No. _____

IN THE

Supreme Court of the United States

ANTHONY BRIAN WALKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a criminal prosecution, when an affirmative defense—such as imperfect self-defense—is supported by substantial evidence, does the trial court have an obligation to instruct the jury on that defense sua sponte, even if defense counsel does not request the instruction?

2. Did the court of appeals improperly fail to follow its own precedent in holding that a proffered jury instruction fails to preserve the defense of imperfect self-defense unless it includes "essential" language providing that the defendant "subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others, even though his belief was not objectively reasonable"?

RELATED PROCEEDINGS

United States District Court (E.D. Okla.):

United States v. *Walker*, Crim. No. 22-00012 (Jun. 9, 2023) (entering judgment of conviction)

United States Court of Appeals (10th Cir.):

United States v. Walker, No. 23-7038 (Mar. 4, 2025) (affirming conviction on direct appeal); (May, 2025) (denying petition for rehearing)

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Anthony Brian Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a-15a) is reported at 130 F.4th 802. The ruling and instructions of the United States District Court for the Eastern District of Oklahoma (App. 25a–36a) are unreported.

JURISDICTION

The court of appeals issued its opinion on March 4, 2025, and denied petitioner's petition for rehearing on May 21, 2025. App. 1a, 17a. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely. *See* S. Ct. R. 13.

CONSITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law[.]

The Jury Trial Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

STATEMENT

In late 2021, Anthony Brian Walker was riding his bicycle down a side street when he noticed that the same red SUV kept crossing his path. It passed him the first time driving in the same direction he was riding, then came back around the block, driving toward him. The SUV then swerved to the wrong side of the road, toward Mr. Walker, apparently to get around a parked car. The SUV came within spitting distance of Mr. Walker—literally, because he reacted by spitting at it, and his spit connected. The SUV then went around the block and followed Mr. Walker. It caught up with him at a stop sign in front of an elementary school. When Mr. Walker saw it, he approached the front passenger side, dropped his bicycle on the grass, and said, "you are following me."

Nineteen-year-old Jason Hubbard was in the front passenger seat. His girlfriend was driving, and a friend of hers sat in the back. Mr. Hubbard told Mr. Walker that they were not following him. Noticing that Mr. Hubbard had a gun in

his lap, Mr. Walker said he wasn't afraid of it, and threw a punch at Mr. Hubbard. Mr. Hubbard was uninjured and had no visible mark thereafter. Mr. Walker stands at a diminutive 5'5"; Mr. Hubbard was half his age and loomed over him at 5'10".

Mr. Hubbard opened the car door, shoving Mr. Walker with it as he did so, and "knocked Mr. Walker down to the ground with one punch." App. 2a. Mr. Hubbard then tossed Mr. Walker's bike to the side, yelling "every four-letter word in the book," and got back in the SUV, which drove away.

Mr. Walker fled to a residential street about half a mile southwest of the school, the encounter apparently over. But then he saw the SUV again, just one house away, in the drive-through of a convenience store. Mr. Walker later said that he believed Mr. Hubbard was trying to track him down and kill him. He walked to the SUV and "stuck" Mr. Hubbard in the chest with a sharp object that was never found. The wound eventually proved fatal.

Mr. Walker turned himself in the next day. He waived his *Miranda* rights and voluntarily submitted to a videotaped interrogation. He explained to law enforcement officers how the SUV had followed him, and how he had tried to get away quickly after Mr. Hubbard knocked him to the ground, "'[be]cause I know he had that gun." He recalled his fear when he saw that the SUV appeared to be still following him, thinking that "if they would have left that drive-thru . . . [Mr. Hubbard] would have pulled the gun out on me again" and was "gonna end up using [it] probably[.]"

The Government charged Mr. Walker with first-degree murder in Indian Country in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153. Mr. Walker pleaded not guilty and invoked his right to a jury trial.

