No. 19-5749

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN MANUEL PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

On November 15, 2019, this Court granted the petition for certiorari in *Walker v. United States*, No. 19-373. The question presented in *Walker* is "[w]hether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a 'violent felony' under the Armed Career Criminal Act, 18 U.S.C. § 924(e)." The Petitioner in *Walker* correctly observed that "the time is ripe for the Court to address the question presented and bring to an end the uncertainty in the lower courts," and suggested that if this Court were to address the question presented, it would ameliorate the very real problem that the fate of a criminal defendant is often decided by the happenstance of geography. *Walker* Pet., at 15, 22.

Unfortunately, it is not that simple; *Walker* alone cannot deliver the needed clarity because it does not address the two related questions that are squarely raised here: (1) are federal courts bound by the label a state court uses to characterize its *mens rea*; and (2) when a statute does not explicitly set forth alternative *mentes reae* as the Texas statute at issue in *Walker* does,[1] is a court to look only to the *mens rea* modifying the use of force, as occurred here, or to the *mens rea* pertaining to the consequences of said use of force?

This case presents a compelling illustration as to why *Walker* alone cannot provide the promised clarity. In 2006, the Ninth Circuit heard its version of

[1] The statute at issue in *Walker*, Texas Penal Code § 29.02, explicitly provides that an individual can be found guilty if in the course of committing a theft, he "intentionally, knowingly, or recklessly causes bodily injury to another." *Walker* BIO, at 5. In other words, there is no ambiguity that the *mens rea* at issue modifies the *consequences* of the defendant's conduct.

Walker: *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). Just like in *Walker*, the Ninth Circuit was presented with a statute that clearly established that the *mens rea* in question modified the consequences of the defendant's intentional conduct, and, as in *Walker*, the statue explicitly set forth three alternative *mentes reae*.[2] *Id.* at 1125. The Ninth Circuit unambiguously held that because the statute proscribed reckless conduct, it could not qualify as a crime of violence under 18 U.S.C. § 16. *Id.* at 1130. Yet, as clear as the Ninth Circuit was in establishing the applicable *mens rea*, because it did not address the two related questions presented here – how to identify a crime's *mens rea* when it is not explicitly set forth in the statute and whether federal courts must blindly accept whatever label a state uses to identify its *mens rea* – the court's attempt to provide clarity has in fact produced bizarre, head-scratching results such that a defendant who consciously disregards a risk that his conduct would result in harm to another *is not* guilty of committing a crime of violence (*Fernandez-Ruiz*, 466 F.3d at 1125 analyzing ARS § 13-1203(A)(1)), but a defendant who honestly believes his conduct would not harm another *is* guilty of a crime of violence. *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1067 (9th Cir. 2018) (analyzing Cal. Penal Code § 245).

Because this case cleanly and squarely presents the two issues that are necessary for this Court to resolve in order to provide the clarity it hopes to achieve

[2] The statute at issue was Arizona Revised Statutes § 13-1203(A)(a) which established that an individual was guilty of assault if he "'[i]ntentionally, knowingly or recklessly caus[ed] any physical injury to another person.'" *Fernandez-Ruiz*, 466 F.3d at 1125.

by granting the petition for certiorari in *Walker*, this Court should grant Perez's petition for certiorari and hear this case as a companion to *Walker*.[3]

I. The Fact that the Definitional Language Happens to be Located at U.S.S.G. § 4B1.2(a)(1) Instead of 18 U.S.C. § 924(e)(2)(B)(i) Has No Bearing on the Quality of this Case as a Vehicle to Address the Critical Questions Raised.

A. Federal Courts Interchangeably Apply Cases Interpreting the Elements Clause from the Sentencing Guidelines to the Identical Clause from the Armed Career Criminal Act and Vice Versa.

The government's primary objection to this Court granting Perez's petition is because the disputed definition appears in the context of the Sentencing Guidelines as opposed to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i). BIO, at 9-10. That is a distinction without a difference here. The text of the two definitions are identical. Indeed, when the Sentencing Commission added the definition in November 1989, it explicitly stated the "definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)." U.S. Sentencing Guidelines, App'x C, Vol. I, Amend. 268, Reason for Amendment (effective Nov. 1, 1989).

