No. _____

# 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**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case presents two questions for review.

1. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court held in a prosecution under 18 U.S.C. § 922(g), the government must prove that the defendant knew his legal status, and thus that a mistake of collateral law is a defense. But this Court left open the possibility that different subdivisions of 18 U.S.C. § 922(g) might have different knowledge requirements. Some circuits have held that, as to all subdivisions, *Rehaif* requires knowledge of collateral law. Other circuits, including the Ninth Circuit panel below, have held that when applied to other subdivisions, *Rehaif* may be satisfied by a showing that defendant was aware of the facts underlying his status.

The first question presented is whether other subdivisions of 18 U.S.C. § 922(g) require knowledge of collateral law.

2. In *Greer v. United States*, 141 S. Ct. 2090 (2021), this Court stated that a defendant may satisfy his burden of demonstrating plain error in an omitted-element case by making an argument or representation on appeal regarding the omitted element. Petitioner in this case requested an opportunity to make such a showing, but his request was ignored by the Ninth Circuit panel, which relied solely on trial evidence in analyzing plain error.

The second question presented is whether appellate courts must give a defendant an opportunity to make an evidentiary proffer to satisfy his burden of demonstrating plain error.

## STATEMENT OF RELATED CASES

- *United States v. Melvyn Gear*, No. 17-cr-00742-SOM, U.S. District Court for the District of Hawaii. Judgment entered on September 27, 2019.
- *United States v. Melvyn Gear*, No. 19-10353, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on August 30, 2021.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Melvyn Gear respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## OPINION BELOW

The Ninth Circuit's opinion, which is published at 9 F.4th 1040, is reproduced at App. 1-26.

## JURISDICTION

The Ninth Circuit issued its amended opinion on August 30, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 924(a)(2) of the United States Code states: "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

Title 18, Section 922(g)(5)(B) provides, in pertinent part: "It shall be unlawful for any person . . . (5) who, being an alien . . . (B) . . . 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))). . . ."

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

## INTRODUCTION

In this case, it is undisputed that a jury found petitioner guilty of a federal offense without finding an essential *mens rea* element. It found that petitioner had possessed a gun, but it did not find that he was aware of his prohibited status—because the jury instructions failed to include that element. The Ninth Circuit nonetheless affirmed his conviction by watering down the meaning of the *mens rea* element and by declining to give petitioner an opportunity to present exculpatory evidence going to that element.

That a criminal offense requires that an intent to do a wrongful act is no "provincial or transient" notion, but rather a "universal and persistent" feature of Anglo-American criminal law. *Morissette v. United States*, 342

U.S. 246, 250 (1952). For that reason, in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court held that in a prosecution for the illegal possession of a gun under 18 U.S.C. § 922(g)(5)(A), the government must prove not only that a defendant knew he had a gun, but also that the defendant knew of his status as a prohibited person. This Court applied the collateral law doctrine, and it made clear that the requisite knowledge is knowledge of *legal* status. But this Court declined to address "precisely the Government must prove to establish a defendant's knowledge of status" for other subsections of § 922(g). *Id*. at 2020.

There is now a clear conflict between the circuits regarding the application of *Rehaif* to other subdivisions of section 922(g). Some Courts of Appeals have closely followed this Court in requiring as an element of a 922(g) offense that a defendant know his *legal status* as a prohibited person. Other circuits, including the panel majority below, have held that the government need only prove the defendant's knowledge of *the facts* underlying that status.

The latter concept finds no mention in the language of *Rehaif*. Equally problematic is the rationale upon which it has been justified by the Ninth and other circuits: that the *Rehaif* definition of the *mens rea* element of a 922(g) offense would make it too difficult to convict a defendant. As the concurring judge below candidly admitted, applying *Rehaif* straightforwardly would make it "nearly impossible" to prove guilt, so the majority felt compelled to offer a "second type" of evidence that could be used to convict. App. 17.

