NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

AARON PEREZ,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant who seeks to demonstrate that a prior conviction is not a categorical match for federal sentencing purposes must point to an actual state court prosecution illustrating the state crime's overbreadth.

2. Whether a defendant's conviction for violating 18 U.S.C. § 922(g)(1), felon in possession of a firearm, must be reversed for insufficient evidence because there was no proof that he knew at the time of the offense that he had a prior felony conviction, as required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

INTERESTED PARTIES

All parties to the case below are named in the caption.

RULE 14.1(b)(iii) STATEMENT

There are no proceedings directly related to the case in this Court.

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Petitioner Aaron Perez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's published opinion affirming Mr. Perez's conviction is reported at 932 F.3d 782 (9th Cir. 2019) and included in the Appendix at 1a. Its October 23, 2019 order denying Mr. Perez's petition for panel rehearing and rehearing en banc is unreported and included in the Appendix at 9a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on July 11, 2019, issued its amended judgment in favor of respondent on July 25, 2019, denied the petition for panel rehearing and rehearing en banc on October 23, 2019, and issued its mandate on October 31, 2019. This petition is timely under S. Ct. R. 13.3.

REGULATIONS AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guideline § 4B1.2(a) provides:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. 4B1.2(a).

California Penal Code § 243(d) provides:

> (d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

Cal. Penal Code § 243(d).

STATEMENT OF THE CASE

In May 2016, following a stipulated-facts bench trial, Mr. Perez was convicted of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). App. 3a. At sentencing, over Mr. Perez's objection, the district court determined that Perez's 2013 conviction for battery with serious injury, in violation of Cal. Penal Code § 243(d), qualified as a prior felony "crime of violence" under USSG §§ 2K2.1(a)(4) and 4B1.2(a)(1) (2016), increasing the base offense level from 14 to 20. App. 3a. The district court imposed a 61-month sentence. App. 3a.

The Ninth Circuit affirmed, holding that Mr. Perez's prior California battery with serious injury conviction qualified as "crime of violence." App. 3a. Mr. Perez had argued that a violation of California's battery with serious injury statute is not categorically a crime of violence because two decisions by two state appellate courts interpreted the statute to encompass non-violent acts that nonetheless resulted in substantial bodily injury. App. 7a-8a. The Ninth Circuit panel rejected the state appellate decisions as involving "improbable hypotheticals." App. 8a. Citing the "realistic probability" requirement in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the panel held that Mr. Perez was required to cite a case "where the state courts in fact did apply section 243(d) to a defendant who had engaged in no more than slight touching." App. 8a.

The Ninth Circuit thereafter denied Mr. Perez's petition for panel rehearing and rehearing en banc. App. 9a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision deepens a mature circuit split among the courts of appeals, namely whether a defendant facing a federal sentencing enhancement must identify an actual state-court prosecution that applied the state offense in the posited, overbroad manner to demonstrate that his state conviction is not a categorical match to the predicate federal offense. The Court should grant the petition, reverse the decision below, and restore uniformity on these important and recurring issues.

If the Court does not grant review based on the categorical approach question, it at least must grant certiorari, vacate Mr. Perez's § 922(g)(1) conviction, and remand in light of *Rehaif* because he was convicted of being a felon in possession of a firearm without sufficient evidence that he knew of his felon status that made his possession of a firearm a crime.

I. There is a direct and acknowledged circuit split on whether defendants must identify an actual prosecution to demonstrate that a state conviction is not a categorical match.

The circuits are split on whether this Court's precedent, namely the "realistic probability" test, requires—in all instances—defendants to identify an actual prosecution of non-generic conduct to prove that a prior state conviction is not a categorical match to a federal predicate offense. Not only is this split well-established, it means that some courts of appeals are ignoring relevant state court opinions merely because of the absence of an actual prosecution, a practice that runs

afoul of this Court's precedent. Further, the rule adopted by the Ninth Circuit below places an unfair and often insurmountable burden upon defendants because the majority of prosecutions never make it into an opinion. This Court should grant review to resolve this circuit conflict.

