No. 18-7232

In the

Supreme Court of the United States

ARTHUR SANCHEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Reply in Support of Petition for Writ of Certiorari

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I. New Mexico case law proves that New Mexico robbery does not have as an element the use of physical force as described by *Stokeling*.

According to this Court's recent decision in *Stokeling v. United States*, 139 S.Ct. 544, 553 (2019), for robbery to come within the force clause, it must have an element that "necessarily involves a physical confrontation and struggle." The Court explained it is the "physical contest between the criminal and the victim" which brings the offense within the force clause because that "confrontation" has the ability to cause physical pain or injury to the victim. *Id.* By comparison, robbery offenses that can be accomplished with minimal force do not have an element of physical force. *See e.g.*, *United States v. Bong*, 913 F.3d 1252, 1264-65 (10th Cir. 2019) (finding after *Stokeling* that Kansas robbery can be committed without the use, attempted use, or threatened use of physical force, because no specific amount of force is required to complete the robbery).

New Mexico robbery can be committed with minimal actual force. The only force necessary to complete New Mexico robbery is that which separates the thing of value from the victim. *State v. Martinez*, 513 P.2d 402, 402 (N.M. Ct. App. 1973); *see also State v. Curley*, 939 P.2d 1103, 1105 (N.M. Ct. App. 1997) (to be guilty of robbery in New Mexico, "when property is attached to the person or clothing of a victim so as to cause resistance, any taking is a robbery, and not larceny, because the lever that causes the victim to part with the property is the force that is applied to break that resistance . . ."). As New Mexico courts do not

require a minimum level of force to complete a robbery, New Mexico robbery, falls outside the force clause.

Moreover, when the degree of force needed to perpetrate a robbery is immaterial, the offense will necessarily include contact which does not rise to the level of violent physical force. Indeed, *Stokeling* found that robbery statutes do not have a physical force element when it is unnecessary for the prosecution to show either, that the accused used any amount of force beyond that effort to obtain possession of another's property or, that there was any resistance by the person to the accused. 139 S.Ct. at 555. New Mexico robbery is such an offense because it requires only an immaterial amount of force to remove an object, such as removing a pin from the victim's clothing if the clothing resists the taking. *Curley*, 939 P.2d at 1105-06; *see also Martinez*, 513 P.2d at 403 ("The amount or degree of force is not the determinative factor."); *State v. Segura*, 472 P.2d 387, 387 (N.M. Ct. App. 1970) (same). In other words, New Mexico robbery can be accomplished without the physical confrontation and struggle between two people that *Stokeling* said was the fulcrum by which a robbery becomes a violent felony.

In New Mexico, any amount of force applied to a person while committing a theft is sufficient, including the mere use of threatening words or gestures. To be sure, in *State v. Barela*, 2018 WL 4959122 (N.M. Ct. App. 2018) (unpub.), the court affirmed a robbery conviction although the accused never touched the victim. While the victim sat in her parked car in her driveway, Barela reached through the open door and took her purse. She testified that by the time he had grabbed her purse she had no time to be afraid. *Id.* at *2. Barela argued this

evidence was insufficient to prove he robbed the victim by threat of force. The court disagreed. It said Barela's comment, "just give me your purse and you won't get hurt," was enough for the jury to find that he took the purse "by threatened force or violence." *Id.* New Mexico robbery then, can be perpetrated with any amount of force, including the mere use of superficially threatening words. *Barela* is consistent with other cases in which the court found the amount of force is immaterial, as long as it is the lever by which an object is separated from its owner.

Barela is proof that New Mexico robbery can be established without evidence of a "physical contest between the criminal and the victim." *Stokeling*, 139 S.Ct. at 553. Thus, contrary to the government's argument, *Stokeling* does not control the outcome here. New Mexico robbery does not have as an element the " use of physical force against the person of another." *Johnson v. United States*, 559 U.S. 133, 135, 138, 145 (2010). The broad range of conduct encompassed by New Mexico robbery is insufficient to meet the physical force requirement in the force clause.

Still, the government insists this Court deny Sanchez's petition, in part, because it denied an ostensibly similar petition in *Garcia v. United States*, No. 17-9469. As Sanchez explains, the comparison is unavailing because *Barela* enervates the Tenth Circuit's opinion in that case.