That logic echoes that of the government in *United States v. Santos*, where, as Justice Scalia noted, its interpretation of the money laundering statute would make it "easier to prosecute" such offenses. While Justice Scalia agreed that a contrary reading would "unquestionably require proof that is more difficult to obtain," he found the government's "position turns the rule of lenity upside down," as the rule required that "ambiguous criminal statutes [be read] in favor of defendants, not prosecutors." 553 U.S. 507, 519 (2008) (plurality op.). There is no canon of statutory interpretation that states courts should interpret criminal statutes in a way that eases the government's path to conviction.

* * *

The *Rehaif* decision also gave rise to a host of claims of plain error that in turn led to this Court's decision in *Greer v. United States*, 141 S. Ct. 2090 (2021). In *Greer*, this Court ruled that reviewing courts in omitted-element cases should consider the entire record, not just the trial record. It also held that courts should consider whether the defendant made an "argument or representation on appeal" about how what exculpatory evidence he could have marshaled on that element. *Id*. at 2100. That opportunity is particularly important in cases like this, where petitioner was barred by the trial court's ruling on a motion *in limine* from presenting any such evidence at trial.

But in *Greer*, this Court offered no guidance on how, as a procedural matter, a defendant can make

such a "representation" on appeal for the first time. Petitioner in this case repeatedly requested such an opportunity, but the Ninth Circuit panel gave him none. The Ninth Circuit's decision below raises an important issue as to the procedures to be followed in the wake of *Greer*.

## STATEMENT OF THE CASE

1. Petitioner Melvyn Gear is a 61-year-old Australian citizen who resides in Hawaii.

He was tried and convicted of violating 18 U.S.C. § 922(g)(5)(B), for possessing a firearm while being present in the United States on a nonimmigrant visa. The charges arose after federal agents discovered a .22 caliber bolt-action rifle in the house where petitioner resided. As a result of the conviction, he faces imprisonment and deportation.

2. Petitioner moved to Hawaii in 2013, and he began working there in the solar panel installation business. He legally resided in Hawaii on a series of work visas. He was initially admitted on an E-3 visa, which is a type of visa given to Australian nationals for work in specified fields.

Petitioner eventually switched to an H-1B visa because he hoped and intended to remain in the United States permanently. His prior wife remained in Australia when he moved to Hawaii, and in 2016, they divorced. While in Hawaii, he met his current wife,

Rhonda Kavanaugh, and they founded a solar installation business together. They eventually married.

In 2017, his ex-wife in Australia shipped many of petitioner's possessions to Hawaii. Among these possessions was a gun safe, which contained a single firearm, Gear's .22 caliber rifle.

3. At trial, federal agents testified as to how they discovered the rifle. Australian police contacted federal agents in the United States in the summer of 2017, and they informed the agents that they suspected petitioner may have illegally imported a gun.

On July 18, 2017, federal agents went to the Hawaii home where petitioner lived with Ms. Kavanaugh. Petitioner was home when they arrived. According to the agents, petitioner initially denied having a gun in the house, stating that he was not allowed to have a gun in the United States. When they produced a warrant, however, petitioner admitted that he had a gun and led them to the gun safe in the garage. The government indicted petitioner a few months later.

At trial, petitioner's defense rested primarily on the theory that he was unaware the safe contained a rifle.

4. The jury was not instructed on the *Rehaif* knowledge element. To the contrary, the district court excluded all evidence of innocent possession, and it instructed the jury that as long as it found petitioner knowingly possessed the gun, it must find guilt.

Prior to trial, the government moved to prohibit petitioner from presenting any defense of "innocent possession." The government relied on then-controlling Ninth Circuit cases law, which held that for the purposes of § 922 offenses, "'[k]nowledge' refers only to the defendant's knowingly possessing the gun." *United States v. Johnson*, 459 F.3d 990, 996 (9th Cir. 2006). The government thus sought to bar all evidence and argument regarding any sort of "innocent possession" defense.

The defense objected, and it argued that the knowledge requirement should apply to each element of the offense. In reply, again relying on then-controlling case law, the government argued that knowledge applied only to possession, and that it need not prove that the defendant knew his status as a prohibited person. According to the government's argument in reply, "[t]he government only has to prove that the defendant knowingly possessed the firearm and not that he knew he was in the United States pursuant to a nonimmigrant visa or that he knew that the rifle and been shipped or transported in foreign commerce."

