No. ______

In the Supreme Court of the United States

Roger Acosta, Michael Terrell Beale, Jason Michael Boykins, Dean Anthony Carter, Jesse James Feehan-Jones, Anthony Charles Gray, Devin Ray Kelbch, Shaelon Dawnee Mitchell, Clifton George Newman, Jr., Andrew Deng Pham, Deonte Marquis Strouble, David Torres, Romie Le'mon Turner, Tajh Dion Weatherspoon, Christopher James Wilder, and Ronald Williams III,

Petitioners,

v.

United States of America,

Respondent.

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

Joint Petition for a Writ of Certiorari

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Questions Presented

Petitioners were each convicted of possessing a firearm as a prohibited person. After their convictions became final, this Court held in *Rehaif v. United States* the statutes underlying Petitioners' convictions include a new mens rea element requiring defendants to know they belonged to the category of persons barred from possessing a firearm at the time of the possession, emphasizing the element's importance in separating innocent gun possession from criminal conduct. 139 S. Ct. 2191 (2019). Yet Petitioners' indictments failed to allege this crucial element.

1. In a federal prosecution, it is structural error for a grand jury to indict a defendant for conduct that is not a federal offense?
2. Should this Court grant review to resolve a Circuit split concerning the proper interpretation of this Court's precedent on defective indictments and the limited jurisdiction of federal courts?

Related Proceedings

Petitioners each brought separate motions to vacate their respective 18 U.S.C. §§ 922(g) and 924(a)(2) convictions under 28 U.S.C. § 2255 in the District of Nevada, under *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The district court denied each motion on its merits and denied certificates of appealability (COA). APP A-2; B-2; C-2; D-2; E-2; F-2; G-2; H-2; I-2; J-2; K-2; L-2; M-2; N-2; O-2; P-2. The Ninth Circuit denied COAs for all Petitioners. APP A-1; B-1; C-1; D-1; E-1; F-1; G-1; H-1; I-1; J-1; K-1; L-1; M-1; N-1; O-1; P-1.

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Petition for a Writ of Certiorari

Roger Acosta, Michael Terrell Beale, Jason Michael Boykins, Dean Anthony Carter, Jesse James Feehan-Jones, Anthony Charles Gray, Devin Ray Kelbch, Shaelon Dawnee Mitchell, Clifton George Newman, Jr., Andrew Deng Pham, Deonte Marquis Strouble, David Torres, Romie Le'mon Turner, Tajh Dion Weatherspoon, Christopher James Wilder, and Ronald Williams III jointly petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit. A joint petition is proper under Sup. Ct. R. 12.4, as Petitioners each challenge the judgments on identical issues.

Opinions Below

The orders of the court of appeals for Petitioners Acosta, Beale, Carter, and Mitchell are not published in the Federal Reporter, but are reprinted at: *United States v. Acosta*, No. 20-17450, 2022 WL 2197152 (9th Cir. Mar. 30, 2022) (unpublished); *United States v. Beale*, No. 21-15591, 2022 WL 1023807 (9th Cir. Mar. 30, 2022) (unpublished); *United States v. Carter*, No. 21-15630, 2022 WL 1089908 (9th Cir. Mar. 30, 2022) (unpublished); *United States v. Mitchell*, No. 21-15551, 2022 WL 986681 (9th Cir. Mar. 30, 2022) (unpublished). APP A-1; B-1; D-1; H-1. The orders of the court of appeals for Petitioners Boykins, Feehan-Jones, Gray, Kelbch, Newman, Pham, Strouble, Torres, Turner, Weatherspoon, Wilder, and Williams are not published or reprinted: *United States v. Boykins*, No. 21-15398, Dkt. 5 (9th Cir. Mar. 30, 2022) (unpublished); *United States v. Feehan-Jones*, No. 3:15-cr-00011-MMD-VPC-1, 2020 WL 7055898 (D. Nev. Dec. 2, 2020); *United States v. Gray*, No. 3:17-cr-00054-HDM-VPC, 2021 WL 1033211 (D. Nev. Mar. 17,