Not surprisingly, circuit courts routinely rely on their analysis of the definition of a crime of violence under the Guidelines to inform their analysis of what constitutes a violent felony under the ACCA, and vice versa. *See, e.g.*, *United States v. Sykes*, 914 F.3d 615, 620 (8th Cir. 2019) ("The relevant definition of a violent felony under the ACCA and the definition of a crime of violence under the

[3] Alternatively, this Court should grant the petition for certiorari in *Trayvon Smith v. United States*, No. 19-5727, which presents the identical issues raised here, and hold Perez's petition pending resolution of *Smith*.

Guidelines are so similar that we generally consider cases interpreting them interchangeably."); *United States v. Evans*, 924 F.3d 21, 29 n.4 (2d Cir. 2019) (same); *United States v. Perez*, 932 F.3d 782, 785 n.2 (9th Cir. 2019) (same); *United States v. Ochoa*, 941 F.3d 1074 (11th Cir. 2019) (same); *United States v. Abdullah*, 905 F.3d 739, 747 n.11 (3d Cir. 2018) (same); *Snider v. United States*, 908 F.3d 183, 188-89 (6th Cir. 2018) (same); *United States v. Oliveira*, 907 F.3d 88, 91 (1st Cir. 2018) (same); *United States v. Kendall*, 876 F.3d 1264, 1267 n.3 (10th Cir. 2017) (same); *United States v. Edwards*, 836 F.3d 831, 834 n.2 (7th Cir. 2016) (same); *United States v. Vann*, 660 F.3d 771, 773 n.2 (4th Cir. 2011) (same).

Where the circuit courts are interchangeably relying on the reasoning and precedents from Guideline cases and ACCA cases to define the universe of crimes that have as an element the use, attempted use, or threatened use of physical force against the person of another, the import of this Court's holding on the two urgent questions presented here will be the same no matter whether it is a Guidelines case or an ACCA case. Indeed, the government's objection here is disingenuous when in its response to Walker's petition for certiorari, the government argued that the "the Sixth Circuit has correctly recognized that *Voisine*'s analysis applies with equal force to the elements clauses in the definitions of 'crime of violence' under the Sentencing Guidelines and 'violent felony' under the ACCA." *Walker* BIO, at 7-8 (internal quotations omitted). In other words, when it comes to the issue of *mens rea*, the analysis is the same whether the issue arises under the Guidelines or the ACCA.

Moreover, the fact that this is a Guidelines case does not diminish its importance. "[A]n an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration," and any jail time "has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (internal quotations and alterations removed). "'[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'" *Id.* at 1908 (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.)).

Accordingly, not only is there no need to wait for an ACCA case, in the interests of judicial economy, it makes no sense to do so when this Court has already committed to addressing the issue of *mens rea* in *Walker*. As the history of the Ninth Circuit amply demonstrates, simply identifying the applicable *mens rea* without deciding whose label controls (state or federal), and without clarifying whether the established *mens rea* modifies the use of force or the consequences of said force, *Walker* standing alone will do little to ensure the ultimate goals of uniformity and fundamental fairness whereby defendants who engage in the same conduct are punished the same at the federal level across the circuits.

B. In the Unlikely Event the Sentencing Commission Adopts the Proposed Amendment from 2018, It Would Not Alter the Definition of a "Crime of Violence" In Any Way Relevant to the Analysis Here.

Alternatively, the government argues that because the Sentencing Commission may someday amend U.S.S.G. § 4B1.2, this Court should wait for a different vehicle to answer the urgent questions pertaining to *mens rea* in the context of defining crimes of violence and violent felonies. BIO, at 10-11. As an initial matter, by statute the Sentencing Commission is comprised of seven voting members and four commissioners are required for a quorum to amend the guidelines.[4] For the past year the Commission has had only two voting members and has thus lacked a quorum to propose, let alone amend, the federal sentencing guidelines." *Id.* It is unclear when the Commission will have a voting quorum, and even less clear that any newly constituted Commission will be interested in passing the amendment proposed in December 2018, particularly where the proposal would permit sentencing judges to review documents for "facts" about a past conviction, the meaning of which "will often be uncertain [a]nd the statements of fact in them. . . downright wrong," *Descamps v. United States*, 570 U.S. 254, 270 (2013), and where "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor v. United States*, 495 U.S. 575, 601 (1990).