The district court agreed with the government and granted the government's motion *in limine*. It ruled that petitioner could present evidence that he did not know he possessed the rifle, but all other evidence of innocent possession or mistake was precluded.

It subsequently instructed the jury along the same lines. The jury instructions at petitioner's trial thus required the jury to find only that petitioner knew he had

a gun. The instructions did not require the jury to find that petitioner knew of his prohibited status.

Based on these instructions, the jury found petitioner guilty on May 10, 2019.

5. Six weeks after petitioner's trial, on June 21, 2019, this Court issued its opinion in *Rehaif*. This Court held that § 922 offenses require not just knowing possession but also knowledge of prohibited status. After *Rehaif*, petitioner filed a motion for a new trial. The district court denied the motion. While it conceded that the instructions erroneously failed to include the *Rehaif* knowledge element, it held that the error was harmless.

6. Petitioner timely appealed. He argued primarily that the jury instructions at his trial failed to include an essential element of the offense—namely, the *Rehaif* knowledge element.

A divided panel of the Ninth Circuit affirmed the conviction. The panel initially issued a ruling on January 19, 2021. After petitioner filed a petition for rehearing, the panel issued an amended opinion on August 30, 2021. The amended opinion, which is published, consists of a per curiam majority, a concurrence, and also a dissent by Judge Bumatay.

The majority held that petitioner failed to properly object to the jury instructions, and thus that his claim was only reviewed for plain error. It held that the first two prongs of the plain error test were satisfied—the jury instructions were erroneous, and the error was

plain. *See* App. 14 ("Gear undisputedly satisfied the first two plain error prongs."). But it held that Gear could not show that the error affected his substantial rights because the evidence of his guilt on the missing *Rehaif* element was overwhelming.

The bulk of the majority's opinion was devoted to addressing the meaning of the *Rehaif* element. But the panel held that there are two ways to establish that element. First, the government can establish actual knowledge of legal status. But in the alternative, under a "second formulation," the government can establish that the defendant knew that his visa "possessed the components" that constitute the status. App. 11; *see also* App. 16 (Silver, D.J., concurring) ("The per curiam opinion states that knowledge required for a conviction under this statute can be established in two ways."). In other words, the panel held that it is sufficient to prove "knowledge of the 'offending characteristics' " that give rise to the prohibited status. App. 12.

The majority concluded, with that formulation, that the evidence at trial sufficiently proved petitioner's guilt on the *Rehaif* element—even if it was never found by the jury.

District Judge Silver, sitting by designation and joining the per curiam, wrote a concurrence further explaining the result. She noted that the "first type of knowledge"—that is, actual knowledge of legal status—would be "nearly impossible" to prove in many § 922(g)(5)(B) cases. App. 17. That is why, she explained, it would be necessary to allow proof of a

"second type" of knowledge. "Under the second type of knowledge, the 'plain error' analysis is straightforward." *Id*.

7. Judge Bumatay dissented. He noted that the evidence at trial was far from clear, and in any event, it was incomplete since the defense was precluded from preventing any evidence of innocent possession. "Had this [*Rehaif*] element been included in the jury instructions, Gear could have altered his trial strategy." App. 23.

Given the equivocal evidence and undeveloped record, he argued that the question should be determined by a jury rather than an appellate panel. "While skillful prosecutors may be able to convince a jury based on the evidence introduced at trial that Gear knew he had a nonimmigrant visa, reaching this conclusion on the jury's behalf requires us to build a 'veritable fairyland castle' of government-friendly inferences." App. 24 (quoting *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting)).

8. Throughout his appeal, petitioner noted that the trial court had barred him from presenting evidence on the omitted element, and thus that the trial record was largely silent as to that element. He requested some opportunity to make a showing on appeal—while also noting that the Rules of Appellate Procedure generally bar submission of new evidence on appeal.

The panel majority's initial opinion faulted Gear for failing to present evidence on the omitted element—

even though he had no opportunity to do so. In his petition for rehearing, Gear requested the opportunity to make a proffer.