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The orders of the district court for all Petitioners are unreported, but are reprinted at: *United States v. Acosta*, No. 2:17-cr-00118-APG, 2020 WL 6136208 (D. Nev. Oct. 16, 2020) (unpublished); *United States v. Beale,* No. 2:17-cr-00050-JAD-CWH-1, 2021 WL 325713 (D. Nev. Feb. 1, 2021) (unpublished); *United States v. Boykins*, No. 3:18-cr-00029-LRH-CLB-1, 2021 WL 50924 (D. Nev. Jan. 6, 2021) (unpublished); *United States v. Carter*, No. 2:17-cr-00153-HDM-GWF, 2021 WL 432155 (D. Nev. Feb. 8, 2021) (unpublished); *United States v. Feehan-Jones*, No. 3:15-cr-00011-MMD-VPC-1, 2020 WL 7055898 (D. Nev. Dec. 2, 2020) (unpublished); *United States v. Gray*, No. 3:17-cr-00054-HDM-VPC, 2021 WL 1033211 (D. Nev. Mar. 17, 2021) (unpublished); *United States v. Kelbch*, No. 3:17-cr-00040-LRH-WGC, 2021 WL 96242 (D. Nev. Jan. 7, 2021) (unpublished); *United States v. Mitchell*, No. 3:16-cr-00082-HDM-VPC, 2021 WL 244764 (D. Nev. Jan. 25, 2021) (unpublished); *United States v. Newman*, No. 2:18-cr-41-JCM-CWH, 2020 WL 5517652 (D. Nev. Sept. 14, 2020) (unpublished); *United States v. Pham*, No. 3:17-cr-00104-LRH-CLB, 2021 WL 66401 (D. Nev. Jan. 6, 2021) (unpublished); *United States v. Strouble*, No. 2:16-cr-00233-RCJ-NJK, 2020 WL 4506772 (D. Nev. Aug. 5, 2020) (unpublished); *United States v. Turner*, No. 2:16-cr-00073-JCM-CWH, 2020 WL 5517665 (D. Nev. Sept. 14, 2020) (unpublished); *United States v. Torres*, No. 2:11-cr-00141-HCM-CWH, 2020 WL 5518606 (D. Nev. Sept. 14, 2020) (unpublished); *United States v. Weatherspoon,* No. 2:16-cr-00377-HDM-CWH, 2021 WL 2092987 (D. Nev. May 24, 2021) (unpublished); *United States v. Wilder*, No. 2:17-cr-00254-JCM-GWF, 2020 WL 5517661 (D. Nev. Sept. 14, 2020) (unpublished); *United States v. Williams*, No. 3:16-cr-00086-MMD-WGC-1, 2020 WL 7059582 (D. Nev. Dec. 2, 2020) (unpublished). APP. A-2; B-2; C-2; D-2; E-2; F-2; G-2; H-2; I-2; J-2; K-2; L-2; M-2; N-2; O-2; P-2.

Jurisdiction

The Ninth Circuit Court of Appeals entered final orders denying COAs on March 29, 30, and 31, 2022, as to Petitioners' motions to vacate. APP A-1; B-1; C-1; D-1; E-1; F-1; G-1; H-1; I-1; J-1; K-1; L-1; M-1; N-1; O-1; P-1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This joint petition is timely per Sup. Ct. R. 13.1.

Constitutional and Statutory Provisions

1. U.S. Const. amend. V, Grand Jury Clause: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

2. Title 18, Section 922(g)(1), of the United States Code states: "(g) It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . 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."

3. Title 18, Section 924(a)(2), of the United States Code states: "(a)(2) 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."

Introduction

In 2019, this Court issued *Rehaif*, 139 S. Ct. at 2200, holding that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove a knowledge-of-status element. Specifically, the government must prove that at the time of the alleged firearm possession the defendant knew he "belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. The Petitioners were each convicted and sentenced before *Rehaif*, without the grand jury being required to find probable cause of *Rehaif*'s knowledge-of-status element. Petitioners seek relief from their unconstitutional convictions and sentences.

Statement of the Case

A. Petitioners were convicted and sentenced for violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

The indictment for each Petitioner lacked the *Rehaif* knowledge-of-status element for convictions under 18 U.S.C. §§ 922(g) and 924(a)(2). Instead, the grand juries charged the Petitioners in indictments using language the same as, or substantively similar to, the following:

> On or about [date], in the State and Federal District of Nevada, [Defendant], defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year, [prior conviction(s)], did knowingly possess a firearm, to wit: [description of firearm], said possession being in and affecting interstate commerce and said firearm having been shipped and transported in interstate commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

APP A-23; *see also* APP B-26; C-27; D-23; E-23; F-49; G-28; H-39; I-24; J-28; K-24; L-47; M-23; N-62; O-24; P-27.

