No. 19-10353

(Before the Honorable Kenneth K. Lee and Patrick J. Bumatay, CJJ, and Roslyn O. Silver, DJ; Opinion filed January 19, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

MELVYN GEAR,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Hawaii
District Court No. 1:17-cr-99742 SOM 1 (Hon. Susan O. Mollway)

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AOKI CENTER FOR CRITICAL RACE AND NATION STUDIES IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

This case warrants rehearing en banc because the panel's published opinion conflicts with case law developing around the country in the wake of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).[1] Other circuits follow the Supreme Court in reinvigorating due process and jury trial rights, but the panel here marched in the opposite direction. The issue here is recurring as well as important. In 2019, there were at least 7,647 cases involving convictions under 18 U.S.C. § 922(g), as reported by the United States Sentencing Commission. *See* United States Sentencing Commission, *Quick Facts*, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf (last visited March 14, 2021). This Court should grant rehearing en banc to bring Circuit precedent in line with jurisprudence in the other courts of appeals.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(e), counsel for Amici state that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than Amici, their members, or their counsel made such a contribution.

ARGUMENT

This case highlights a clash between two values. On one hand are defendants' rights to due process and trial by jury, enshrined in the Fifth, Sixth and Fourteenth Amendments to the Constitution. "Together," these guarantees form the "pillars of the Bill of Rights." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019). On the other hand is the preservation rule embodied in Rule 52(b) of the Federal Rules of Criminal Procedure. There is no dispute that Gear's constitutional rights were violated at trial, but the per curiam opinion does not mention those rights at all. Instead, the panel applied a compressed plain error review that is particularly inappropriate in cases, like this one, where there has been a sea change in the law between trial and appeal.

I. The panel decision disregards the reinvigorated right to have a jury determine each element of an offense.

In finding that Gear was not prejudiced by the jury's reliance on an erroneous legal standard, the per curiam decision did not mention — and gave no explicit weight — to Gear's right to have a jury determine that most subjective of the elements of the crime of conviction. That omission undermines the panel's judgment, and warrants rehearing.

Demonstrating its central place in our form of government, the right to trial by jury is established in both the Constitution itself, *see* U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"), and the Bill of Rights, *see*

U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"). The Sixth Amendment provides, "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilty," *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (internal quotes omitted), while the Due Process Clauses require a unanimous jury determination, beyond a reasonable doubt, as to "every element of the crime" with which the defendant is charged. *Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000). These are rights, *Apprendi* declared, "of surpassing importance." *Id*. at 476.

Throughout our history, the jury's role, particularly vis-à-vis the role of judges, has waxed and waned. *See* Theodore W. Ruger, *Preempting the People: The Judicial Role in Regulatory Concurrency and Its Implications for Popular Lawmaking*, 81 Chi.-Kent L. Rev. 1029, 1049-50 (2006). But beginning with *Jones v. United States*, 526 U.S. 227 (1999), and *Crawford v. Washington*, 541 U.S. 36 (2004), the Court reasserted the "Framers' understanding" of due process and the Sixth Amendment, and refused to permit the "diminishment of the jury's significance," *Jones*, 526 U.S. at 248; *Crawford*, 541 U.S. at 62 ("[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes"). Whether one views *Apprendi* and its progeny as

revolutionary or mere rediscovery of the Framers' understanding,[2] those cases reaffirmed and extended the principles in *Jones* and *Crawford.*

II. The panel decision conflicts with post-*Rehaif* cases that have affirmed the importance of the right to a jury trial.

In contrast with the panel decision here, circuits around the country have applied plain error review in post-*Rehaif* cases in a way that affords proper respect to the surpassing constitutional rights at issue. That is, the overwhelming weight of authority supports requiring a jury to decide facts — and especially facts that *were not even at issue* before the trial court.

In *United States v. Russell*, 957 F.3d 1249 (11th Cir. 2020), the defendant was convicted of possessing a firearm as an immigrant illegally or unlawfully in the United States in violation of 18 U.S.C. § 922(g)(5)(A). He overstayed his authorization to stay as a nonimmigrant visitor, but a U.S. citizen (Hood) filed a petition to classify him as her spouse. After Hood's petition was approved, however, she learned the defendant was still married to another woman in Jamaica and she withdrew the petition. "At some point" before that, the defendant had filed an application to register permanent residence or adjust status. The government

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[2] *Compare* Susan N. Herman, *Applying* Apprendi *to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 Iowa L. Rev. 615 (2002), and *Duncan v. United States*, 552 F.3d 442, 445 (6th Cir. 2009), *with* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 Ohio St. L.J. 1307, 1362 (2007).

successfully moved in limine to exclude evidence of the defendant's application notwithstanding his counsel's argument that it was relevant because the defendant had "started the ball rolling" with the immigration process and was "entitled to a defense." *Id*. at 1253.