While his petition for rehearing was pending, this Court issued its decision in *Greer v. United States*, 141 S. Ct. 2090 (2021). It held that a defendant attempting to show plain error under *Rehaif* should be allowed to make "an argument or representation on appeal that he would have presented evidence at trial that he did not in fact know" his legal status. *Id*. at 2100. Immediately after this Court's opinion, petitioner filed a 28(j) letter noting that language in *Greer* and again requesting some opportunity to make a showing.

The Ninth Circuit ignored his requests and denied his petition for rehearing. As with the initial opinion, the majority's amended relied solely on the trial record, and it ignored petitioner's representations about how he could have demonstrated his lack of knowledge—if given the chance to do so.

9. Although the district court denied petitioner's motion for a new trial, it found that he had substantial issues for appeal, and thus allowed petitioner to remain free on bail pending the appeal. The Ninth Circuit likewise granted petitioner's motion to stay the mandate, finding that he would have a substantial claim in a petition for certiorari. Petitioner thus remains free on bail pending the resolution of this petition.

## REASONS FOR GRANTING CERTIORARI

This case presents two issues for review. The first issue relates to how the *Rehaif* knowledge requirement applies to other provisions of § 922(g). Some circuits have held that, as to all subdivisions, *Rehaif* requires knowledge of collateral law. Other circuits, including the Ninth Circuit panel below, have held that when applied to other subdivision, *Rehaif* may be satisfied by a showing that defendant was aware of the facts underlying his status. This Court should clarify which approach is correct.

The second issue relates to appellate procedure for omitted element. In *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021), this Court stated that a defendant may satisfy his burden of demonstrating plain error in an omitted-element case by making "an argument or representation on appeal" regarding the omitted element. Petitioner in this case requested an opportunity to make such a showing, but his request was ignored by the Ninth Circuit panel. This Court should clarify what lower courts must do to give concrete meaning to the holding of *Greer*.

## I. Certiorari is Warranted to Settle a Division in the Circuits as to Whether the *Rehaif* Knowledge Can Be Satisfied by Knowledge of Factual Circumstances Rather Than Knowledge of Collateral Law.

### A. This Court Held in *Rehaif* That, as to Section 922(g)(5)(A), Knowledge of Collateral Law is an Essential Element.

1. In *Rehaif*, this Court held that federal gun charges under 18 U.S.C. § 922(g) require not just knowing possession of a firearm but also knowledge of prohibited legal status.

Section 922(g) lists categories of persons who are prohibited from possessing firearms. The list includes, for example: felons, § 922(g)(1); drug addicts, § 922(g)(3); and illegal aliens, § 922(g)(5)(A). Section 922(g) works in conjunction with § 924(a)(2), which states that whoever *knowingly* violates § 922(g) is guilty of a felony punishable by 10 years in prison.

This Court held in *Rehaif* that the adverb "knowingly" in § 924(a)(2) applies to both the possession element and the status element. This Court noted that when Congress includes a general *mens rea* adverb, it ordinarily applies to all material elements of an offense. "As 'a matter of ordinary English grammar,' we normally read the statutory term ''knowingly' as applying to all the subsequently listed elements of the crime.'" 139 S. Ct. at 2196 (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009)); *see also id*. at 2195 (citing § 2.02(4) of the Model Penal Code for the

proposition that when a statute prescribes *mens rea*, it ordinarily applies "to all the material elements of the offense").

More generally, this Court noted that a dual *mens rea* requirement was consistent with the common law's strong presumption of *mens rea* for serious criminal offenses. "[O]ur reading of § 922(g) and § 924(a)(2) is consistent with a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called 'a vicious will.'" *Id.* at 2196 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 21 (1769)).

2. Critical to this Court's opinion in *Rehaif* was the collateral law doctrine. Under the collateral law doctrine, when an element of an offense is defined by reference to a collateral law, a defendant's mistake as to that collateral law can negate guilt.

