No. 20-7909

IN THE

Supreme Court of the United States

JUAN PABLO PRICE,

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

REPLY BRIEF FOR PETITIONER

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Perhaps most striking about the government's brief in opposition is that at no point does it assert that the Ninth Circuit majority's legal conclusion regarding the requirements of 18 U.S.C. § 2244(b)—-the issue in Mr. Price's petition—was correct. Not once. Never. It does claim that the "court of appeals correctly affirmed petitioner's conviction," BIO 9, but its entire argument is premised not on the correctness of the legal decision (which, based on its silence, the government tacitly appears to concede was erroneous) but on the panel's alternative holding—also erroneous—that any error was harmless, BIO 9-13. It is thus quite convenient that after ignoring the legal question presented in this case, the government then proceeds to argue that certiorari is "rarely granted" when a case turns on "factbased" harmlessness grounds, and "the misapplication of a properly stated rule of law." BIO 9-10, 12-13 (quoting Sup. Ct. R. 10). But wishing it so does not make it true.

The legal issue presented in Mr. Price's petition—whether the knowledge requirement in § 2244(b) applies to all elements of the offense, such that the government must prove *both* that the defendant knowing engaged in sexual contact with another person *and* that defendant knew he lacked that other person's permission—is *not* fact-based in any way. It's a straightforward issue of statutory construction in a case where the court of appeals did *not* correctly state the rule of law. And the Ninth Circuit panel based its harmlessness decision on a misapplication of harmless error caselaw, as Judge Collins explained below. Pet. App. 103a-108a (discussing the requirements for harmlessness review under *Neder v. United States*, 527 U.S. 1 (1999), and other Court precedents, and explaining that "[t]he panel's harmless error analysis is legal flawed under these standards"). Rule 10 simply does not apply. If anything, the Ninth Circuit panel's—and government's—misstatement and misapplication of the law for harmless error review further supports the need for this Court to review this case to correct those misunderstandings involving the secondary question subsumed within the question presented (and argued in the Petition), *i.e.*, whether the error here was harmless.

A brief discussion on those misunderstandings is thus warranted. Contrary to the court of appeals's understanding below (and the government's argument here), *Neder* instructs that the failure to have a jury determine a required element in a criminal case is not harmless if the defendant presented *sufficient* evidence to permit a finding in his favor. *Neder*, 527 U.S. at 19. The question is not what a court believes a reasonable jury *would* have found, but what a reasonable jury *could* have found, given the evidence in the record. *See id.* And perhaps most importantly, in reviewing for harmlessness under these circumstances, the evidence must be viewed in the light most favorable to *defendant*. *Cf. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (explaining how to conduct a sufficiency-of-evidence review

in the context of determining whether the evidence was sufficient to convict). It is not for an appellate court to weigh and discount testimony; it is the jury's role to assess the weight and credibility of any testimony. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) (citing *Jackson*, 443 U.S. at 319).

In *Neder*, the defendant was convicted of federal charges involving tax fraud. Although materiality was an element of the crime, the district court refused to submit the materiality issue to the jury. *Id.* at 4. *Neder* applied harmless error review, but it explained that because the omitted element was never submitted to a jury, the review must focus on "whether the record contains evidence that *could* rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19 (emphasis added). If, after a "thorough examination of the record," the reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant *contested* the omitted element and raised evidence *sufficient* to support a contrary finding—it should not find the error harmless." *Id.* (emphasis added).

But here, as Judge Collins explained, the Ninth Circuit panel concluded that simply "by convicting Price, the jury *necessarily* 'believed A.M.'s story of what occurred on the flight over Price's story.'" Pet. App. 106a (quoting Pet. App. 52a, 71a-73a). And the panel then "construe[d] the record in the light most favorable to the *Government*, and conclude[d] that, under A.M.'s version of events, 'no reasonable juror could have found that Price subjectively believed' that he had permission." Pet. App. 106a (quoting Pet. App. 53a) (emphasis in original). "The problem with this approach is that, on the record of this trial, the jury could easily have found that Price lacked objective permission even if it believed his version of events. Thus, the fact that the jury convicted under the (deficient) instructions

given in this case does not *necessarily* mean that the jury disbelieved any, much less all, of Price's testimony." Pet. App. 106a.