A. This Court's precedent does not require defendants in all instances to identify an actual prosecution applying a state crime in a nongeneric manner.

In *Taylor v. United States*, 495 U.S. 575, 601-02 (1990), this Court set out the "categorical approach" requiring that—for a federal sentencing enhancement to be imposed—the elements of a state offense for which the defendant was previously convicted be the same as, or narrower than, the elements of the corresponding "generic" federal offense. Following *Taylor*, sentencing courts compare the elements of the defendant's state offense against the federal predicate to determine the propriety of an enhancement. *Id.*

In *Duenas-Alvarez*, this Court outlined the "realistic probability" test. 549 U.S. at 193. The defendant in *Duenas-Alvarez* argued that California case law demonstrated that his state offense fell "outside the generic definition." *Id.* at 193-94. The Court disagreed with the defendant's interpretation of California precedent. *Id.* But it added:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Id. at 193. The defendant in *Duenas-Alvarez* made no "such showing." *Id.*

This Court revisited the "realistic probability" test in *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). There, the Court affirmed *Duenas-Alvarez* and reiterated that *Taylor*'s "focus on the minimum conduct criminalized by the state statute is not an invitation to apply legal imagination to the state offense." *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193); *see also id.* at 205-06. Thus, the Court explained that where federal law excludes trafficking in "antique firearm[s]," 18 U.S.C. § 921(a)(3), from its definition of a violent felony, 8 U.S.C. § 1101(a)(43)(C), "a conviction under any state firearms law that lacks such an exception" would not automatically "be deemed to fail the categorical inquiry." 569 U.S. at 205. Instead, "[t]o defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." *Id.* at 206. This language from *Moncrieffe*, together with this Court's reference in *Duenas-Alvarez* to cases "in which the state courts did in fact apply" the law in the manner urged by the defendant, has led several circuits to hold that a defendant must point to an actual prosecution of a state crime in a nongeneric manner to prove that a defendant's prior state crime of conviction is not a match to the generic, federal predicate.

In more recent cases, however, this Court has not required defendants to provide examples of specific prosecutions, thus demonstrating that the Court's earlier references to actual prosecutions were intended merely to drive home the point that the "realistic probability" test is designed to rule out contrived hypotheticals

unfounded in the language of the statute or state court decisions. For example, in *Mathis v. United States*, 136 S. Ct. 2243 (2016), this Court outlined the modified categorical approach without "apply[ing]—or even mention[ing]—the 'realistic probability' test." *United States v. Titties,* 852 F.3d 1257, 1275 (10th Cir. 2017). *Mathis* instead affirmed that the focus under *Taylor* is on " 'the elements of the statute of conviction,' " not the " 'particular facts underlying [the prior] convictions.' " 136 S. Ct. at 2251 (alteration in original) (quoting *Taylor*, 495 U.S. at 600-01).

To analyze whether state statutes match the generic offense under the modified categorical approach, *Mathis* explained that sentencing courts should consider "state court decision[s]" and the statutory scheme and structure. 136 S. Ct. at 2256. Only "if state law fails to provide clear answers" can sentencing courts look at charging documents and jury instructions (in other words, the record of actual prosecutions) to determine whether statutory alternatives are treated as "elements or means." *Id.* at 2256-57.

And in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), this Court relied on the plain language of the California statute at issue to conclude that petitioner had "'show[n] something special about California's version of the [statutory rape] doctrine'–that the age of consent is 18, rather 16." *Id.* at 1568, 1572 (quoting *Duenas-Alvarez*, 549 U.S. at 191). Given the clarity of the statutory language, it was not necessary to consider whether there was a "reasonable probability" that a 21-year–23-year-old would actually be prosecuted for having consensual sexual intercourse with a 17-year-old. *See id.* at 1572.