Each Petitioner pled guilty.[1] The plea documents for each Petitioner mirror the unconstitutional indictments by lacking the *Rehaif* knowledge-of-status element. APP A-13–22; B-16–25; C-15–26; D-12–22; E-17–22; F-15–48; G-15–27; H-12–38; I-13–22; J-16–27; K-13–23; L-17–46; M-13–22; O-13–23; P-14–26.

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[1] Petitioner Weatherspoon was charged with two counts of §§ 922(g)(1), 924(a)(2). APP N-62–63. The district court severed the counts. Weatherspoon pled guilty to the first charge (Count 1), and was convicted by a jury of the second charge (Count 2). APP N-29 (guilty plea); N-37 (jury verdict). The plea transcript and jury instruction mirrored the indictment, lacking the *Rehaif* knowledge-of-status element. APP N-20 (elements provided in plea colloquy); N-35 (elements provided in memorandum supporting guilty plea); N-45–47 (elements provided in jury instruction).

In total, Petitioners were sentenced to over 87 years in prison and 48 years of supervised release, receiving the following sentences: Acosta (52-month imprisonment, 3-year supervised release); Beale (74-month imprisonment, 3-year supervised release); Boykins (38-month imprisonment, 3-year supervised release); Carter (63-month imprisonment, 3-year supervised release); Feehan-Jones (46-months imprisonment partially concurrent to a state sentence, 3-year supervised release); Gray (63-month imprisonment, 3-year supervised release); Kelbch (63-month imprisonment, 3-year supervised release); Mitchell (36-month imprisonment consecutive to a state sentence, 3-year supervised release); Newman (46-month imprisonment, 3-year supervised release); Pham (42-month imprisonment, 3-year supervised release); Strouble (71-month imprisonment, 3-year supervised release); Torres (120-month imprisonment, 3-year supervised release); Turner (76-month imprisonment, 3-year supervised release); Weatherspoon (120-month imprisonment, 3-year supervised release); Wilder (66-month imprisonment concurrent to state and federal sentences, 3-year supervised release); and Williams (70-month imprisonment, 3-year supervised release). APP. A-6–7; B-10–11; C-7–8; D-6–7; E-9–10; F-6–7; G-7–8; H-6–7; I-7–8; J-7–8; K-7–8; L-7–8; M-7–8; N-8–9; O-7–8; P-8–9.

B. Petitioners seek to vacate their §§ 922(g)(1) and 924(a)(2) convictions and sentences under this Court's *Rehaif* decision.

On June 21, 2019, this Court issued *Rehaif*, 139 S. Ct. at 2200, holding that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove a knowledge-of-status element. Specifically, the government must prove that at the time of the alleged firearm possession the defendant knew he "belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200.

Petitioners sought relief from their §§ 922(g) and 924(a)(2) convictions and sentences by moving to vacate under 28 U.S.C. § 2255, raising claims under *Rehaif*. All Petitioners argued their indictments did not allege the respective Petitioner knew he had been convicted of a crime punishable by more than one year of imprisonment and thus (1) violated the Fifth Amendment's Grand Jury Clause and (2) stripped the district court of jurisdiction. The government opposed relief for all Petitioners. It was not disputed that the indictments lacked *Rehaif*'s knowledge-of-status element. APP A-2; B-4; C-3; D-2; E-3; F-2; G-2; H-2; I-2; J-2; K-2; L-2; M-2; N-2; O-2; P-3.

The district court denied relief for each Petitioner on the merits and also denied COAs. APP A-2; B-2; C-2; D-2; E-2; F-2; G-2; H-2; I-2; J-2; K-2; L-2; M-2; N-2; O-2; P-2. As to Petitioners' claim that the defective indictment stripped the courts of jurisdiction, each district court held that the indictment's failure to allege an element of an offense does not deprive the court of jurisdiction. APP A-3; B-3; C-3; D-2–3; E-3; F-3; G-3; H-2; I-3; J-3; K-3–4; L-3; M-3; N-3; O-3; P-3. The orders relied on *United States v. Cotton*, 535 U.S. 625, 630 (2002), and/or *United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir. 2003), to hold that jurisdiction remained intact.

For the constitutional claims, the courts generally held the *Rehaif* error was not structural. APP B-3–4; C-4; D-3–4; E-5; F-3–4; G-4; H-3–4; I-4; J-4; L-4; M-4; N-4–5; O-4; P-4. The orders also found the constitutional claims were barred because a guilty plea generally constitutes waiver of non-jurisdictional defects to an indictment, citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). APP B-4; C-3; D-2; E-5; F-2; G-3; H-2; I-2; J-3; K-4; L-3; M-3; N-3; O-3; P-4–5.