Indeed, here, there plainly was evidence sufficient to support a jury finding that Mr. Price did *not* know he did not have permission to engage in sexual contact with A.M.. Mr. Price expressly testified that when A.M. had gotten up and moved away from him following the sexual contact, he "thought she just changed her mind somehow. She just had a different attitude all of a sudden." ER 871.[1] And that change in her attitude left him "a little upset." ER 871. He explained that he "felt like if she -- if she had changed her mind, if she was bothered by -- if she decided that she didn't want to go any farther with what we were doing, that she could have just told me. She could have just -- she didn't have to move away without saying anything." ER 871-872. He also explained that when the flight purser later told him a passenger had said she had been "violated," that he "just couldn't believe it" because "the whole time . . . we have been engaged in a sexual act -- touching that was -- that I was completely sure that it was consensual. And so why would she do that? Why would she turn against me like that? I did not know. And I just -- I was very, very upset." ER 872. This is all evidence supporting the conclusion that Mr. Price did not know he lacked permission to engage in sexual contact with A.M.—the element the jury was not permitted to decide. He expressly testified that he thought the encounter was consensual.

Was the jury free to reject Mr. Price's testimony? Of course. But that does not mean that there wasn't testimony from which it *could* have concluded that Mr. Price believed the sexual contact was consensual, *i.e.*, with A.M.'s permission. And *Neder* does not permit appellate judges to simply conclude that every juror

[1] "ER" refers to the Excerpts of Records submitted in the Ninth Circuit.

"necessarily" would have rejected Mr. Price's testimony regarding the omitted element merely because they did not believe him based on a reading of the cold record. On this point, Judge Collins was correct and the panel and government were wrong on what the *law* requires, and what appellate courts may consider, for harmless error review.

In addition, in its apparent effort to obscure the Ninth Circuit's erroneous interpretation of the requirements of § 2244(b), and the need for this Court's review, the government makes the rather absurd argument that no conflict exists between the panel majority's decision and decisions of this Court because "[n]one of the cases that petitioner cites involved Section 2244(b)," and thus review by this Court is unnecessary. BIO 9, 14-15 (citing *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (interpreting a firearms statute); *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (interpreting an identity-theft statute); *Liparota v. United States*, 471 U.S. 419 (1985) (interpreting a fraud statute)). Seriously? Yes, it's true, none of this Court's cases cited by Mr. Price—for how a statute must be interpreted—involved § 2244(b). But so what? *Rehaif* involved interpretation of the federal gun possession statutes but none of the cases this Court relied on there for interpreting that statute involved those statutes. *Flores-Figueroa* (one of the cases relied on in *Rehaif* and by Mr. Price here) involved the identity theft statute, but it didn't rely on cases involving identity theft for applying the rules of statutory construction. This Court relied on the very same cases Mr. Price has cited here—the ones the government apparently thinks aren't applicable—for the applicable rules of statutory construction. And the fact remains that the Ninth Circuit's decision that needs to be reviewed here violates, *i.e.*, conflicts with, the rules of statutory construction explained in those cases. Had the Ninth Circuit panel majority correctly applied this Court's precedents, it could not have interpreted § 2244(b) the way it did—as

Judge Gilman and Judge Collins explained in their opinions. Pet. App. 32a-51a; 73a-108a.

The same is true with respect to the conflict created with the Eighth Circuit's en banc decision in *United States v. Bruguier*, 735 F.3d 754 (8th Cir. 2013) (en banc) (interpreting 18 U.S.C. § 2242(2)). Although the government disingenuously argues that the Eighth Circuit's decision does not conflict with the Ninth Circuit's decision here (BIO 14-15), the fact remains that § 2244(b) and § 2242(2) are nearly identical in structure and were both part of the same Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87(b), 100 Stat. 3592, 3620-23 (codified as amended at 18 U.S.C. §§ 2241–44, 2246), as discussed in Mr. Price's petition. Pet. 17-18 & n.10. *See also* Pet. App. 41a-44a (discussing the similarities between the statutes and concluding that "the Eighth Circuit's analysis . . . applies equally to § 2244(b)"). Section 2244(2) makes it a crime to "knowingly . . . engage[] in a sexual act with another person if that other person is—(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." The only difference with § 2244(b) is that it's a bit longer and substitutes a handful of words. The Eighth Circuit rightly concluded that the knowledge requirement applied *both* to engaging in a sexual act (as compared to "sexual contact" in § 2244(b)), *and* to the victim's incapacity or inability to consent (as compared to "the other person's permission" in § 2244(b)). *Bruguier*, 735 F.3d at 757-58, 760-61. The reasoning there (relying on the same precedents from this Court discussed above) is in unequivocal conflict with the Ninth Circuit's decision here. And similar to its dismissal of this Court's holdings in *Rehaif* and *Flores-Figueroa*, and other precedents of this Court, the Ninth Circuit majority dismissed the *Bruguier* decision as simply "not affecting" its analysis. Pet. App. 23a n.3.