The government in *Rehaif* relied heavily on the hoary old maxim that "ignorance of the law is no defense." That maxim retains great purchase in popular culture, but as criminal law scholars have long noted, it is (at best) an oversimplification, as the principle is "subject to numerous qualifications and exceptions." 1 W. LaFave, *Substantive Criminal Law* § 5.6(a) (3d ed. & 2020 update); *see* R. Perkins, *Criminal Law* 325-36 (2d ed. 1969); G. Williams, *Criminal Law: The General Part* 321-27 (2d ed. 1961).

The true principle is that ignorance of the law *is* a defense if it negates an element of the offense. As the Model Penal Code states, "[i]gnorance as to a matter of

fact or law is a defense if . . . the ignorance or mistake negatives the [*mens rea*] required to establish a material element of the offense." *See* ALI, *Model Penal Code and Commentaries* § 2.04(1), p. 267 (1985); *see also id*. cmt. n.2 ("There is no sensible basis for a distinction between mistakes of fact and law in this context, and, indeed, the point is often recognized in the cases by assimilating legal errors on collateral matters to a mistake of fact. . . .").

The classic example, known to law students everywhere, is bigamy. If a defendant mistakenly believes that his prior divorce was valid, then he is not guilty of bigamy when he remarries. His mistake of law—as to the collateral legal matter—*is* a defense.

The critical distinction is between situations where "the defendant is unaware of the existence of a statute proscribing his conduct" and those where "the defendant has a mistaken impression concerning the legal effect of some collateral matter." 1 LaFave, *supra*, § 5.6(a). In the former situation, ignorance of the law is not a defense. In the latter situation, ignorance of the law is a defense. Thus, a defendant who marries two wives because he mistakenly believes that bigamy is legal is guilty of bigamy. But a defendant who marries two wives because he mistakenly believes that his divorce was legally valid is not guilty of bigamy.

3. This Court noted precisely that distinction in *Rehaif*. It stated that the government's argument rested on "confusion" about when ignorance of the law is a defense. Citing LaFave's treatise and the Model

Penal Code, it noted that "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." *Id*. at 2198 (quoting *LaFave*).

The collateral law doctrine distinguishes between different kinds of mistakes. Much of the confusion surrounding the ignorance-of-the-law maxim stems from "'the failure to distinguish [these] two quite different situations.'" *Id*. (again quoting *LaFave*).

Applying that distinction to § 922(g)(5)(A), this Court held that ignorance of the law with respect to alien status is a defense.

> 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.

*Id*.

Thus, at least for the purposes of § 922(g)(5)(A), this Court held that in order to find a defendant guilty, the government must prove that the defendant was aware of his legal status that renders him ineligible. A mistake concerning legal status is a defense to the charge.

### B. Lower Courts are Divided as to How *Rehaif* Applies to Other Provisions of Section 922(g).

1. The defendant in *Rehaif* was charged with an offense under § 922(g)(5)(A)—he was a prohibited person as a result of being an illegal alien because his visa had expired. As noted above, § 922(g) defines many other categories of prohibited persons. Much of this Court's analysis in *Rehaif* referred generally to § 922(g) offenses, and the knowledge requirement of § 924(a)(2) does not distinguish between the different subsections of § 922(g). Thus, this Court held in general that for any prosecution under § 922(g), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2020.

This Court suggested, however, that the precise contours of knowledge requirement might vary from subsection to subsection. "We express no view, however, 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*.; *see also id*. at 2207-08 (Alito, J., dissenting) (arguing that it would be difficult or impossible to apply the majority's rule to other provisions of the firearms statute).

Federal gun crimes are frequently prosecuted, and in the two and a half years since *Rehaif* was decided, lower courts have heard hundreds of cases involving potential *Rehaif* errors. They have reached varying

conclusions about what exactly *Rehaif* requires when applied to other provisions of § 922(g).

2. Some circuits have applied *Rehaif* straightforwardly. They have recognized that the logic of *Rehaif* applies equally to all subdivisions of § 922(g), and that the collateral law doctrine also applies with equal force. They have thus concluded that, as to the other subdivisions, a defendant must be aware of his *legal status*, and a mistake of law is a defense.