Nonetheless, several orders applied cause and prejudice review for procedural default because the indictment had not been previously challenged. APP A-3; B-2; C-3; D-3; E-2; F-3; G-3; H-2; I-3; J-3; L-3; M-3; N-3; O-3; P-3. The Petitioners were found to have established cause because *Rehaif*'s holding overturned long-standing and widespread precedent of the federal circuits, per *Reed v. Ross*, 468 U.S. 1, 16 (1984). APP A-3; B-3; C-3; E-4; G-3; I-3; J-3; L-3; M-3; O-3; P-4. Four orders did not address cause because the court found the prejudice prong was not met. APP D-3; F-3; H-2; N-3.

Ultimately, the constitutional claims were denied because the district courts found Petitioners failed to show prejudice for procedural default. APP A-4; B-3; C-3–4; D-3; E-4; F-3; G-3–4; I-3; J-3; L-3–4; M-3–4; N-3–4; O-3–4; P-4. To determine prejudice, the courts summarized the prior criminal sentences, examining the entire record. APP A-3–4; B-3; C-2–4; D-2–3; E-4; F-2–3; G-3–4; H-3; I-4; J-2; L-2–4; M-2; O-2; P-3. Three orders noted there was no reasonable probability the grand jury would find the Petitioners were unaware of their status. APP A-4; D-3; F-3. Four orders noted Petitioners could not show prejudice because if the indictment were dismissed the government could simply seek reindictment. APP A-4; B-4; K-4; M-3. The majority of orders found Petitioners could not show prejudice because there was no reasonable probability that, but for the *Rehaif* error, the outcome of the proceeding would have been different due to the Petitioners' prior sentences. APP C-4; D-3; E-4; F-3; G-3–4; H-3; I-4; J-3–4; L-4; N-3–5; O-3–4; P-4.

Each district court denied a COA. APP A-4; B-4; C-4; D-4; E-5; F-4; G-4; H-4; I-4; J-4; K-5; L-4; M-4; N-4; O-4; P-5.

C. Petitioners appealed the denials of their motions to Ninth Circuit, which denied COAs.

Petitioners timely appealed. The Ninth Circuit summarily denied COAs for all Petitioners. Each summary denial contained the same ruling:

> The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

APP A-1; B-1; C-1; D-1; E-1; F-1; G-1; H-1; I-1; J-1; K-1; L-1; M-1; N-1; O-1; P-1.

Petitioners Acosta, Beale, Feehan-Jones, Newman, Torres, Weatherspoon, and Wilder remain incarcerated serving their prison terms. Petitioners Boykins, Carter, Gray, Kelbch, Mitchell, Pham, Strouble, Turner, and Williams have completed their prison terms but remain on supervised release.

Reasons for Granting the Petition

Rehaif established an essential knowledge-of-status element for convictions under 18 U.S.C. §§ 922(g) and 924(a)(2): that at the time of the alleged firearm possession the defendant knew he "belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. The Petitioners' indictments lacked this essential element.

I. This case presents the important federal question of whether, in a federal prosecution, it is structural error for a grand jury to indict a defendant for conduct that is not a federal offense.

"It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge" in the first instance. *United States v. Williams*, 504 U.S. 36, 51 (1992). Absent that foundation, the grand jury lacks the basis to predicate a criminal charge and initiate the federal prosecution.

After this Court's decisions in *Rehaif* and *Greer*, an important question has arisen that should be decided by this Court—whether a conviction based on an indictment that fails to allege a criminal offense by omitting the knowledge-of-status element violates the Fifth Amendment Grand Jury Clause of the Constitution. *See* Sup. Ct. R. 10(a). Because no grand jury found probable cause to believe Petitioners committed a federal firearm offense as defined by *Rehaif*, each Petitioner sustained a violation of their fundamental rights under the Fifth Amendment Grand Jury Clause. This Court should find this constitutional violation constitutes structural error.

A. The Fifth Amendment protects individuals from federal prosecution unless indicted for a federal offense by a grand jury.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. "The institution of the grand jury is deeply rooted in Anglo-American history." *United States v. Calandra*, 414 U.S. 338, 342 (1974). Our "Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *Id.* at 343; *see also United States v. Sells Engineering, Inc.,* 463 U.S. 418, 423 (1983) ("The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution.").