In her opening statement, Mr. Walker's counsel did not suggest that Mr. Hubbard had *actually* threatened Mr. Walker's life, but she repeatedly emphasized that Mr. Walker subjectively *believed* that he did—and she asserted that Mr. Walker had acted in "imperfect" "self-defense":

- "Mr. Walker was scared, he was terrified, he was sure he was being hunted."
- "He panicked. He went into fight or flight mode."
- "It was in self-defense, albeit imperfect, maybe flawed, but self-defense nonetheless. In his mind he was in fear of his life."

"Imperfect" self-defense is closely related to, but essentially distinct from, self-defense. Self-defense is available to a defendant in a homicide case who "kills out of fear of imminent peril." *Middleton v. McNeil*, 541 U.S. 433, 434 (2004). Self-defense is a complete defense that entitles the defendant to an acquittal. 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(a) (West, Westlaw through October 2024 Update). However, where the defendant killed out of an "unreasonable (but nevertheless genuine)" fear of imminent peril, the defense of "imperfect self-defense" applies. *Middleton*, 541 U.S. at 434; *accord United States v. Britt*, 79 F.4th 1280, 1286–87 (10th Cir. 2023) (imperfect self-defense where defendant subjectively believed he was in imminent danger of death or great bodily harm but "'was criminally negligent in his belief'") (*quoting United States v. Craine*, 995 F.3d 1139,

1156 (10th Cir. 2021)). Unlike "perfect" self-defense, "imperfect" self-defense does not lead to full acquittal, but instead reduces the level of homicide from murder to involuntary manslaughter. *Britt*, 79 F.4th at 1287.

At the time of the opening statements in Mr. Walker's trial, neither party had requested an involuntary manslaughter instruction. But that omission was rectified at an off-the-record discussion involving the parties and the district judge's law clerk, during which an involuntary manslaughter instruction was added. App. 5a. (Mr. Walker's counsel requested the instruction.) As finally given to Mr. Walker's jury, that instruction defined involuntary manslaughter as causing Mr. Hubbard's death "while protecting himself lawfully but using excessive force without due caution and circumspection, which act might produce death." App. 8a, 34a. The district court's final instructions included instructions on first-degree murder, as well as the lesser-included offenses of second-degree murder, voluntary manslaughter, the involuntary manslaughter instruction quoted above, and self-defense. App. 25a–35a.

In her closing argument, Mr. Walker's counsel returned to the main themes of her opening statement—that Mr. Walker acted in the heat of passion, and/or in the subjective but criminally negligent belief that his life was threatened:

- "Mr. Walker did it in fear of his life and in the heat of passion."
- "In Mr. Walker's mind, that car was still following him, still stalking him, still searching for him."
- "[F]rom [Mr. Walker's] perspective, he was acting on insult [*sic*], fight or flight. In his mind it was self-defense. To others it may not be self-defense. But to him, in his mind, this was how he was defending himself from what

was coming, that car driving, running him over, beating him up, or worse, shooting him."

- "[F]rom Mr. Walker's perspective, like I said, this was an act of self-defense. The immediate danger was the car, the gun, Mr. Hubbard, that they were going to come after him again. But as I said, from other's perspectives, this may not have been the perfect self-defense under law. But this self-defense informs, and it leads to the question of intent and heat of passion."

Mr. Walker's counsel concluded by urging the jury to find Mr. Walker "guilty of manslaughter."

Unfortunately for Mr. Walker, the prospect of the jury accepting his imperfect self-defense theory, and convicting him of involuntary manslaughter rather than murder, was eviscerated by the district court's refusal to structure the first-degree murder instruction in such a way as to make that possible.