B. There is an acknowledged circuit split on the scope of the "realistic probability" test.

Because the circuits are divided on whether a defendant must identify an actual prosecution of his prior state offense in the proposed nongeneric manner, review is warranted.

1. The Fourth, Fifth, and D.C. Circuits require defendants to point to an actual prosecution of nongeneric conduct to satisfy the realistic probability test. In *United States v. Bell*, 901 F.3d 455, 472 (4th Cir. 2018), the Fourth Circuit required the defendant to " 'point to ... cases in which state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.' " 901 F.3d at 472 (quoting *Duenas-Alvarez*, 549 U.S. at 193)). And the Fourth Circuit further dismissed as "dicta" a defendant's reliance on Maryland cases stating that robbery can be completed by threats to property. *Id.*

Similarly, in *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016), the D.C. Circuit faulted the defendant for failing to point to any "Maryland case in which ... a conviction [for nonviolent conduct] ha[d] been obtained." *Id.* at 485. Instead, like the Fourth Circuit, the D.C. Circuit dismissed as "dicta" Maryland case law cited by the defendant stating that armed robbery could be committed by threats to property. *Id.*

So too in the Fifth Circuit. In *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc), the Fifth Circuit held that the "realistic probability" test requires a defendant to "provide actual cases where state courts have applied the statute in [the nongeneric] way." According to the court, "[t]here is no exception

to the actual case requirement articulated in *Duenas-Alvarez*" even "where a court concludes a state statute is broader on its face." *Id.* (emphasis added). And the Fifth Circuit went so far as to reason that *Duenas-Alvarez*'s statement "that a defendant must 'at least' point to an actual state case" led to "the implication ... that even pointing to such a case may not be satisfactory." *Id.* (emphasis added) (quoting *Duenas-Alvarez*, 549 U.S. at 193).

2. On the other side of the split, the First, Third, and Sixth Circuits have rejected the requirement of an actual prosecution where the statutory language is plain or state courts have definitively addressed its interpretation. In *Swaby v. Yates*, 847 F.3d 62, 65 (1st Cir. 2017), the First Circuit rejected the Board of Immigration Appeals' reasoning that the defendant was required "to show that there was a realistic probability that Rhode Island would actually prosecute [nongeneric] offenses under [the statute at issue]." The state crime—a controlled substance offense—"clearly" applied "more broadly than the federally defined offense," and "[n]othing in *Duenas-Alvarez* ... indicates that this state law crime may be treated as if it is narrower than it plainly is." *Id.* at 66. And in *United States v. Steed*, 879 F.3d 440, 448 (1st Cir. 2018), the First Circuit held that it was "bound by how a state's highest court defines a crime in that state."

In *Zhi Fei Liao v. Attorney General*, 910 F.3d 714 (3d Cir. 2018), the Third Circuit held "that it is unnecessary to apply the realistic probability test where the elements of the offense, whether as set forth in a statute or case law, do not match the generic federal crime." *Id.* at 723 n.9 (emphasis added). Noting the many "sister

circuit[s]" that had reached similar conclusions, the court rejected the government's argument that it must examine actual "convictions under the state statute"; Pennsylvania courts had already provided "guidance as to how the statute applies". *Id.* at 723, 724 n.11; *see, e.g., Salmoran v. Att'y Gen.*, 909 F.3d 73, 82 (3d Cir. 2018) ("Salmoran does not need to identify cases in which New Jersey actually prosecuted overbroad conduct."); *see also Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481-82 (3d Cir. 2009); *Singh v. Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016).