Thus, we have a constitutional right not to be tried and convicted in federal court on a federal offense unless a grand jury issues an indictment finding probable cause for each element of the federal offense. U.S. Const. amend. V; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989). The grand jury serves the crucial responsibility of initiating the federal criminal process by determining "whether there is probable cause to believe a crime has been committed" and thus "protect[s]" us "against unfounded criminal prosecutions." *Calandra*, 414 U.S. at 343 (citing *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972)). In this way, the grand jury serves "as a primary security to the innocent against hasty, malicious and oppressive persecution," "standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Branzburg*, 408 U.S. at 688 n.23 (quoting *Wood v. Georgia*, 370 U.S. 375, 390 (1962)) (alterations in original). The grand jury also limits our jeopardy to only those offenses charged in the indictment. *Russell v. United States*, 369 U.S. 749, 771 (1962) (citing *Stirone v. United States*, 361 U.S. 212, 218 (1960)). To this end, the grand jury serves its role "independently" from both the government and the judiciary. *Id.*

This Court therefore identifies two requirements for a grand jury indictment to pass constitutional muster: "first, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). It is *not* "within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes," for to do so would "fritter[] away" the Grand Jury Clause of the Fifth Amendment "until its value is almost destroyed." *Russell*, 369 U.S. at 770–71. So defined, the Grand Jury Clause cannot be manipulated by either the judicial or the executive branches.

Yet Petitioners stand convicted of a federal firearm offense neither presented to nor contemplated by a grand jury. Nothing shows this more clearly than Petitioners' indictments, each of which fails to allege a federal firearm offense under 18 U.S.C. §§ 922(g) and 924(a)(2), as defined in *Rehaif*. The allegations presented to the grand jury amounted to, at most, "an innocent mistake to which criminal sanctions normally do not attach"—not a federal firearm offense. *Rehaif*, 139 S. Ct. at 2197. This is structural error.

B. The scope and purpose of structural error

This Court "divide[s] constitutional errors into two classes: '"trial error[s]" and "structural error[s]." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Trial errors "occur[] during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). Structural errors "defy analysis by harmless-error standards because they affec[t] the framework within which the trial proceeds, and are not simply an error in the trial process itself." *Id.* (internal quotations marks and citation omitted). Structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)).

The precise reason this Court deems an error structural "varies in a significant way from error to error," though "[t]here appear to be at least three broad rationales." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). The first exists when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)). In such cases, "harm is irrelevant to the basis underlying the right," rendering "a violation of that right structural error." *Id.* (citation omitted). The second exists "if the effects of the error are simply too hard to measure." *Id.* These cases make it "almost impossible" for the government to prove the error was harmless and so the costs of allowing it to attempt to do so are unjustified. *Id.* The third exists "if the error always results in fundamental unfairness." *Id.* These cases render "futile" any government effort "to try to show harmlessness." *Id.*

Of course, these rationales outline only broad categories, not rigid confines, of structural errors. *Weaver*, 137 S. Ct. at 1908. Any given structural error may involve one or more of these rationales, as no one rationale is determinative. *Id.* But no matter the rationale employed, the structural errors are presumed prejudicial and require "automatic reversal." *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993).

C. It is structural error for a federal grand jury to indict a defendant for violating 18 U.S.C. §§ 922(g) and 924(a)(2) without alleging *Rehaif*'s knowledge-of-status element.

The structural nature of the error here is inherent in the purpose of the Fifth Amendment's Grand Jury Clause. Before this Court's decision in *Rehaif*, federal grand juries indicted each Petitioner for violating 18 U.S.C. §§ 922(g) and 924(a)(2), without alleging a knowledge-of-status element. Absent the allegation that Petitioners knew they were prohibited from possessing a firearm at the time of the firearm possession, their resulting indictments did not charge a federal crime. This error frustrates the grand jury's crucial responsibility to determine probable cause of an offenses elements and thus fails to protect individuals from "unfounded criminal prosecutions."' *Calandra*, 414, U.S. at 343.

The *Rehaif* error's effect on the grand jury and trial processes are immeasurable for at least two intertwining reasons. The first is presented in cases like Petitioners' where individuals were forced into federal court by a grand jury indictment when the grand jury did not allege a federal offense. Because the indictments omit the necessary knowledge-of-status element, they allege "an innocent mistake to which criminal sanctions normally do not attach"—not a serious crime. *Rehaif*, 139 S. Ct. at 2196. The indictment violates the Grand Jury Clause and its intended protections. U.S. Const. amend V. If it is permissible to omit material offense elements from the four corners of federal indictments, the Founders' purpose in establishing the federal grand jury and relying on the protections it serves would be rendered a nullity. Such evisceration of the grand jury's historically honored role and purpose cannot be tolerated.