The first-degree murder instruction directed the jury to convict Mr. Walker of this offense only if it found that the killing was (i) premeditated, (ii) not done in the heat of passion on sudden provocation, and (iii) not done in self-defense. App. 26a–28a. But it did *not* direct the jury to convict Mr. Walker of first-degree murder only if it found that he did not act while "protecting himself lawfully but using excessive force without due caution and circumspection." Thus, while the first-degree murder instruction required the government to prove premeditation (precluding second-degree murder), absence of heat of passion (precluding voluntary manslaughter), and absence of self-defense (precluding acquittal on that theory), it did *not* require the government to prove the absence of imperfect self-defense (precluding involuntary manslaughter). The verdict form compounded the problem, instructing

the jury that, if it found Mr. Walker guilty of first-degree murder, it should declare its deliberations "complete" and "[s]kip the remaining questions."

The upshot of the first-degree murder instruction and verdict form was that the jury was instructed to convict Mr. Walker of first-degree murder without ever considering whether he acted in imperfect self-defense.

Mr. Walker's counsel had tried to repair this flaw in the instructions during the trial. Just after the off-the-record discussion during which the involuntary manslaughter instruction was added, Mr. Walker's counsel had objected to the omission of a cross-reference to this instruction in the first-degree murder instruction:

> In the 9th Circuit, the government has to prove all the lessers beyond a reasonable doubt. So we would ask that involuntary be included as an element that the government has to prove beyond a reasonable doubt for first, second and voluntary. App. 5a.

As the panel noted, what Mr. Walker's counsel clearly meant, and the district court understood, was that involuntary manslaughter should be included as an element the government had to "disprove (not prove) for a murder or voluntary manslaughter conviction." App. 5a n.3. But the district judge—following an off-the-record consultation with his clerk—overruled the objection, leaving the jury free to convict Mr. Walker of first-degree murder without ever considering whether he acted in imperfect self-defense.

And that, presumably, is what it did—convicting Mr. Walker of first-degree murder on the basis of these instructions. The district court imposed the statutorily

mandated life sentence, and Mr. Walker appealed to the Tenth Circuit, challenging the district court's refusal to repair the flaw in the first-degree murder instruction.

The court of appeals rejected Mr. Walker's challenge in a published opinion. App. 1a–15a. The court rested its holding on two grounds, both necessary to its affirmance.

First, the court held that Mr. Walker had failed to preserve his request for an imperfect self-defense instruction. App. 6a–11a. The court reasoned that the involuntary manslaughter instruction Mr. Walker successfully requested did not constitute an imperfect self-defense instruction, because it lacked what the court described as "the essential requirement of imperfect self-defense—that the defendant subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others, even though his belief was not objectively reasonable." App. 14a n.6. The court at one point acknowledged that the involuntary manslaughter instruction "may imprecisely raise a version of imperfect self-defense based on criminal negligence"—but posited that the instruction was nevertheless insufficient to preserve the defense because it lacked the requisite language describing Mr. Walker's fear as "not objectively reasonable." App. 9a. The court further reasoned that the defenses Mr. Walker "actually raised at trial" did not include imperfect self-defense, but only heat of passion and self-defense. App. 11a.

Second, the court held that the district court did not commit plain error by failing to sua sponte instruct the jury on imperfect self-defense. App. 11a–15a. The

court cited its prior decision in *United States v. Sago*, 74 F.4th 1152 (10th Cir. 2023), for the proposition that, in the absence of a request for an imperfect self-defense instruction, the district court had no obligation to instruct on the defense sua sponte. App. 12a–13a. The court noted that one "'persuasive reason'" it had identified for this view was that "'whether to request [an affirmative defense] instruction is often a strategic or tactical decision.'" App. 12a–13a (*quoting Sago*, 74 F.4th at 1162).

Mr. Walker filed a petition for panel and en banc rehearing, arguing that the court's holding regarding the instructional language necessary to preserve imperfect self-defense conflicted with the court's prior precedent, and that the court had misread the record in holding that he did not press an imperfect self-defense theory at trial. The court denied the petition without a vote. App. 17a. Soon after it denied Mr. Walker's petition, the court issued its opinion in *United States v. Maryboy*, 138 F.4th 1274 (10th Cir. 2025). Mr. Walker filed a motion to recall the mandate, arguing that the Court had found that the defendant in *Maryboy* preserved imperfect self-defense by requesting an instruction materially identical to the one Mr. Walker requested and received in his trial. The court denied the motion without explanation.