Reviewing for plain error, the Eleventh Circuit vacated the conviction, emphasizing, "we pass no judgment on whether Russell actually had the requisite knowledge under § 922(g)(5) — *that is for a jury to decide*." *Id*. at 1254 (emphasis added). The dissent relied on two facts for its conclusion there was no reasonable probability a jury could have concluded the defendant believed he was here legally: he overstayed his visa, and he was already married to another woman when he married Hood, but the majority cogently observed, "neither of those facts tells us what Russell subjectively believed about his immigration status, and that is what matters here." *Id*. at 1254 n.5.

In *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc), the defendant was convicted of violating 18 U.S.C. § 922(g)(1) after the jury heard a stipulation that, prior to the date when he allegedly possessed the firearm, he had been "convicted of a felony crime punishable by imprisonment for a term exceeding one year." *Id*. at 151.[3] After carefully analyzing "the due process and

[3] The specific issue in the case was whether an appellate court on plain-error review is restricted to the trial record. *Id*. at 161.

Sixth Amendment concerns in play here," the en banc court vacated the defendant's conviction, holding: "we are not free to suppose what the government could have proven at a different trial." *Id*. at 164. Plain error review, the Court felt, should not treat "judicial discretion as powerful enough to override the defendant's right to put the government to its proof when it has charged him with a crime." *Id*. at 169; *see also id.* at 179-90, 188 (Matey, J., concurring) ("[f]ailing to notice error here would necessarily contravene the original understanding of the Sixth Amendment and, therefore, necessarily flout the rule of *Olano*"). It elaborated:

> Given the imperative of due process, and "[i]n view of the place of importance that trial by jury has in our Bill of Rights," it should not be supposed that "the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, [can be substituted] for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Id. at 169-70 (quoting *Bollenbach v. United States*, 326 U.S. 607, 615 (1946)).

Similarly, in *United States v. Cook*, 970 F.3d 866 (7th Cir. 2020), the defendant was convicted of violating 18 U.S.C. § 922(g)(3) by possessing a firearm as an unlawful user of a controlled substance. Applying plain error review, the court acknowledged, "[t]he government's case against Cook was certainly strong," after all, Cook "told an investigator he had been using marijuana for nearly ten years to 'mellow[ ] [himself] out,' and he acknowledged that he had smoked two blunts on the day of his arrest." *Id*. at 883. But the court did not find

that evidence "overwhelming" because "[e]ven if we take it as a given that Cook understood marijuana was a controlled substance that was illegal for him to possess and use, we do not regard it as *inevitable* that the jury would have found that Cook knew he was an unlawful user *as the case law defines that term*." *Id*. at 884 (emphasis added). More generally speaking, the court explained that given the gravity of the serious constitutional errors, "[o]nly in the exceptional case will prejudice not be found," *id*. at 882, and it applied plain error review in a way that respected the jury's constitutionally mandated role as factfinder: A defendant "need only convince the court that there is a reasonable probability that the result of the trial might have been different — that is, one sufficient to undermine confidence in the actual outcome of the trial, or put another way, a plausible, non-negligible chance of a more favorable result . . ., [which] includes a deadlocked jury as well as an acquittal, as neither is a conviction." *Id*. at 881 (citations omitted).

Finally, in *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020),[4] the defendant was convicted of being a felon in possession of a firearm. In vacating the conviction, the court concluded that not doing so would deprive the defendant

[4] The Fourth Circuit granted rehearing en banc, 2020 U.S. App. LEXIS 35628 (4th Cir. Jan. 14, 2021). The precedential value of the panel opinion is thus in limbo, but its compelling analysis further supports the position taken by the circuit decisions discussed in the text.

of multiple constitutional protections, prohibit him from ever mounting a defense to the knowledge-of-status element, require inappropriate appellate factfinding, and do serious harm to the judicial process. *Id*. at 403. Two elements of the court's reasoning are particularly relevant to Gear's case. First, the court acknowledged there was substantial post-trial evidence of the defendant's knowledge of his prohibited status: "Medley was incarcerated for over sixteen years after being convicted of second-degree murder." *Id*. at 417. Nevertheless, the court concluded the "essentially uncontroverted" requirement was not satisfied:

> It would be unjust to conclude that the evidence supporting the knowledge-of-status element is "essentially uncontroverted" when Medley had no reason to contest that element during pre-trial, trial, or sentencing proceedings. Unlike [*United States v.*] *Cotton*, [535 U.S. 625 (2002)], *Neder* [*v. United States*, 527 U.S. 1 (1999)], and *Johnson* [*v. United States*, 520 U.S. 461 (1997)], where the defendants received notice of the element and had substantial reason to contest the element, that is not the case here. Moreover, in those cases, the district court judges had already found that the element was proven and we — as appellate judges — were not asked to cast a defendant's constitutional rights aside and trample over the grand jury and petit jury's function.