The second reason is endemic to our criminal justice system. Just 2% of criminal defendants proceed to trial in federal court. The overwhelming majority of criminal defendants plead guilty to the indictments brought against them.[2] "Guilty pleas have replaced trial for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if

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[2] John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, Pew Research Center (June 1, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

they invoke the right to trial and lose," often called a "trial tax."[3] Faced with the choice between a higher sentence if they proceed to trial or a favorable plea bargain,

> individuals almost uniformly surrender the right to trial rather than insist on proof beyond a reasonable doubt, defense lawyers spend most of their time negotiating guilty pleas rather than ensuring that police and the government respect the boundaries of the law including the proof beyond a reasonable doubt standard, and judges dedicate their time to administering plea allocutions rather than evaluating the constitutional and legal aspects of the government's case and police conduct.[4]

The choice between proceeding to trial or entering a guilty plea is no choice at all. "Empirical studies and exoneration data have revealed that the pressures defendants face in the plea bargaining process are so strong even innocent people can be convinced to plead guilty to crimes they did not commit."[5]

The dire consequences of being forced into court to face an indictment that failed to allege a federal offense are compounded when, as here, the grand jury's constitutionally mandated gatekeeping role is excised. All resulting proceedings,

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[3] National Association of Criminal Defense Lawyers, *The Trial Penalty*: *The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf; *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006) ("Indeed, plea bargaining pressures even innocent defendants to plead guilty to avoid the risk of high statutory sentences."); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 841 (2006) ("The incentive to plead applies to innocent and guilty defendants alike. Indeed, it may apply more strongly to innocents, who are more risk averse than their guilty counterparts.").

[4] *Id.*

[5] *Id.*

the goal of which is to determine guilt or innocence, lack the most fundamental of guarantees—that an impartial body reviewed the offense elements and find probable cause to indict on all essential elements. The grand jury process is typically the only time an independent body reviews the allegations. Thus, to stand convicted as Petitioners do of violating 18 U.S.C. §§ 922(g), 924(a)(2), when the grand jury never indicted them for committing a federal criminal offense under those statutes is structural error.

This case questions the propriety of allowing the judiciary, when faced with an indictment that fails to allege a federal offense, to make assumptions about what a grand jury might have done in the first instance. The district court assumed what the grand juries would have done had the *Rehaif* knowledge-of-status allegations been made. *See, e.g.*, APP A-4; D-3; F-3. But "an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quoting *Russell*, 369 U.S. at 770).

The *Rehaif* error here is not simply a defect or imperfection in matter of form. *See id.* at 770. Rather, the error is material as it omits the essential mens rea element necessary to charge and convict a defendant for violating 18 U.S.C. §§ 922(g) and 924(a)(2). That the indictments alleged Petitioners sustained prior convictions punishable by more than a year in prison does not suffice for the knowledge-of-status element. The indictments do not prove the grand juries were presented with any information proving Petitioners *knew* they were prohibited from possessing a firearm as a result of their previous convictions. Nor would have there been reason to present such proof to any grand jury before *Rehaif*, as *Rehaif* overturned decades of federal cases holding a defendant's knowledge of his prohibited firearm status at the time of the firearm possession was not an element of the offense. *See Greer v. United States*, 141 S. Ct. 2090, 2101 (2021) (Sotomayor, J., partially concurring and partially dissenting) ("For years, all 12 Courts of Appeals with criminal jurisdiction agreed that a defendant need not know he is a felon to be guilty of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2).").

Nor is this *Rehaif* error a plea or trial error that would allow a reviewing court to determine its prejudice based on its review of the record. *See Greer*, 141 S. Ct. 2090 (addressing, under plain error review, the effect of a Rehaif error in jury instructions and a plea colloquy). Reviewing courts cannot "guess" whether a grand jury would have indicted a defendant in the first instance as doing so "would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell*, 369 U.S. at 770.

D. This Court should grant review.

Allowing an individual to be forced into federal court on a grand jury indictment failing allege a federal offense implicates the core of the Fifth Amendment's grand jury protections. As all federal courts defer to this Court in identifying structural errors, it falls on this Court to preserve the integrity of the Fifth Amendment's Grand Jury Clause and the rights its protects. This Court should grant review.