REASONS FOR GRANTING THE PETITION

I. The court of appeals' opinion implicates an acknowledged divergence among the circuit courts on the question of a trial court's obligation to instruct sua sponte on an affirmative defense theory that is supported by substantial evidence.

In holding that the district court was not required to instruct the jury sua sponte on imperfect self-defense, the court of appeals cited its prior opinion in *United States v. Sago*, 74 F.4th 1152 (10th Cir. 2023). App. 12a–13a. In *Sago*, the court acknowledged a division of authority regarding a district court's obligation to instruct the jury sua sponte on an affirmative defense that is supported by substantial evidence but is not requested by the defendant. *Sago*, 74 F.4th at 1160 & n.6. The court cited opinions of the Second, Third, Ninth, and Eleventh Circuits in support of its view, *id.* at 1160 n.6 (*citing United States v. Newton*, 677 F.2d 16 (2d Cir. 1982) (per curiam); *United States v. Tyson*, 653 F.3d 192 (3d Cir. 2011); *United States v. Gutierrez*, 745 F.3d 463 (11th Cir. 2014); and *United States v. Montgomery*, 150 F.3d 983 (9th Cir. 1998)), while acknowledging contrary opinions of the First and Ninth Circuits, *id.* (*citing United States v. Guevara*, 706 F.3d 38 (1st Cir. 2013); and *United States v. Bear*, 439 F.3d 565 (9th Cir. 2006)).

In *United States v. Newton*, 677 F.2d 16 (2d Cir. 1982), the Second Circuit reviewed a conviction for unlawful re-entry after deportation. *Id.* at 16. The defendant argued that the district court erred in failing to instruct his jury that his "good faith belief that he had permission to enter the country could constitute an affirmative defense." *Id.* at 17. The Second Circuit disagreed, noting that the defendant had failed to "submit a timely request for such an instruction," and that a

"passing reference" to the possibility of such an instruction during a colloquy on another topic was "insufficient to put the trial judge on notice that appellant in fact desired such an instruction." *Id*. The court contrasted this conduct with the defendant "plainly and at some length" raising a different affirmative defense. *Id*. "Under the circumstances," the court concluded, the district court was "not under an obligation sua sponte" to instruct the jury on this defense. *Id*.

In *United States v. Tyson*, 653 F.3d 192 (3d Cir. 2011), the Third Circuit reviewed (*inter alia*) the defendant's convictions for violations of the Virgin Islands Code connected to his unlawful sale in the Virgin Islands of firearms he purchased in Tennessee. *Id*. at 195–97. Ten of these convictions were for unauthorized possession of a firearm without a locally issued license, in violation of Virgin Islands law. *Id*. at 211. The defendant challenged the district court's denial of his motion for a judgment of acquittal on these counts, arguing that he was entitled to an affirmative defense pursuant to a Virgin Islands statute creating a defense for individuals who immediately register imported weapons upon entering the territory. *Id*. at 211–12.

The Third Circuit noted that the defendant had neither requested a jury instruction on this defense nor objected to the district court's proposed instructions omitting it. *Id*. at 211. Under the circumstances, the court stated, the issue was waived unless the defendant could demonstrate plain error. *Id*. But rather than examining the prongs of the plain error standard, the court observed that, "[s]imply put, [the defendant] did not request an instruction on [the affirmative] defense." *Id*.

at 212. The court acknowledged that the evidence "arguably" would have supported the defense, but speculated that the defendant "may have reasoned that to present the defense would only serve to highlight his clear guilt under the prima facie elements of [unauthorized possession]." *Id*. Positing that "[a] defendant's strategy is his own," the court found no error. *Id*.