But while it's true that no other circuit has expressly addressed in a published opinion how § 2244(b) should be interpreted, given the Ninth Circuit's oversized role, not only in the number of criminal cases overall, but also in the number of passengers that fly into and out of the circuit as compared to other circuits, the failure to review this case and ensure correct application of the statute will have devastating consequences. Indeed, according to the Airports Council International, five of the thirteen busiest airports in the nation in 2019 (the last year unaffected by COVID-19) were in the Ninth Circuit (LAX, San Francisco, Seattle, Las Vegas, and Phoenix);[2] by contrast, only two other circuits have more than one among the top fifteen busiest airports in the United States, and four circuits have none.[3] So, while flights certainly occur all over the country, the Ninth Circuit accounts for significantly more than any other circuit and thus is likely to have more cases involving § 2244(b) charging groping allegations in the air. Moreover, the fact that this is the only published appellate decision interpreting the statute necessarily means that it will be the case primarily relied on by all district courts across the country. There is no need to wait for an express conflict among the circuits on the correct interpretation of § 2244(b) when the Ninth Circuit's majority decision is plainly at odds with this Court's rules of statutory construction and the Eighth Circuit's contrary interpretation of a nearly identical statute.

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[2] In addition, San Diego, Honolulu, and Portland are all in the top 30. *See North American Airport Traffic Report - Airports Council International - North America, available at* https://airportscouncil.org/intelligence/north-american-airport-traffic-reports/.

[3] First Circuit--zero, Second Circuit--one (JFK), Third Circuit--one (Newark), Fourth Circuit--one (Charlotte), Fifth Circuit--two (Dallas/Fort Worth and Houston-Bush), Sixth Circuit--zero, Seventh Circuit--one (Chicago-O'Hare), Eighth Circuit--zero, Tenth Circuit--one (Denver), Eleventh Circuit--three (Atlanta, Orlando, Miami), D.C. Circuit--zero.

* * *

As Judge Collins explained in his dissent from the denial of rehearing en banc, the panel majority's decision "[wa]s heavily influenced by the majority's strongly held policy views about what the Government should and should not be expected to prove in criminalizing the offense conduct at issue here," and its belief that "the textualist reading of § 2244(b) that Judge Gilman and [he] adopt 'would create a shield for sexual predators' and allow 'still too-common regressive beliefs about sexual interaction' to 'become defenses.'" Pet. App. 75a (quoting Pet. App. 55a, 56a). But the courts "are not free to disregard the plain language of those laws or the settled rules of statutory interpretation simply because we dislike the outcome." Pet. App. 75.

There is no dispute that sexual contact occurred here. And A.M. certainly claimed she did not consent. But Mr. Price testified to how and why he believed his sexual contact with A.M. was fully consensual, and that he had no idea that their sexual interaction was without A.M.'s permission. The Ninth Circuit panel majority misapplied multiple canons of statutory construction and ignored or misapplied several decisions of this Court in concluding that A.M.'s accusation alone—that Mr. Price misunderstood their interaction and that the contact was not consensual—is enough for conviction. But "accusation equals guilt" cannot be what Congress intended, is not what the law permits, and it cannot be how this case ends. The petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: August 26, 2021

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CERTIFICATE OF SERVICE

I, Jonathan D. Libby, a member of the Bar of this Court, hereby certify pursuant to Sup. Ct. R. 29 that on this 26th day of August, 2021, a copy of Reply Brief for Petitioner (on Petition for Writ of Certiorari) was emailed and mailed, postage-prepaid, to the Solicitor General of the United States, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5614, Washington, DC 20530-0001, counsel for the Respondent.

Respectfully submitted,

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