II. Courts are split whether an indictment's failure to charge an essential element renders federal courts without jurisdiction.

Lower federal courts have limited jurisdiction over criminal cases: they can preside only over "offenses against the laws of the United States." 18 U.S.C. § 3231. This limitation serves a crucial function, "recogniz[ing] the fact that maintenance of order and fairness rests primarily with the States." *Pennsylvania v. Nelson*, 350 U.S. 497, 519–20 (1956) (Reed, J., dissenting). But federal courts of appeal have long disagreed how to interpret this Court's cases about § 3231 defects in an indictment. *Rehaif* has deepened the circuit split, and only this Court's intervention can provide the proper analytical framework on this issue of critical importance. *See* Sup. Ct. R. 10(a).

A. *Rehaif* has widened a circuit split whether an indictment defect can deprive federal courts of jurisdiction.

Circuits are split whether an indictment defect can ever deprive federal courts of jurisdiction. *See United States v. Muresanu*, 951 F.3d 833, 838 (7th Cir. 2020) (recognizing split). Some circuits hold certain defects in an indictment render the courts without jurisdiction, while others hold defects, no matter how severe, do not impact jurisdiction.

This conflict stems from this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which addressed a "defective" indictment. In *Cotton*, the indictment did "not allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)." *Id.* at 628. This Court held such "defects in an indictment do not deprive a court of its power to adjudicate a case."

Id. at 630. Thus, the defect did not deprive the district court of jurisdiction. *Id.* at 632.

Cotton based its jurisdictional holding on *Lamar v. United States*, 240 U.S. 60 (1916). The *Lamar* indictment charged the defendant with "falsely pretend[ing] to be an officer of the Government of the United States, to wit, a member of the House of Representatives." *Id.* Because a congressperson is not a United States officer, the defendant argued the indictment did not charge a crime and the court therefore did not have jurisdiction. *Id.* The *Lamar* Court rejected the defendant's jurisdictional argument:

> [T]he District Court, which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 65 (internal citation omitted).

But in rejecting jurisdictional challenges based on the indictment defects present in both *Lamar* and *Cotton*, these cases properly adhere to § 3231's jurisdictional mandate. In *Lamar*, the indictment alleged all essential elements of "falsely pretend[ing] to be an officer," thus alleging a cognizable crime. 240 U.S. at 64. Though the *Lamar* defendant argued the method for proving one element, "officer," did not meet the statutory requirements, this argument went to his innocence and not whether the indictment alleged a cognizable crime. *Id.*

Similarly, the indictment in *Cotton*—which charged the defendant with conspiracy and possession with intent to distribute cocaine and cocaine base, but failed to "allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)"—also alleged a cognizable offense. *Cotton*, 535 U.S. at 628. Because conspiring and possessing with intent to distribute *any* cocaine and cocaine base violates United States law, alleged drug quantity controlled only the statutory sentencing range, not the conviction for a cognizable crime itself. *See* 21 U.S.C. § 841(a) and (b).

Relying on *Cotton*, the First, Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have drawn a hard line, holding that "defects" in an indictment—of whatever kind—do not affect subject matter jurisdiction.[6] *United States v. Lara*, 970 F.3d 68, 85–86 (1st Cir. 2020); *United States v. Balde*, 943 F.3d 73, 91–92 (2d Cir. 2019); *United States v. Scruggs*, 714 F.3d 258, 262–64 (5th Cir. 2013); *United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020); *UUnited States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019); *United States v. Velasco-Medina*, 305 F.3d 839, 845–46 (9th Cir. 2002); *United States v. De Vaughn*, 694 F.3d 1141, 1147–48 (10th Cir. 2012). The Seventh Circuit holds without exception that "indictment defects are never jurisdictional." *United States v. Maez*, 960 F.3d 949, 956 (7th Cir. 2020). The other Circuits in this group similarly hold under *Cotton* that an indictment defect can never deprive a court of the power to adjudicate a case, categorically denying the defendants' claims challenging jurisdiction based on omission of the *Rehaif* mens rea element. *UUnited States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019);

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[6] The Third Circuit has not squarely addressed the question but has suggested it reads *Cotton* similarly. *United States v. Al Hedaithy*, 392 F.3d 580, 588 (3d Cir. 2004).