United States v. Gutierrez, 745 F.3d 463 (11th Cir. 2014), involved the Eleventh Circuit's review of a conviction for assault of a federal officer. *Id*. at 465. The defendant challenged the district court's failure to instruct the jury on self-defense. *Id*. at 472–73. The Eleventh Circuit disagreed, noting that the defendant had not requested the self-defense instruction at trial. *Id*. at 472. Although the court stated that it would accordingly review the omission of the instruction for plain error (*id*.), it proceeded to focus on the fact that at trial, defense counsel had initially requested the instruction, then expressed "misgivings" about including it, stating that he wished to consult with the defendant about it, and then failed to request it again. *Id*. at 472–73. The Eleventh Circuit found no error, reasoning that "[a] District Court is not required to instruct the jury on an affirmative defense in light of defense counsel's silence," and therefore the court is likewise not required to give the instruction where the defendant is "unsure" or "equivocal." *Id*. at 473.

The Ninth Circuit in *United States v. Montgomery*, 150 F.3d 983 (9th Cir. 1998), reviewed convictions for various narcotics offenses. *Id*. at 987–88. The defendant had been arrested following a "reverse sting operation" carried out with the assistance of a cooperator. *Id*. at 989. The defendant argued that the district

court erred in failing to give the jury a "*Sears* instruction"—*i.e.*, an instruction stating that "'there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy.'" *Id.* at 995 (*quoting Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965)). The Ninth Circuit stated that, because the defendant "failed to object to the omission of a *Sears* instruction," it would review the claim for plain error. *Id.* at 996. The court cited its prior opinion in *United States v. Span*, 970 F.2d 573, 578 (9th Cir. 1992), for the proposition that "[w]here a defendant does not offer a particular instruction, and does not rely on the theory of defense embodied in that instruction at trial, the district court's failure to offer an instruction on that theory *sua sponte* is not plain error." *Montgomery*, 150 F.3d at 996. Asserting that the defendant "did not rely on a *Sears*-type defense theory at trial," the Ninth Circuit found no plain error. *Id.*

The First Circuit took a contrary approach in *United States v. Guevara*, 706 F.3d 38 (1st Cir. 2013). The defendant was convicted of several narcotics offenses. *Id.* at 43. He had been arrested following a reverse-sting operation involving multiple undercover operatives. *Id.* at 40–43. On appeal, he challenged the district court's failure to give the jury an entrapment instruction. *Id.* at 45. The First Circuit noted that, because the defendant had "neither requested an entrapment instruction nor objected contemporaneously to the omission of such an instruction from the court's charge," it would review the claim for plain error. *Id.* at 46. In contrast to the opinions summarized above, however, the First Circuit did not simply give lip-service to the plain error standard and proceed to hold the

instruction irretrievably waived; instead, the court conducted a thorough review of the trial evidence, "in the light most favorable to [the defendant]," to determine whether it justified an entrapment instruction. *Id*. at 46–47. Concluding that it did not, the court found no reversible error. *Id*. at 47.

The Ninth Circuit took a similar approach in *United States v. Bear*, 439 F.3d 565 (9th Cir. 2006). The defendant had been convicted of conspiracy to manufacture and distribute methamphetamine. *Id*. at 567. At trial, the defendant maintained in her testimony and closing argument that she had believed that a government agent had authorized her to engage in the drug transactions for which she was being prosecuted. *Id*. at 569. This evidence supported a "public authority" defense—*i.e*., a defense maintaining that the defendant "reasonably believed that a government agent authorized her to engage in illegal acts." *Id*. at 568. However, defendant's counsel neither requested a public authority instruction nor objected to the district court's omission of such an instruction. *Id*. at 567–68.

The Ninth Circuit held that the district court plainly erred in failing to give the instruction sua sponte, reasoning that, "[w]hen a defendant actually presents and relies upon a theory of defense at trial, the judge must instruct the jury on that theory even where such an instruction was not requested." *Id*. at 568–69 (*citing Montgomery*, 150 F.3d at 996, *and Span*, 970 F.2d at 578). Because the defendant's testimony and closing argument "clearly presented" a public authority claim, the court reasoned, "a jury instruction on that theory of defense was required." *Id*. at

569. Concluding that the remaining prongs of the plain error standard were satisfied, the court reversed the defendant's conviction. *Id.* at 569–71.