And in *United States v. McGrattan*, 504 F.3d 608, 614-15 (6th Cir. 2007), the Sixth Circuit looked to both the language of Ohio law and the pronouncements of Ohio courts to find "a 'realistic probability' that the statute would be applied [in a nongeneric manner]." Although the Sixth Circuit was "not aware of any cases in which the Ohio Supreme Court ha[d] explicitly addressed [the] situation ... or where Ohio ha[d] prosecuted someone entirely [on the basis of nongeneric conduct]," the "analysis ... performed by several other Ohio courts ma[de] it clear that such a possibility [wa]s contemplated by the law." *Id.* at 614. According to the Sixth Circuit, it did "not matter what precedential weight Ohio state courts give these decisions." *Id.* at 615. "In the absence of binding Ohio precedent indicating that [the statute] does not apply in such situations," nonbinding analysis of lower Ohio courts was sufficient to show "a 'realistic probability' that someone could be prosecuted." *Id.*; *see also United States v. Lara*, 590 F. App'x 574, 584 (6th Cir. 2014) (rejecting argument that defendant must point to actual prosecutions where the "meaning of

the statute" is "plain" or "state-court cases ... suggest that a statute applies to non-generic conduct").

3. The Second, Ninth, Tenth, and Eleventh Circuits have taken an intermediate approach. Like the First, Third, and Sixth Circuits, these three circuits have also held that the defendant need not point to specific overbroad convictions under *Duenas-Alvarez* if the defendant can show the statutory language itself is overbroad. However, unlike the First, Third, and Sixth Circuits, these three circuits, including the Ninth Circuit in this case, have rejected sources of state law other than the language of the statute itself.

In *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), the Second Circuit concluded that "[t]here is no ... requirement" that the defendant " 'point to ... cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues,' " where the " 'statutory language itself ... creates the realistic probability that a state would apply the statute to conduct beyond the generic definition.' " *Id.* at 63 (quoting *Duenas-Alvarez*, 549 U.S. at 193; *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013)). The Second Circuit, however, rejects charging documents to show a realistic probability that the state prosecutions are overbroad. *Matthews v. Barr*, 927 F.3d 606, 622 (2d Cir. 2019).

The Ninth Circuit has held that defendants "need not point to an actual case applying the statute of conviction in a nongeneric manner." *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015). Instead, a defendant "may simply 'rely on the statutory language to establish the statute as overly inclusive.' " *Id.* (quoting *United*

States v. Vidal, 504 F.3d 1072, 1082 (9th Cir. 2007)). However, the Ninth Circuit, in this case, has rejected state court interpretations of the statute at issue. The panel dismissed state appellate court opinions that explained that felony battery resulting in serious bodily injury could be committed with non-violent force, as "technical analyses of state law issues unrelated to the question whether section 243(d) constitutes a crime of violence" that "rested their conclusions on improbable hypotheticals." App. 8a. Despite the state court appellate opinions interpreting the statute to require no more than mere "offensive touching," the Ninth Circuit required Mr. Perez to cite a case "where the state courts in fact did apply section 243(d) to a defendant who had engaged in no more than slight touching." App. 8a.

Like the Ninth Circuit, the Tenth Circuit has also rejected the argument that the defendant "[could] not prevail" because "he ha[d] not supplied 'any case in which [the state] has prosecuted someone' " in the proposed nongeneric manner. *Titties*, 852 F.3d at 1274. But, like the Ninth Circuit, the Tenth Circuit does not defer to state court interpretations of the statute. In *United States v. Turrieta*, 875 F.3d 1340, 1346 (10th Cir. 2017), the Tenth Circuit rejected state appellate court opinions that referred to trailers or mobile homes as dwellings when the state cases did not directly decide the issue of whether a mobile home or trailer would constitute a residence or dwelling house.

The Eleventh Circuit too has rejected the argument that defendants must demonstrate actual prosecutions of nongeneric conduct to prevail, but only when the statutory language itself creates the 'realistic probability' that a state would apply

the statute to conduct beyond the generic definition. *Bourtzakis v. United States Attorney Gen.*, 940 F.3d 616, 624 (11th Cir. 2019).