What is clear, however, is that even if the Commission someday acquires a quorum and decides to enact the amendment, the proposed amendment changes nothing about the analysis called for here. The actual proposal would permit courts

[4] U.S. Sentencing Comm'n, Annual Report 2–3, 2018, *available at* https://www.ussc.gov/about/annual-report-2018.

to "consider the conduct that formed the basis of the conviction, *i.e.*, only the conduct that *met one or more elements* of the offense of conviction or that was an alternative means of meeting *any such element*." 88 FR 65400-01 (December 20, 2018) (emphasis added). The proposal then identifies a limited universe of documents that sentencing judges could mine to determine whether a defendant's actual conduct satisfied the elements of the definition of a crime of violence. *Id.*

In other words, under the proposed amendment the definition of a "crime of violence" will remain identical to that of a "violent felony." Courts will still need to know what *mens rea* to apply to what provision of the definition and whose label characterizing *mens rea* controls. The only thing that changes is what about a past conviction a judge could look at to determine whether said conviction matches the very same definition of a crime of violence at issue here. The exercise of defining *mens rea*, therefore, is as important today as it will be in the unlikely event the Sentencing Commission ever enacts its 2018 proposed amendment.

II. By Providing Much Needed Clarity Regarding Whether Federal Courts are Bound By the Label a State Elects to Use to Characterize the Substantive *Mens Rea* It Has Identified, This Case Would Serve as a Critical Companion Case to *Walker*.

The issue here is as cleanly and clearly presented as possible. There is no ambiguity that the Ninth Circuit believed it was bound by how the California Supreme Court labels its *mens rea*, and there is also no ambiguity that what the California Supreme Court labels "negligence" is irreconcilable with how this Court has defined criminal negligence.

In *Vasquez-Gonzalez*, the Ninth Circuit recognized that in *Elonis v. United States*, 135 S. Ct. 2001 (2015) this Court defined negligence as "a 'reasonable person' standard," but reasoned that it was "not dealing with a simple reasonable person standard" because "we have been expressly told by the California Supreme Court that negligence is not enough." *Vasquez-Gonzalez*, 901 F.3d at 1067 n.5.

To be sure, the California Supreme Court did say negligence was not sufficient, indeed it even said recklessness was not sufficient, "because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know." *People v. Williams*, 26 Cal. 4th 779, 788 (2001); *see*, *e.g., People v. Wyatt*, 48 Cal. 4th 776, 781 (2010) (explaining that "the requisite *mens rea* [for assault] may be found even when the defendant honestly believes his act is not likely to result in such injury" so long as he is aware of facts that would have put a reasonable person on notice of the risk); California Jury Instructions, CALJIC § 9.00 (explaining that "an assault does not require. . . an actual awareness of the risk that injury might occur to another person").

California can certainly elect to label the *mens rea* that holds a defendant responsible even if he was not aware of the risk posed by his conduct as something greater than negligence, and there is no ambiguity that is exactly what California's highest court has repeatedly elected to do. This is not a situation where a court of appeals interpreted or construed state law such that deference is due.[5] Indeed, this is the opposite situation.

[5] Both of the cases the government relies on for the proposition that this Court should defer to the Ninth Circuit's "interpretation" of California law (*Elk Grove Unified Sch. Dist. v. Newdow*,

The question presented here is whether federal courts in imposing recidivist enhancements under the Sentencing Guidelines, the Armed Career Criminal Act and 18 U.S.C. § 924(c), where decades of an individual's liberty can hang in the balance, must blindly adopt whatever label a state elects to use to characterize a particular *mens rea* when federal courts use a different label to characterize the same *mens rea*.