As these divergent approaches illustrate, there is substantial variance among the federal circuit courts regarding the first question presented in this petition. 6 Wayne R. LaFave *et al.*, *Criminal Procedure* § 24.8(g) (West, Westlaw through Nov. 2024 Update) (citing *Sago* for the proposition that a judge "generally" has no constitutional obligation to give an affirmative defense instruction sua sponte, and noting that "some states require sua sponte instruction under state law"). The question is an important one. It arises regularly, and it directly implicates a criminal defendant's Fifth Amendment due process right to present a complete defense, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), as well as his Sixth Amendment right to a jury finding beyond a reasonable doubt of every fact necessary to his conviction, *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Rather than permitting this divergence in approaches to persist and deepen, the Court should grant certiorari and resolve the question.

When it does so, the Court should take the side of those courts that find an obligation for trial courts to give sua sponte instructions on affirmative defenses that are supported by substantial evidence. Notably, although courts on both sides of the question acknowledge that plain error principles apply to this, as to other forms of unpreserved error, only the courts that recognize a sua sponte obligation—or the least the *possibility* of such an obligation—faithfully apply the plain error principles required by Federal Rule of Criminal Procedure 52(b) and this Court's

precedent. *United States v. Olano*, 507 U.S. 725 (1993). In *Tyson*, *Gutierrez*, and *Montgomery*, the courts paid lip-service to the notion that they were applying the plain error standard—but in reality they treated each defendant's failure to request the instruction in question as dispositive in and of itself. This is not how plain error review is meant to work. *Olano*, 507 U.S. at 731–37.

Those courts' justifications for short-circuiting their purported plain error review in this fashion—the mantra that a defendant's failure to request the instruction may be a "strategy" call—is not compelling, for two reasons.

First, the mere invocation of a hypothetical "strategy" is not a proper justification for depriving a defendant of the full scope of plain error review. In some cases—as in *Bear*—the nature of the trial defense may make it perfectly clear that the defendant did *not* deliberately pursue a "strategy" of not requesting the instruction. In others, this may be less clear—but it remains a question that may be carefully examined in determining whether the trial court's erroneous failure to give the instruction affected substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 732–35. Unlike the approach that simply invokes the concept of hypothetical "strategy" and declares plain error review over, this approach respects the courts' obligation to faithfully apply the standards governing this form of review.

Second, the practice among reviewing courts of assuming that a trial court's unexplained failure to give a sua sponte instruction on an affirmative defense supported by substantial evidence reflects the court's tacit deference to defense

counsel's unspoken "strategy" decisions ignores the manner in which jury instructions are formulated at trial. The trial court does not simply draft instructions and recite them to the jury—it circulates the draft instructions to both parties' counsel, and then reviews them with counsel before finalizing them. Fed. R. Crim. P. 30; App. 4a–5a. Thus, when a trial court becomes aware that substantial evidence supports a particular affirmative defense instruction, it can add that instruction to the draft instructions, or notify the parties of its intention to give it. In the (presumably rare) instances in which a defendant believes there is a "strategic" reason to keep his jury in the dark about an affirmative defense that is supported by substantial evidence, he can ask the court to remove the instruction. This approach properly respects both the defendant's "strategy" decisions and the court's need to instruct the jury on all of the legal principles having a direct bearing on the defendant's legal culpability.

In short, the first question presented implicates an important issue on which the federal circuit courts are divided, with the court of appeals in the instant case falling on the wrong side of the split. S. Ct. R. 10(a), (b). This case presents a good vehicle for examining this issue, because the court of appeals' published opinion clearly addressed it, under a separate heading, making plain that it constituted a necessary ground for its affirmance of Mr. Walker's conviction. App. 11a–15a. This Court should grant certiorari and reverse the court of appeals' refusal to hold that the district court reversibly erred by failing to instruct Mr. Walker's jury sua sponte on the defense of imperfect self-defense.