The circuits are thus in disarray over whether the "realistic probability" test always requires a defendant to identify an actual case prosecuting a state offense in the proposed nongeneric manner, and, if not, what other sources of state law can be considered. They have repeatedly acknowledged their disagreement. *See, e.g., Vazquez v. Sessions*, 885 F.3d 862, 873 & n.4 (5th Cir. 2018) (recognizing that "[o]ther circuits have held that a statute's plain meaning is dispositive" without requiring an actual prosecution); *Castillo-Rivera*, 853 F.3d at 241 (Dennis, J., dissenting) ("[T]he majority opinion's unqualified rule that a defendant must in all cases point to a state court decision to illustrate the state statute's breadth" ignores "the holdings of several of our sister circuits."); *Salmoran*, 909 F.3d at 81 ("[W]e recognize that [the language of *Duenas-Alvarez*] has caused some confusion in the courts of appeals."). This Court should grant review to resolve the confusion.

C. Requiring defendants to identify an actual prosecution of nongeneric conduct contravenes this Court's precedent and unjustifiedly creates a Herculean hurdle.

Reading the "realistic probability" test to require a defendant to point to an actual prosecution of nongeneric conduct even when the state courts have interpreted the statute, as the Ninth Circuit has done, contravenes this Court's precedent and imposes an unrealistic and unfair burden on defendants.

1. This Court has repeatedly held that the categorical approach requires a comparison of the elements of the state statute to the generic crime. *Taylor*, 495 U.S. at 600-01. The question is not the underlying factual conduct for which the defendant

was convicted, nor the factual conduct undergirding the prosecutions of others, but what conduct the state statute criminalizes as a whole. *Id.*; *Mathis*, 136 S. Ct. at 2251.

Answering this question—that is, construing the state crime—typically begins with the text of any relevant statute. *See, e.g., Descamps v. United States*, 570 U.S. 254, 275 (2013) ("[I]n determining a crime's elements, a sentencing court should take account ... of the relevant statute's text [.]"). It would be anomalous for federal courts to "ignore the statutory text and construct a narrower statute than the plain language supports" because a defendant has not happened to unearth a conviction involving nongeneric conduct that is clearly encompassed by the text. *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017); *see also Titties*, 852 F.3d at 1274; *Swaby*, 847 F.3d at 66. Demanding that a defendant "produce old state cases to illustrate what the statute makes punishable by its text ... 'misses the point of the categorical approach and "wrenches ... [this] Court's language in *Duenas-Alvarez* from its context." ' " *Hylton*, 897 F.3d at 64 (citation omitted).

Likewise, it is state courts who are the ultimate arbiters of state law. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither [the Supreme] Court nor any other federal tribunal has any authority to place a construction on a state statute different from one rendered by the highest court of the State."). Whether a crime is enshrined in statute or created by common law (as in this case), it is just as inappropriate to ignore state court constructions of state law as it is to ignore the plain meaning of statutory text. Courts cannot close their eyes—as the Ninth Circuit

did below—to state precedent broadly construing a state crime merely because the facts underlying the conviction in that case did not involve non-generic conduct.

To place actual prosecutions of non-generic conduct over and above these interpretive tools—"state court decisions" and the statutory text—conflicts with this Court's precedent. *Mathis*, 136 S. Ct. at 2256. Moreover, requiring defendants to point to actual prosecutions shifts the focus away from the elements of the state statute to the underlying facts of conviction (whether of the defendant or others) in contravention of *Taylor*. *See id.* at 2251; *Taylor*, 495 U.S. at 600-01. Thus, an "actual prosecution" regime turns on the vagaries of a prosecutor's decision to charge unlawful conduct, rather than on a comparison of the elements of the state and federal offenses. But "where the text of a statute" or state court precedent "is clear," courts should not "rely on the forbearance of prosecutors to prevent an offense from qualifying as a crime of violence." *Villanueva v. United States*, 893 F.3d 123, 138 n.2 (2d Cir. 2018) (Pooler, J., dissenting).