For example, as to § 922(g)(1), the felon-in-possession statutes, federal circuits have generally held that a defendant must be aware of his status as a felon. *See, e.g.*, *United States v. Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020) (applying *Rehaif* to § 922(g)(1) and concluding that the statute thus requires "not only that the felon knows he is possessing a firearm—but that the felon also knows he is a convicted felon"); *United States v. Gary*, 954 F.3d 194, 201-02 (4th Cir. 2020) (same), *rev'd on other grounds by Greer*, 141 S. Ct. 2090.

The Tenth Circuit, for example, similarly applied *Rehaif* to § 922(g)(9), which makes ineligible those who have been convicted of a misdemeanor domestic violence offense. *See United States v. Benton*, 988 F.3d 1231, 1239 (10th Cir. 2021) (stating that to be guilty of an offense under § 922(g)(9), the government must prove both that the defendant "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").

In these cases, circuits have recognized the critical distinction at the heart of *Rehaif*—the distinction regarding the collateral law doctrine. Thus, for the felon-in-possession statute, for example, a defendant does not need to be aware that it is illegal for a felon to possess a firearm—but he does need to be aware that he is a felon. *See United States v. Moody*, 2 F.4th 180, 198 & n.6 (4th Cir. 2021) (citing additional cases). If a defendant is mistakenly told, for example, that his assault offense is a misdemeanor, and thus is unaware that he is a felon, he cannot be found guilty of an offense under § 922(g)(1). *See United States v. Games-Perez*, 667 F.3d 1136, 1142-44 (10th Cir. 2012) (Gorsuch, J., concurring) (discussing a case where a defendant was potentially misinformed about his felon status).

And based on that distinction, some lower courts have recognized across a variety of § 922(g) charges that a mistake of collateral law is a defense. As the Second Circuit has said, it is not enough "that the defendant knew *the facts* that the law deems constitute 'illegal' status"—rather, he must be aware of the illegal status itself. *United States v. Balde*, 943 F.3d 73, 96 (2d Cir. 2019); *see also United States v. Jawher*, 950 F.3d 576, 581 (8th Cir. 2020) ("[T]he government needed to establish that Jawher knew about a collateral legal issue.").

3. Lower courts, however, are not uniform in their approach. In this case, applying *Rehaif* to § 922(g)(5)(B), the Ninth Circuit rejected the claim that *Rehaif* requires knowledge of law. Rather, the Ninth Circuit held that a defendant can be found

guilty if the government proves that he was aware of underlying factual circumstances that give rise to his status.

Section 922(g)(5)(B) makes ineligible persons who are admitted to the United States on a nonimmigrant visa. But according to the panel majority, there are two ways to establish the requisite knowledge: "Such knowledge can be established by demonstrating Gear 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*." App. 11 (emphasis added). Under that "second formulation" or the knowledge requirement, *id*., actual knowledge of law is not required. Rather, it is enough to show that the defendant was aware of the "offending characteristics" of his conduct. App. 12.[1]

Judge Silver, concurring to the per curiam opinion, explained more forthrightly why the majority had adopted this "second formulation" as a means of proving guilt. She correctly noted that immigration law is quite complicated, and the definition of "nonimmigrant visa" is difficult to parse. App. 16-17. She expressed concern that a defendant might avoid liability simple because he "does not know what qualifies a 'nonimmigrant visa.' " App. 17. Indeed, she argued that if actual knowledge of law were required, "it would be nearly

[1] For this point, the majority relied on *Staples v. United States*, 511 U.S. 600, 620 (1994), and *McFadden v. United States*, 576 U.S. 186, 196 (2015). Neither of those cases, however, involved an element defined by legal status—neither of those cases, in other words, involved the collateral law doctrine.

impossible for the government to prove" the requisite *mens rea* for the offense. *Id*. She thus reasoned that *mens rea* requirement must be interpreted as being satisfied by proof of a "second type of knowledge"—that is, knowledge of the underlying factual characteristics.