II. The court of appeals' requirement of specified "essential" language to preserve a request for an imperfect self-defense instruction conflicts with the court's own prior and subsequent precedent.

The court of appeals' underlying premise, in reaching the question of the district court's duty to instruct Mr. Walker's jury sua sponte on imperfect self-defense, was that the involuntary manslaughter instruction that Mr. Walker successfully requested did *not* amount to an imperfect self-defense instruction. App. 6a–11a. This premise rested on the notion that a jury instruction does not preserve an imperfect self-defense theory unless it includes "essential" language stating that the defendant "subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others, even though his belief was not objectively reasonable." App. 14a n.6; *see also id*. 9a.

This notion conflicted with the court's own precedent. The court cited two sources for this purported "essential" requirement: its earlier opinion in *Britt*, and a pattern jury instruction issued three years after Mr. Walker's trial. App. 9a. But *Britt* and the court's pattern instructions refute, rather than supporting, the court's premise.

In *Britt*, the court found reversible error in a first-degree murder case where the district court refused to instruct the jury on imperfect self-defense, even though the defendant's proffered "imperfect self-defense" instruction was a "legally incorrect" one that got the defense "exactly backwards." *Britt*, 79 F.4th at 1290. The Court held that the defendant's failure to proffer a properly-worded instruction did not excuse the district court from its obligation to instruct the jury on this defense. *Id*. at 1292.

The sentence from the *Britt* opinion on which the court relied in the instant case described imperfect self-defense as involving a subjective but "not objectively reasonable" belief that the use of deadly force is necessary. App. 9a (internal quotation marks omitted). But the court's premise—that the *Britt* panel held this language to be "essential" to preserving this defense—suffers from two independently fatal flaws.

First, this passage from *Britt* was not quoting the defendant's proffered "imperfect self-defense" instruction. In fact, the defendant's proffered instruction did not include this "essential" language, or anything close to it. Instead, it included language that got the defense "exactly backwards," stating that the defendant was entitled to the defense if he "reasonably" believed he was in imminent danger from the victim. *Britt*, 79 F.4th at 1290. In fact, the court's description of Mr. Walker's involuntary manslaughter instruction as "imprecisely" raising a "version" of imperfect self-defense (App. 9a) marks it as superior to the one the defendant in *Britt* requested. If a "legally incorrect," "exactly backwards" instruction is sufficient to preserve the defense, *a fortiori* an instruction that "imprecisely" raises a "version" of the defense is as well.

Second, the sentence from *Britt* that the court quoted goes on to describe the pertinent mens rea as *criminal negligence*:

> "If . . . the defendant subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others, but his belief was not objectively reasonable, i.e., 'if the factfinder concludes the defendant was *criminally negligent* in his belief,' he is not entitled to a complete acquittal, but rather 'is guilty of involuntary manslaughter.'"

Britt, 79 F.4th at 1287 (emphasis added; *quoting Craine*, 995 F.3d at 1156); *see also id.* at 1294 n.8 (*citing United States v. Toledo*, 739 F.3d 562, 569 (10th Cir. 2014), for the proposition that "if the defendant was 'criminally negligent' in his 'belief that deadly force was necessary to prevent death or great bodily harm,' 'then he is guilty of involuntary manslaughter'" on an imperfect self-defense theory).

The court erred in overlooking this criminal negligence language in *Britt*. The *Britt* opinion's use of the abbreviation "i.e." (the Latin phrase id est ("that is")) between "not objectively reasonable" and "criminally negligent" signifies that the two phrases are interchangeable—not that one is "essential" while the other is ineffectual. Moreover, the *Craine* opinion that *Britt* quoted confirms that "[a] defendant acts in 'imperfect self-defense' if the factfinder concludes the defendant was 'criminally negligent' in his 'belief that deadly force was necessary to prevent death or great bodily harm.'" *Craine*, 995 F.3d at 1156 (emphasis added; *quoting Toledo*, 739 F.3d at 569).