In *United States v. Garcia*, 877 F.3d 944, 953 (10th Cir. 2017), the panel agreed that in New Mexico, a jury is not asked to decide as an element of robbery, the degree of force and whether that force was

capable of causing bodily injury. The panel then conceded that when, as in New Mexico, "no specific quantum of force is required to commit a robbery . . . it precludes the use of convictions under the Element Clause of the ACCA." *Id.* at 953 n. 9; & *id.* at 956 (admitting New Mexico cases have held "any quantum of force which overcomes resistance could be sufficient to support a robbery conviction). It also acknowledged that New Mexico's Uniform Jury Instruction for robbery was one in which the amount of force used to commit robbery was described as "immaterial." *Id.*

Nevertheless, *Garcia* dismissed the instructions sanctioned by the New Mexico Supreme Court and the state appellate courts' rulings because "what is said is less important than what is done." *Id.* at 956. In other words, it was convinced by its truncated survey of published appellate decisions that *every* robbery conviction in New Mexico will categorically involve more force than the "minimal level of physical force to take a victim's property." *Id.* *Barela*, *supra*, demonstrates that is not so. Because the degree of force used is immaterial to deciding whether force was used, New Mexico robbery, will be accomplished in a variety of ways with varying degrees of force. Robbery can be perpetrated with minimal force and without any resistance by or injury to the victim. Consequently, New Mexico robbery does not categorically involve the violent physical force required under the ACCA's force clause. Neither *Stokeling*, nor *Garcia* dictate the outcome here.

II. Contrary to the government's belief, New Mexico aggravated assault does not have as an element the use, attempted use, or threatened use of violent force against the person of another so as to qualify as a violent felony under the ACCA, because state law holds that aggravated assault does not have any mens rea element directed to the victim.

The government relies exclusively on its brief in *Marquez v. United States*, No. 18-6097, to argue that New Mexico aggravated assault "necessarily threatens the use of physical force" and therefore, "satisf[ies] the ACCA's elements clause." Br. in Opp. 3. Here, Sanchez reviews why the government's argument is incorrect.

The New Mexico Court of Appeals has definitively ruled that to prove aggravated assault with a deadly weapon the state is "not required to prove any threat – or any conduct at all – directed toward the [victim]." *State v. Branch*, 417 P.3d 1141, 1147-49 (N.M. Ct. App. 2018) (*Branch II*). In other words, it does not require any violent action be directed toward the person of another. Consequently, New Mexico aggravated assault with a deadly weapon does not have the "against the person of another" element of the ACCA's force clause.

Branch undermines the Tenth Circuit's interpretation of state law in *United States v. Ramon Silva*, 608 F.3d 663 (10th Cir. 2010). In that decision, upon which the government relies, the court held that New Mexico aggravated assault with a deadly weapon is a violent felony under the force clause. *Marquez*, Br. in Opp. 13-16. Ordinarily, the Tenth Circuit is bound by the latest New Mexico appellate court interpretation of the elements of that state's aggravated assault

offense, but here, inexplicably, it has ignored that rule. *See United States v. Badger*, 818 F.3d 563, 570-71 (10th Cir. 2016) (departing from precedent in large part in light of more recent Utah opinions) (quoting *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1231 (10th Cir. 2000)); *In re Tung Thanh Nguyen*, 783 F.3d 769, 775 (10th Cir. 2015) (following intervening state court decision rather than Tenth Circuit precedent).[1] The government does not convincingly explain why the Tenth Circuit decision is correct when New Mexico courts say it is not. The court's decision not only subverts its own precedent but, as Sanchez discusses in section III, conflicts with other circuits' rulings as well. Sanchez asks this Court to remedy this disharmony among the circuits.

A. The government ignores that in New Mexico, the prosecution is not required to prove any threat – or any conduct at all – directed toward the victim.

In New Mexico, to prove aggravated assault with a deadly weapon ("AADW"), the prosecution is "not required to prove any threat – or any conduct at all – directed toward the [victim]." *Branch II*, 417 P.3d at 1147-49. Consequently, Sanchez has argued that New Mexico AADW does not have the "against the person of another" element of the Armed Career Criminal Act's (ACCA) force clause. 18 U.S.C. § 924(e)(2)(B)(i). The government did not address this argument here or in *Marquez*.

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[1] This rule also applies when the intervening declaration comes from an intermediate appellate court absent convincing evidence the state's highest court would hold otherwise. *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1451-52 (11th Cir. 1991); *Kantor v. Hiko Energy, LLC*, 100 F. Supp. 3d 421, 426-29 (E.D. Pa. 2015).