The majority and concurrence thus reasoned backward from desired conclusion to legal rule. They reasoned that it would be too difficult to prove knowledge of law, and thus knowledge of facts is sufficient. Neither the majority nor the concurrence even mentioned the collateral law doctrine—even though that doctrine was central to the ruling in *Rehaif*. And the majority's opinion is flatly inconsistent with the holdings of other circuits that it is *not* enough "that the defendant knew *the facts* that the law deems constitute 'illegal' status." *Balde*, 943 F.3d at 96.

4. The Ninth Circuit is not entirely alone in this approach. For example, in the wake of *Rehaif*, the Sixth Circuit expressed doubt as to whether *Rehaif* applies to other provisions of § 922(g). *See United States v. Bowens*, 938 F.3d 790, 797 (6th Cir. 2019) ("The defendants' reading of *Rehaif* goes too far because it runs headlong into the venerable maxim that ignorance of the law is no excuse."); *see also United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020) ("To establish a § 922(g)(1) violation after *Rehaif*, the government must show that Hobbs knew the facts underlying his status.").

The Eleventh Circuit has similarly suggested that, for the purposes of § 922(g)(9)—the domestic violence

provision—knowledge of facts constituting legal status can be sufficient. *See United States v. Johnson*, 981 F.3d 1171, 1182 (11th Cir. 2020) (noting "the misimpression that *Rehaif* requires technical knowledge of the law. It doesn't.").

More recently, the Third Circuit suggested that it would be difficult or impossible to apply *Rehaif* to § 922(g)(8), the provision making ineligible those subject to a protective order. As the Third Circuit said, "In the context of § 922(g)(8), the knowledge requirement is less straightforward." *United States v. Boyd*, 999 F.3d 171, 180 (3d Cir. 2021). Relying on part on Justice Alito's dissent, the Third Circuit expressed concern that applying *Rehaif* to § 922(g)(8) would render the burden of proof too high—but it ultimately disposed of the case without reaching the issue. *Id*. at 180-81; *see also United States v. Sholley-Gonzalez*, 996 F.3d 887, 896 (8th Cir. 2021) (stating that a defendant was guilty under § 922(g)(8) because "he was aware of the facts that met the statutory requirements").

5. In sum, when applying *Rehaif* to other provisions of § 922(g), some lower courts have held that a defendant must have actual awareness of *legal status*, while other courts have held that a defendant need only have knowledge of *the facts that give rise to that legal status*. That distinction is critically important in some circumstances. Given the vagaries of state court sentencing practices, for example, in some instances defendants will not be aware that they are felons even though they are aware of all the facts that give rise to

that status. *See Games-Perez*, 667 F.3d at 1145-46 (Gorsuch, J., concurring).

And indeed, that distinction was outcome-determinative in this case. As Judge Silver noted in her concurrence, it would have been "nearly impossible" to find petitioner guilty of actual knowledge of law were required. App. 17. But a finding of guilt based on knowledge of underlying facts—based on what she termed the "second type of knowledge"—was by contrast entirely "straightforward." *Id*.

This Court should grant certiorari to resolve the conflict among lower court cases. It should grant certiorari to clarify whether, when applied to other provisions of § 922(g), *Rehaif* merely requires knowledge of underlying facts or whether it requires actual knowledge of collateral law.

## II. This Court Should Grant Certiorari to Clarify How a Defendant May Make a Sufficient "Representation or Argument on Appeal" Regarding an Omitted Element

1. This case also presents a second reason for granting certiorari: This Court should clarify how, in omitted element cases, defendants are allowed to make a showing on appeal that they would have contested the element.

In *Greer v. United States*, this Court clarified that when conducting plain error review on an omitted element, appellate courts may consider not just the "trial

record" but the "entire record." 141 S. Ct. 2090, 2098 (2021). That means, for example, that prosecution may rely on evidence contained in a pre-sentence report. But on the flip side of the coin, this Court suggested that the defendant should also be able rely on evidence outside the trial record. It stated that a defendant could 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.

But this Court did not explain, as a procedural matter, how a defendant could make such a showing on appeal. And as this case illustrates, it is far from self-explanatory. Petitioner repeatedly requested such an opportunity but was never given one.