These descriptions of the mens rea for imperfect self-defense as amounting to criminal negligence are crucial, because that description maps neatly onto the involuntary manslaughter instruction that Mr. Walker successfully requested. That instruction referred to Mr. Walker "protecting himself lawfully but using excessive force without due caution and circumspection" (App. 8a, 34a)—as would be the case if he were criminally negligent in his belief that he needed to use deadly force to protect himself from death or great bodily harm. *Britt*, 79 F.4th at 1287; *Craine*, 995 F.3d at 1156, 1294 n.8; *Toledo*, 739 F.3d at 569.

And that was Mr. Walker's leading defense theory at trial. As shown above, Mr. Walker's counsel suggested that he acted in the sincere belief—albeit a belief that may have been "imperfect," "flawed," unacceptable to "others," and skewed by his "panicked" perspective—that he needed to act to neutralize a deadly threat. The court's opinions in *Britt* and *Craine* demonstrate that, contrary to the court's core premise, this theory *is* "a version of imperfect self-defense based on criminal negligence" (App. 9a), because it posits that Mr. Walker was "'criminally negligent in his belief'" that deadly force was necessary. *Britt*, 79 F.4th at 1287 (*quoting Craine*, 995 F.3d at 1156).

The court's reliance on its newly-minted imperfect self-defense pattern instruction (App. 9a) was also flawed. The pattern instruction describes the pertinent mens rea as an "unreasonable" belief, rather than a "criminally negligent" one—but nothing in the instruction indicates that this language is essential to preservation of the defense. Nor could it, because the Court's pattern instructions are not binding, *United States v. Freeman*, 70 F.4th 1265, 1280 n.13 (10th Cir. 2023), and they are designed to be merely "generic minimalist instructions" that "never need to be given verbatim." Tenth Circuit Criminal Pattern Jury Instructions (Rev. ed. Feb. 7, 2025) (Introductory Note at 6, 7). In short, the court of appeals' description of the language it identified as "essential" to preserving imperfect self-defense conflicted with the court's own prior precedent.

In fact, it *also* conflicted with the court's *subsequent* precedent. Eight days after the court of appeals denied Mr. Walker's petition for rehearing, it issued its

published opinion in *United States v. Maryboy*, 138 F.4th 1274 (10th Cir. 2025). In *Maryboy*, the parties had jointly proposed an instruction captioned, "Imperfect self-defense," that declared itself applicable if the defendant "inadvertently caused [the victim's] death while defending himself, a lawful act, in an unlawful manner by using excessive force," in which case the offense would be "classified as involuntary manslaughter." ROA Vol. I 192 in *United States v. Maryboy*, No. 23-4117 (10th Cir.). The court of appeals treated this instruction as having preserved imperfect self-defense, such that the district court reversibly erred by failing to instruct the jury that the government had to *dis*prove imperfect self-defense beyond a reasonable doubt in order for it to convict the defendant of second-degree murder. *Maryboy*, 138 F.4th at 1290–95. After *Maryboy* was issued, Mr. Walker filed a motion to recall the mandate in his case, arguing that recall was necessary to resolve an intracircuit conflict between *Maryboy* and the instant case. The court denied Mr. Walker's motion without explanation.

In sum, the court of appeals' published opinion in the instant case conflicts with the court's prior *and* subsequent precedent. Although this Court generally leaves intracircuit conflicts to the courts of appeals to resolve, *Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (Mem.) (Kagan, J., respecting denial of certiorari); in some circumstances an intracircuit conflict may justify the grant of certiorari. *See*, *e.g.*, *Inyo Cnty., Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 708 n.5 (2003); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950). Such a grant of certiorari is appropriate here, in light of the court of appeals' striking refusal to

conform its published opinion in the instant case with its prior and subsequent precedential authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 15th day of August, 2025.

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