2. Further, requiring a defendant to identify an actual prosecution of a state offense in a nongeneric manner is an impractical, if not impossible, burden. According to the most recent data from the Department of Justice, ninety-four percent of state felons plead guilty. Sean Rosenmerkel et al., U.S. Dep't of Justice, Felony Sentences in State Courts, 2006 Statistical Tables, Nat'l Jud. Reporting Program at 1, 25 tbl.4.1 (Dec. 2009)[1]; *see also Missouri v. Frye*, 566 U.S. 136, 143 (2012). "[I]n [such] a system ... we can hardly expect a judicial opinion to have issued on each available fact

[1] Available at https://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

pattern." *Villanueva*, 893 F.3d at 137 (Pooler, J., dissenting). The vast majority of prosecutions will never be discussed in a trial court opinion, let alone a published, appellate opinion, and "may thus be unavailable" to defendants. *Castillo-Rivera*, 853 F.3d at 244-45 (Higginson, J., dissenting); *see also United States v. Davis*, 875 F.3d 592, 606 (11th Cir. 2017) (Rosenbaum, J., concurring) ("[O]nly a handful of the numerous cases prosecuted under [Fla. Stat.] § 784.041 have published opinions in them. As a result, we have no way of knowing the scope of what Florida has actually prosecuted under that statute."). Cases appealed through a state court system constitute a "small fraction of total cases." Doug Keller, Causing Mischief for *Taylor*'s Categorical Approach: Applying Legal Imagination to *Duenas-Alvarez*, 18 Geo. Mason L. Rev. 625, 660-61 (2011). The likelihood that there will be state precedent addressing the array of possible prosecutions is further diminished "for defendants whose prior convictions occurred in small states (which have fewer prosecutions and thus fewer appellate decisions for any given statute) and defendants whose prior convictions occurred under a relatively new statute." *Id.* at 660, 661 n.237 (providing example of state statute cited only twenty-nine times in forty-one years, and of those times, only nine cases discussed the facts underlying the prosecution).

When appellate decisions are unavailable, asking defendants to comb through unpublished trial court orders or charging documents to find an "actual prosecution" of nongeneric conduct is a nearly insurmountable burden, especially where many of these records will not be widely accessible.

In sum, "[a] defendant's inability to find a case illustrating a particular type of conviction does not necessarily indicate that such cases do not exist." *Villanueva*, 893 F.3d at 137 (Pooler, J., dissenting). Instead, "it may well reflect the fact that finding such a case would require onerous and unwieldy research into the filings of individual cases, to ascertain whether the particular facts might fit the mold obviously encompassed by the statutory language." *Id.* at 137-38. And "[e]ven if there truly were no cases to have ever been charged under such a fact pattern, this could be attributable more to the preferences of prosecutors than a lack of a legal element." *Id.* at 138 n.3. Where state law is plain, it is inappropriate to require defendants to find a needle in a haystack.

II. If the Court does not grant the writ based on the categorical overbreadth issue, it should grant, vacate and remand because the evidence was not sufficient to support Mr. Perez's § 922(g)(1) conviction under *Rehaif*

On June 21, 2019, this Court held in *Rehaif* that the word "knowingly" in the federal gun statutes "applies both to the defendant's conduct and to the defendant's status." 139 S. Ct. at 2194. Thus, for a conviction under § 922(g), the government must prove "that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* Mr. Perez was convicted at a stipulated-facts bench trial of § 922(g)(1) without sufficient evidence, as required by *Rehaif*, that he knew at the relevant time that he was a felon. His § 922(g)(1) conviction thus was not supported by sufficient evidence and violated his constitutional right to due process. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). If the Court does not grant Mr. Perez's petition on the first issue presented, it should grant, vacate, and remand based on *Rehaif*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 21, 2020

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