Lara, 970 F.3d at 85–86; *United States v. McEachin*, No. 19-4255, 2021 WL 4060436, at *2 (4th Cir. Sept. 7, 2021) (unpublished disposition); *United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (unpublished disposition).[7] And when rejecting the argument that an indictment's omission of the *Rehaif* mens rea deprived the court of jurisdiction, the Second Circuit expressed that only "an indictment that utterly fails, on its face, to charge any federal offense may fail to establish the jurisdiction of the federal court." *Balde*, 943 F.3d at 89.

The Eleventh Circuit generally has taken a more nuanced approach, recognizing that "'indictment errors are not all the same' and should not be treated categorically." *United States v. McIntosh*, 704 F.3d 894, 902 (11th Cir. 2013). Some indictments "charge no federal crime at all," such as offenses not set forth in the United States Code. *Id.* But some, such as the *Cotton* indictment, still charge "'a complete federal offense'" even though they omit an allegation necessary for an enhanced sentence. *Id.* And in the *Rehaif* context, the Eleventh Circuit placed the error in the latter category, concluding that "[s]o long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction." *United States v. Moore*, 954 F.3d 1322, 1336 (11th Cir. 2020); *see United States v. Morales*, 987 F.3d 966, 978–79 (11th Cir.), *cert. denied*, 142 S. Ct. 500 (2021). To so hold, the Circuit applied the rule that an indictment is

[7] The Third Circuit has also summarily rejected this *Rehaif* claim, though based solely upon its law that an indictment is not defective if its language "echoes the language of the statute." *United States v. Nasir*, 982 F.3d 144, 162 n.15 (3d Cir. 2020).

sufficient if it "track[s] the statutory language and stat[es] approximately the time and place of an alleged crime." *Moore*, 954 F.3d at 1332.

The Sixth Circuit has recognized, in the context of a defendant who pled guilty to illegal possession of a firearm, that a defendant successfully challenges jurisdiction if he establishes "that the face of the indictment failed to charge the elements of a federal offense." *United States v. Martin*, 526 F.3d 926, 934 (6th Cir. 2008) (holding that, pre-Rehaif, the indictment charged all the elements of § 922(g)(1)); *see also United States v. Howard, 947 F.3d* 936, 942 (6th Cir. 2020) (citing Martin favorably for the proposition "that a defendant challenges the court's jurisdiction when he asserts that the 'indictment failed to charge the elements of a federal offense'"). In the *Rehaif* context, however, the Sixth Circuit relied on *Cotton*'s statement that "defects in an indictment do not deprive a court of its power to adjudicate a case" to hold that an indictment's omission of the *Rehaif* mens rea element did not deprive the court of jurisdiction. *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020) (quoting *Cotton*, 535 U.S. at 630).

In sum, the majority of Circuits have now weighed in on their interpretation of this Court's precedent, though with conflicting results. Because only this Court can clarify its prior cases to resolve this conflict, review is warranted. *See* Sup. Ct. R. 10(a).

B. This question has important national implications.

Petitioners present an issue with widespread national importance. *See* Sup. Ct. R. 10(a). Federal prosecutions for unlawful firearm possession under 18 U.S.C. § 922(g) account for just over ten percent of all federal criminal cases. U.S. Sent.

Comm'n, *Quick Facts: Felon in Possession of a Firearm* (May 2021). In fiscal year 2020, 6,782 cases involved convictions under § 922(g), representing only a slight decline from fiscal year 2019's significant high over the previous four years. *Id.* (reporting 4,984 unlawful possession cases in fiscal year 2015 and progression through fiscal year 2019). Unlawful firearms offenses thus continue to represent a steady and significant portion of federal convictions. And this Court has already addressed the framework through which to review the validity of defendants' pre-*Rehaif* guilty plea and jury trial convictions. *Greer v. United States*, 141 S. Ct. 2090, 2096 (2021).

As outlined here, *Rehaif* presents a unique wrinkle in the debate over when, and whether, a "defect" in an indictment strips the courts of jurisdiction. This Court's pronouncement in *Rehaif* of the previously missing mens rea element demolished the wall of Circuit authority to the contrary and demarcated the difference between a federal crime and "an innocent mistake to which criminal sanctions normally do not attach." *Rehaif*, 139 S. Ct. at 2197. This Court should grant certiorari to review how the defective indictment framework applies here, and whether the critical mens rea omission requires dismissal.

Conclusion

Petitioners ask the Court to grant this joint petition for a writ of certiorari.

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Respectfully submitted,

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