Id. at 417. Second, the court acknowledged that, in some cases, assessing whether the government proved the elements of an offense by "overwhelming" and "uncontroverted" evidence requires courts to examine the trial record to glean whether the jury verdict would have been the same absent the erroneous instruction. But where, as in *Medley*, the missing element emerged as a consequence of a sea change in the law after trial, "it is inappropriate to speculate

whether a defendant could have challenged the element that was not then at issue." *Id*. at 413.

All of these cases confirm that appellate judges are "ill-equipped to evaluate a defendant's state of mind on a cold record." *Id*. at 414 (citing *United States v. Houston*, 792 F.3d 663, 669 (6th Cir. 2015), which rejected the application of *Neder* because "appellate judges are better equipped to assess materiality than to evaluate states of mind based on a cold record"). The jury is best suited to make the subjective scienter determination, as required by the Constitution.

III. This Court should uphold Gear's constitutional right to a jury trial.

The panel spent no more than a single sentence in considering whether the evidence was uncontroverted and overwhelming (PFR 9-10) and simultaneously failed to even acknowledge Gear's constitutional rights.

Gear's knowledge of his immigration status should not be determined by an appellate court based on an undeveloped and one-sided record. "It would be unjust to conclude that the evidence supporting the knowledge-of-status element is 'essentially uncontroverted' when [the defendant] had no reason to contest that element." *Medley*, 972 F.3d at 417. Even worse, in this case, due to the motion *in limine*, and the former state of law, Gear was not provided with *any* genuine opportunity to "mount[] any defense about his knowledge of his immigration status." *Russell*, 957 F.3d at 1254.

A jury must decide whether Gear had the requisite knowledge. An appellate court is not "free to suppose what the government could have proven at a different trial," *Nasir*, 982 F.3d at 164, and thus should refrain from fact-finding based on a "dead record." *See id.* at 169-70. Therefore, this Court should "pass no judgment on whether [Gear] actually had the requisite knowledge . . . — *that is for a jury to decide*." *Russell*, 957 F.3d at 1254 (emphasis added).

Moreover, the evidence in the record was not overwhelming *even if* Gear had been allowed the opportunity to contest it. In *Cook*, the evidence was not "overwhelming" because it was not "*inevitable* that the jury would have found that Cook knew he was an unlawful user *as the case law defines that term*." *Cook*, 970 F.3d at 884 (emphasis added).[5] Here, the per curium opinion found there to be overwhelming evidence based on hearsay testimony that Gear stated to officers that "he was not a U.S. citizen." *United States v. Gear*, 985 F.3d 759, __ (2021). Although this was evidence that Gear knew he was not a U.S. Citizen, that was not the "defined term" at issue. Under the reasoning of the per curium opinion, Gear had to know he was on a "nonimmigrant visa," or, "looking to what 'nonimmigrant

[5] We agree with Gear that immigration law can be exceedingly complex, *see Padilla v. Kentucky*, 559 U.S. 356, 369 (2010), that his H-1B dual intent visa added another layer of complexity (PFR 8), and that, under *Rehaif*, the government was required to prove Gear knew he had a "nonimmigrant visa" as the complex body of statutory and regulatory law defines that term. *Cf. Cook*, 970 F.3d at 883-84 ("[k]nowledge of one's status under section 922(g)(3) encompasses questions of law . . . [that] may be tricky").

visa' actually means: a visa issued to an alien *coming temporarily to the United States* to perform services in a specialty occupation." *Id.* (emphasis added). As the dissent concluded, the evidence "demonstrates only that he knew was not a citizen" (*id.*); and it was apparent from the record that Gear did have the intent to remain here permanently. *See id.* (Gear had all his possessions moved to the United States and ultimately remarried here). In sum, the evidence was not overwhelming, and it was only "uncontroverted" because Gear had no genuine opportunity to contest it at trial.

CONCLUSION

Rehearing en banc should be granted to protect criminal defendants' due process and jury trial rights as originally understood and as reinvigorated by the Supreme Court, and to harmonize Circuit precedent with the conflicting opinions of the Third, Fourth, Seventh, and Eleventh Circuits on an important and recurring issue.

Date: March 15, 2021

Respectfully Submitted,

/s/ David M. Porter
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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The Brief is printed in proportionally spaced 14-point type, and there are 2.667 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.

March 15, 2021

By: s/ *David M. Porter*

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

March 15, 2021 By: /s/*Alex Moyle*