The Government noted Mr. Contreras was aware his release on bond was conditioned upon his appearance at hearings to contest his immigration status. Gov't br., 7. Admittedly, Mr. Contreras had entered the United States illegally. ROA. 268, 297-98. Further, he had received paperwork in which the Government alleged Mr. Contreras was in the United States illegally and was subject to removal. ROA. 247-61, 300-04, 326-27. However, Mr. Contreras, after seeking relief from deportation, also was informed that, “[i]f you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8

CFR 241-16(A) and specific addresses and locations for surrender can be obtained from your local DHS office or over the internet.” ROA. 252; *accord* ROA. 251-53, 256-63, 327.

While the Government’s brief describes the Form I-94 permit as a “sparse immigration document,” Gov’t br., 7-8, 10, the Government does not, and cannot, deny the Department of Homeland Security in the Form I-94 itself described the Form I-94 as a permit. The government-issued Form I-94 permit certainly did not change Mr. Contreras’ underlying immigration status. However, the Government cannot establish beyond a reasonable doubt Mr. Contreras did not reasonably believe his government-issued Form I-94 permit gave him permission to live lawfully on bond in the United States while he lawfully challenged his immigration status.

Indeed, as the Government concedes Mr. Contreras testified he did, in fact, believe the government-issued Form I-94 permit made legal his presence on bond in the United States while he challenged his immigration status. Gov’t br., 8-9. That is, the Government failed to prove beyond a reasonable doubt Mr. Contreras knew he was in the United States illegally. Rather, the Government proved beyond a reasonable doubt that, at the time of his instant arrest, Mr. Contreras knew he was on bond with a government-issued Form I-94 permit living freely and openly in the United States while his immigration status was being challenged lawfully. See *Silva*, 92 F.4th at 552-55.

Thus, at the time of his arrest, Mr. Contreras had submitted paperwork to allow him to remain in the United States legally. ROA. 261-74, 282-90. Further, Mr. Contreras had a government-issued Form I-94 permit, which he reasonably believed gave him lawful status to be in the United States legally while his immigration status was resolved. ROA. 179-80; *see Silva*, 92 F.4th at 552-55.

For these reasons, the Government failed to prove beyond a reasonable doubt that, contrary to Mr. Contreras' testimony and evidence, he "knew he was an alien illegally or unlawfully in the United States[]" when he possessed the firearm and ammunition. ROA. 186. Indeed, the Government introduced no statement, oral or written, from Mr. Contreras to contradict his testimony. Moreover, the Government offered no relevant form to contradict Mr. Contreras' testimony. *See Silva*, 92 F.4th at 552-55.

This is not a case that involved a prior conviction, a prior notification, a cancelled visa, an overstayed visa, or some other document or event that controverted Mr. Contreras' sworn testimony. Mr. Contreras is a citizen of Mexico who speaks English as a second language. He did his best to comply with the conditions of his immigration bond and his government-issued Form I-94 permit pending the ruling on his immigration status by the immigration judge. He possessed the firearm and ammunition openly and admittedly while he thought he had a government-issued Form I-94 permit that made his continued presence in the United States lawful pending the ruling on his immigration status. ROA. 179-80, 332-33; *see Silva*, 92 F.4th at 552-55.

Given Mr. Contreras' possession of a government-issued Form I-94 permit and the plain language in the government-issued Form I-94 permit, Mr. Contreras reasonably believed he was in the United States lawfully when he was in possession of the firearm at issue herein. For these reasons, the Government failed to meet its burden of proof. Therefore, Mr. Contreras' conviction must be reversed, his sentence must be vacated, and a judgment of acquittal must be entered. *See Silva*, 92 F.4th at 552-55.

Accordingly, Mr. Contreras respectfully submits the District Court erred. Therefore, Mr. Contreras respectfully submits this Court should reverse his conviction, should vacate his sentence, and should enter a judgment of acquittal.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,  
/s/ Douglas Lee Harville  
Douglas Lee Harville # 27235  
Louisiana Appellate Project  
P.O. Box 52988  
Shreveport, Louisiana 71135-2988  
Telephone: (318) 222-1700  
Telecopier: (318) 222-1701  
lee.harville@theharvillelawfirm.com  
APPELLATE ATTORNEY FOR  
EVARISTO CONTRERAS SILVA,  
DEFENDANT/APPELLANT/PETITIONER

Date:  
April 10, 2024