2. In this case, prior to trial, the district court granted the government's motion *in limine* to exclude all evidence of "innocent possession." The district court agreed with the government that knowing possession was the only knowledge requirement, and thus that any evidence pertaining to any other *mens rea* element was irrelevant. Petitioner thus had no opportunity to present any evidence on the *Rehaif* knowledge element at trial.

Petitioner also had no opportunity to make such a showing on appeal. After all, the rules of appellate procedure make clear that the record on appeal is limited to the trial court record. Fed. R. App. P. 10(a). The Ninth Circuit has repeatedly chastised parties for attempting to submit new evidence on appeal. *See*

*IMDB.com Inc. v. Becerra*, 962 F.3d 1111, 1126 (9th Cir. 2020).

Throughout the appeal, petitioner indicated that he would make such a showing if given the opportunity. In his reply brief, for example, he stated that while he would defend against the element on retrial, he had previously "had no meaningful opportunity to, and did not [offer such evidence] because the court's instructions did not permit a defense of ignorance of that legal prohibition." Petitioner reiterated at oral argument that he would have attempted to submit such evidence given the opportunity.

In its initial opinion, the majority faulted petitioner for failing to present evidence on the omitted element—even though he had never had an opportunity to do so. In his petition for rehearing, petitioner stated:

> Gear would welcome the opportunity to submit new evidence on the *Rehaif* element. To the extent the panel majority was looking for some proffer, let it be said clearly: If he had the opportunity to do so, Gear would testify that the agents' testimony about his own statements was false. . . . He would also testify regarding his lack of knowledge of immigration law, and that he played virtually no role in preparation of his visa application. He would deny that he knew he was a prohibited person. That testimony is nowhere in the current record, largely because it was barred by the district court's pretrial order.

While his petition for rehearing was pending, this Court decided *Greer*. Petitioner submitted a letter pursuant to Fed. R. App. P. 28(j), in which he noted that this Court suggested he should have an opportunity to make some sort of proffer or representation. He suggested that, at a minimum, the Ninth Circuit should order supplemental briefing on the matter.

The Ninth Circuit panel did none of that. It simply ignored petitioner's representation and argument, and it ignored his request to make a proffer. It ignored the relevant portions of this Court's ruling in *Greer*.

3. In sum, petitioner in this case attempted to argue the omitted element—but he also attempted to follow the rules of appellate procedure, which forbid attempts to present new evidence on appeal. The latter made the former impossible. That result is especially unfair in light of the trial court's ruling, which forbade petitioner from presenting any evidence on knowledge of status at trial.

As Judge Bumatay noted in his dissent, the entire trial might have been different if it had taken place after *Rehaif*, and it is fundamentally unfair to fault petitioner for failing to present evidence that he had been explicitly barred from presenting.

> Had this element been included in the jury instructions, Gear could have altered his trial strategy. For example, Gear would have refrained from putting his wife on as a witness or encouraged her to invoke a spousal privilege if called by the government. Or he could

> have challenged the introduction of the visa application form or his verbal admissions to law enforcement. But none of this happened because the only contested issue at trial (in light of the erroneous jury instructions) was whether Gear knowingly possessed the gun. This is the usual problem with our plain-error review of omitted-element jury instructions.

App. 23-24 (citation omitted). And while Judge Bumatay focused on government evidence that Gear could have contested, the more important point is that Gear could have affirmatively presented exculpatory evidence on the same element. It would have been an entirely different trial.

4. Implicit in this Court's recent opinion in *Greer* is the common-sense proposition that on plain error review, a defendant should have some opportunity to demonstrate that he lacked the knowledge required by *Rehaif*. But this Court did not explain how a defendant may do so, consistent with the rules of appellate procedure. And as the Ninth Circuit's handling of this case demonstrates, lower courts do not have any clear understanding of how *Greer* should be applied in practice.

This Court should grant certiorari to specify what type of argument or representation on appeal should be allowed. Or, in the alternative, this Court should grant certiorari, vacate the Ninth Circuit's opinion, and remand for reconsideration in light of *Greer*.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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