Instead, it contends New Mexico AADW fits within ACCA's force clause definition because it is a general intent crime. *Marquez*, Br. in Opp. 13-16. This argument does not counter any that Sanchez has made. Rather, his point is that New Mexico AADW does not require any mens rea whatsoever – negligent, reckless, general intent, specific intent or otherwise – that has any nexus to another person. General criminal intent, that is, the conscious wrongdoing, relates to the act itself, without any regard to its relationship to a bystander, intentional, reckless, negligent or otherwise. Put another way, the prosecution is not required to establish any threat – or any conduct at all – directed toward an innocent bystander. Because New Mexico AADW does not have as an element, "against the person of another", it is not a violent felony as described in § 924(e)(2)(B)(i)'s force clause.

Relying on the Tenth Circuit's unpublished decision in this case (*United States v. Sanchez*, 2018 WL 4214236, *2 (10th Cir. 2018)), the government insists that "*Branch* did not alter the state of New Mexico law." *Marquez*, Br. in Opp. 16 (citing *Ramon Silva*, 608 F.3d at 673). This suggestion completely overlooks that in *Branch II*, the New Mexico Court of Appeals expressly rejected the Tenth Circuit's interpretation of its aggravated assault statute. Instead of agreeing with the *Ramon Silva* majority, the Court of Appeals sided with the dissenting Judge Hartz. His assessment – that "a person [in New Mexico] who intentionally handles a weapon in a manner that induces fear of battery can be guilty of assault even if he merely wants to show off his dexterity in handling the weapon, without any interest in inducing fear" – accurately reflected that the offense can be committed

without any mens rea of any sort related to the person whose fear has been induced. *Branch II*, 417 P.3d at 1148 (quoting *Ramon Silva*, 608 F.3d at 675). According to the New Mexico Court of Appeals, the prosecution is not expected to prove "that the defendant intended to assault [a] bystander, but only that he did an unlawful act which caused the bystander to reasonably believe that she was in danger of receiving an immediate battery, and that the act was done with a deadly weapon, and with general criminal intent." *Branch II*, 417 P.3d at 1148.

Ramon Silva depended for its force clause ruling on notions of New Mexico law *Branch II* disavowed.[2] *Branch II* rejected the Tenth Circuit's view of state law in *Ramon Silva* regarding the mens rea element of New Mexico AADW. According to *Branch II*, the "state [is] not required to prove any threat – or any conduct at all – directed toward the" victim. *Branch II*, 417 P.3d at 1148; *compare Ramon Silva*, 608 F.3d at 674 ("apprehension-causing aggravated assault requires proof that a defendant purposefully threatened or engaged in menacing conduct *toward* a victim"). That the *Branch II* court cited with approval Judge Hartz's dissent confirms the conflict between *Ramon Silva*'s ruling and New Mexico law. *Id.*

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[2] Likewise, the government's suggestion that the statute's "'reasonable fear' requirement . . . ensures that force is used or threatened to be used against the person of another" is also incorrect. *Marquez*, Br. in Opp. 16-17. New Mexico AADW requires no mens rea with respect to any inadvertent threat resulting from the defendant's unlawful conduct. All that matters in that regard is the reasonable belief of the victim, not of the defendant.

Branch II's construction of the aggravated assault statute is an authoritative statement of what that statute has always meant. *See United States v. Davis*, 875 F.3d 592, 603 (11th Cir. 2017) (in ACCA's force clause context, Alabama state court construction of what forcible compulsion statute means is an authoritative statement of what statute meant before and after case giving rise to the construction) (citing *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994)). *Ramon Silva* incorrectly construed that statute's elements and that decision should no longer be binding. *See Johnson*, 559 U.S. at 138 (federal courts are bound by interpretations of state law by state's highest court). Correctly understood, "the minimum conduct criminalized by" the New Mexico AADW statute, *see Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), has no mens rea element with respect to the victim. As demonstrated above, that means the offense is not a violent felony under the ACCA's force clause.[3]

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[3] In passing, the government intimates that "employing a deadly weapon" is an element of New Mexico aggravated assault, and therefore a person convicted of this offense will always "'threaten[] the use of physical force against the person of another.'" *Marquez*, Br. in Opp. 16 (quoting *Sanchez*, 2018 WL 4214236, at *2). This belief is incorrect. The statute's plain language does not require a weapon be used in the assault. New Mexico appellate opinions have held the 'deadly weapon' element does not require proof of a threat to use the weapon or even a threat of actual physical harm. *State v. Gaitan*, 131 N.M. 758, 765 (2002) (intending to intimidate by claiming possession of gun is assault with a deadly weapon). As long as a deadly weapon is present or implied, the 'deadly weapon' element is satisfied.

III. The Tenth Circuit's decision conflicts with other circuits which have held that similar state statutes are not categorically violent offenses because they do not require proof the accused intentionally targeted another person.