The *mens rea* necessary to qualify an offense as a crime of violence or violent felony, which presumably this Court will clarify in *Walker*, is part of the federal definition of a crime of violence or violent felony. The government, therefore, confuses the relevance of *Johnson v. United States*, 559 U.S. 133 (2010) here. BIO, at 7-8. As this Court explained in *Taylor*, "the meaning of the federal statute should not be dependent on state law," and thus it was a fallacy to believe that when defining a crime of violence or a violent felony that "Congress. . . incorporated

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542 U.S. 1 (2004) and *Bowen v. Massachusetts*, 487 U.S. 879 (1988)), BIO, at 8, rely on *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, this Court was confronted with an ordinance that was subject to multiple interpretations and it did "not have any authoritative interpretation of this ordinance by a North Carolina state court," and this Court explained that *where the state courts have not addressed* an issue pertaining to state law, this Court generally defers to the next best thing – an interpretation of state law by federal judges who practice in the state. *Bishop*, 426 U.S. at 345-46, 346 n.10 (quoting *MacGregor v. State Mut. Life Assurance Co*., 315 U.S. 280, 281 (1942), which concluded that where there was "[n]o decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law. . . we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience"). In sharp contrast here, the Ninth Circuit did not deploy any specialized expertise to divine the meaning of an ambiguous state law about which no state court had opined; instead it simply accepted the label the California Supreme Court elected to use to describe a particular *mens rea* at face value without any analysis. *Vasquez-Gonzalez*, 901 F.3d 1067, 1067 n.5. Indeed, the Ninth Circuit's blind deference to how a state elects to label a particular *mens rea* when said label is inconsistent with the label federal courts would use to describe the same *mens rea* is precisely the issue in a nutshell.

state labels of particular offenses." *Taylor*, 495 U.S. 592 (internal quotations omitted). Commonsense should tell us that when it comes to the elements of a federal recidivist enhancement provision we "must have some uniform definition independent of the labels employed by various States' criminal codes." *Id.* The definitional element of *mens rea* is no different than the definitional element of "burglary" at issue in *Taylor* or the definitional element of "physical force" at issue in *Johnson*. The meaning of *mens rea* in the federal definition of a crime of violence or violent felony must be "a question of federal law, not state law." *Johnson*, 559 U.S. at 138; *see, e.g. Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019) ("A state law's 'exact definition or label' does not control"); *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) ("[T]he label a State assigns to a crime. . . has no relevance to whether that offense is an ACCA predicate").

Were it otherwise, it would not accomplish much for this Court to clarify the applicable *mens rea*; federal sentencing enhancements would still be "left to the vagaries of state law." *Taylor*, 495 U.S. at 588. Federal courts would be at the mercy of how a state court elects to label a particular *mens rea*, as the Ninth Circuit believed it was in *Vasquez-Gonzalez*, leaving defendants subject to "the unfairness of having [an] enhancement depend on the label employed by the State of conviction." *Id.* at 589. *Compare Vasquez-Gonzalez*, 901 F.3d at 1067 (holding that California assault, which does not require proof that when the defendant acted he had any awareness of the risk that his conduct might harm another, qualifies as a crime of violence because the California Supreme Court elects to label a *mens rea*

that simply requires knowledge of facts that would put a reasonable person on notice of the risk of harm as something greater than negligence) with *United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017) (holding that a Massachusetts assault statute that, like Cal. Penal Code § 245, did not require proof that a defendant was even aware of the risk of serious injury even though a reasonable person would have perceived the risk, was not a violent felony, and in so doing, the First Circuit disregarded the label "reckless" that the state elected to use to characterize the *mens rea*).

To be sure, "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). BIO, at 8. Nobody is suggesting otherwise. The California Supreme Court has clearly articulated the *substance* of the *mens rea* required for the government to secure a conviction under Cal. Penal Code § 245, and federal courts are bound by that substance. *Johnson*, 559 U.S. at 138. The issue here is whether federal courts are also bound by the *label* the State elects to use to characterize the substantive *mens rea* it has identified when that label conflicts with how federal law would characterize the substantive *mens rea* identified by the State.