The government insists that an earlier Tenth Circuit opinion demonstrates that its decision here is consistent with other circuits. *Marquez*, Br. in Opp. 17-18. Citing *United States v. Ford*, 613 F.3d 1263 (10th Cir. 2010), the government suggests that the Tenth Circuit, like other circuits, has held that to fit within the force clause, an offense must have as an element the use, attempted use, or threatened use of physical force *against* another person. *Marquez*, Br. in Opp. 17-18. That may have been so, but the court's decision here ignored *Ford*. Although New Mexico's aggravated assault statute does not have any mens rea element with respect to the victim, the panel still found it fit within the force clause's definition of violent felony. Unwittingly, the government's argument highlights the conflict between other circuits' decisions and the panel's here: Since an offense must have as an element a mens rea relating to the victim to fall within the ACCA's force clause, in the Fourth, Fifth, Seventh, Ninth and Eleventh Circuits, Sanchez's New Mexico aggravated assault conviction would fall outside the force clause definition and he would not have been given an ACCA enhanced sentence.

Indeed, the government's reliance on *Ford* emphasizes the problem created by the panel's decision here. In *Ford*, the court ruled that Kansas' criminal discharge of a firearm at an occupied vehicle fell outside of the ACCA force clause's definition. *Id.* The offense

"require[d] force against a building or vehicle, but not against the person inside." *Id.* at 1271. For that reason, the court said, the offense did not satisfy the force clause's against-a-person requirement. *Id.* at 1271-72. Thus, when an offense has no mens rea of any kind directed towards a person, the offense does not meet all the force clause requirements. *Ford*, 613 F.3d at 1271-72. Had the Tenth Circuit panel here understood the elements of New Mexico aggravated assault as defined in *Branch II* and then followed *Ford*, it would have been compelled to rule that Sanchez's New Mexico aggravated assault conviction was not a violent felony under the force clause. Since it did not, its decision upends *Ford* and puts it in conflict with other circuits.

It makes no difference that the other circuits were not deciding whether New Mexico aggravated assault is a violent felony. *Marquez*, Br. in Opp. 16-17. New Mexico aggravated assault fits within the group of offenses that do not satisfy the force clause's "against the person of another" element. For example, in *United States v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. 2015), the court found North Carolina's discharging a firearm into an occupied building was missing this element because "proving that an occupant is targeted or threatened is unnecessary to satisfying the state offense's elements." *Id.* at 445. Similarly, in *United States v. Jaimes-Jaimes*, 406 F.3d 845, 849-50 (7th Cir. 2005), the court found that element absent in Wisconsin's discharging a firearm into a vehicle or building. The court said the statute did not require the force used be directed against the person of another, only toward a vehicle or building. And in *United States v. Alfaro*, 408 F.3d 204 (5th Cir. 2005), the court held Virginia's

shooting at an occupied dwelling did not have as an element the use of force against another person. It found that "a defendant could violate this statute merely by shooting a gun at a building that happens to be occupied without actually shooting, attempting to shoot, or threatening to shoot another person." *Id.* at 209.

Like these shooting at occupied building statutes, New Mexico aggravated assault also does not require proof of the use of force against another person. The prosecution is not expected to prove any threat – or any conduct at all – directed toward the innocent bystander. As with these shooting offenses, in New Mexico, the prosecution does not have to establish the defendant targeted or threatened the bystander/victim. A person perpetrates the offense when he commits an unlawful act with conscious wrongdoing by handling a weapon in a manner that induces fear of battery without any mens rea of any sort directed at the person whose fear has been induced. The Tenth Circuit's decision here is inconsistent with the logic and reasoning of five other circuits. Thus, this case presents an important and compelling issue of federal law relevant to every case in which a district court must decide whether an offense without any mens rea directed toward a victim has an element the use of force against another person.

Conclusion

The Tenth Circuit did not live up to its obligation to approve the severe penalties in § 924(e)(1) only if it is certain the defendant has a conviction that necessarily satisfies § 924(e)(2)(B)(i)'s violent felony definition. That deficiency resulted in Sanchez unjustly being ordered to serve a mandatory 15 year prison term. This Court should grant certiorari to correct the Tenth Circuit's flawed analysis and provide direction to the lower courts on the important question of federal law this case clearly presents.

Respectfully submitted,

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DATED: April 11, 2019

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Certificate of Service

I, John F. Robbenhaar, hereby certify that on April 11, 2019, a copy of the petitioner's Reply in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

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Respectfully submitted,

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