The issue is starkly presented here where what California has elected to label as greater than recklessness, is the very definition of negligence as articulated by this Court in *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015), yet the Ninth Circuit unequivocally believed it was bound by the label the State court elected to use and thus explicitly rejected as irrelevant this Court's definition of criminal

negligence in *Elonis*. *Vasquez-Gonzalez*, 901 F.3d at 1067, 1067 n.5. Notably, in a case the government relies upon (BIO, at 9),[6] the Tenth Circuit likewise considered itself bound by the labels California uses to characterize its *mens rea*. *United States v. Santos-Santos*, 463 F. App'x 728, 731-32 (10th Cir. 2011)(unpub)(rejecting defendant's argument that a *mens rea* that simply requires proof that a defendant knew the facts that would have put a reasonable person on notice of a risk of harm constituted at least recklessness because "*Williams* explicitly held otherwise," and "what elements (among them a *mens rea*) must be proved to sustain a conviction under California Penal Code § 245(a)(1) is a question of state law; here, the California Supreme Court's determination is conclusive").

This case, therefore, provides an excellent vehicle for this Court to resolve the issue of whether federal courts are at the mercy of how a state court elects to label *mens rea* when imposing substantive sentencing enhancements under federal law, and thus a critical companion case to *Walker*, in which this Court will presumably resolve the issue of what *mens rea* applies to the definition of a federal crime of violence and a federal violent felony.

III. Alternatively, This Court Should Hold the Petition Pending Clarification in *Walker* as to Whether the *Mens Rea* Applies to the Use of Force or to the Consequences of the Use of Force.

Alternatively, this Court should hold Perez's petition pending resolution of *Walker* given that the resolution of *Walker* will almost certainly require this Court

[6] The other circuit court cases the government relies upon addressing Cal. Penal Code § 245 (BIO, at 8-9) either were decided on the basis of the degree of force required and did not consider *mens rea,* or else were decided in the context of defining what constitutes an "aggravated assault" under former U.S.S.G. § 2L1.2.

to articulate whether the *mens rea* in the elements clause of the crime of violence definition applies to the defendant's use of force or the defendant's awareness of the consequences of said force given that the Sixth Circuit's decision in *Walker* is premised on this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016). *Walker v. United States*, 769 F. App'x 195, 201 (6th Cir. 2019) (Stranch, J., concurring). The statute at issue in *Voisine* defined a misdemeanor crime of domestic violence as one that simply involves the "'use . . . of physical force.'" *Voisine*, 136 S. Ct., at 2276 (alteration in original). Walker's argument is that the definition of a crime of violence/violent felony requires not only the use of force, but the deployment of said force *against the person of another*, and that this statutory distinction should matter when determining the applicable *mens rea*. *Walker* Pet., at 7, 12-13, 21.

Like the Sixth Circuit in *Walker*, the Ninth Circuit in *Vasquez-Gonzalez* limited its analysis to whether the use of force was intentional, opining that the "essential question is whether assault in California can be committed accidently or whether it requires an intentional use of force," and because "[a]s defined in California, assault requires an intentional act," "[w]e conclude that this definition requires an intentional use of force," and thus "assault in California satisfies the *mens rea* requirement for § 16(a)." *Vasquez-Gonzalez*, 901 F.3d at 1068.

Just as *Walker* does, in reliance on this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), which emphasized the importance of the language "against the person of another," Perez argued below and before this Court that the Ninth Circuit

erred when it ignored this language and focused exclusively on whether the defendant's use of force was intentional. Pet., at 16-28, Perez AOB, at 22-27, Perez Reply, at 4-9. And that is the significance of the cases identified in Petitioner's petition that the government mistakenly believed was an endorsement of a particular *mens rea*. BIO, at 9. The issue is that regardless of the applicable *mens rea*, there is both a circuit split and intra-circuit splits as to what part of the definition the *mens rea* modifies. The resolution of *Walker* will likely answer that question.

CONCLUSION

Perez respectfully requests that this Court grant his petition for writ of certiorari and hear his case with *Walker v. United States*, No. 19-373, to provide much needed clarity on the issue of whether federal courts are bound by the labels states use to characterize *mentes reae*, or alternatively, hold his petition pending resolution of *Walker*.

Dated: December 6, 2019

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